

**OVER-CRIMINALIZATION OF CONDUCT/  
OVER-FEDERALIZATION OF CRIMINAL LAW**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON CRIME, TERRORISM,  
AND HOMELAND SECURITY  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED ELEVENTH CONGRESS  
FIRST SESSION

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JULY 22, 2009  
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## **OVER-CRIMINALIZATION OF CONDUCT/ OVER-FEDERALIZATION OF CRIMINAL LAW**

**WEDNESDAY, JULY 22, 2009**

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

The Subcommittee met, pursuant to notice, at 3:03 p.m., in room 2237, Rayburn House Office Building, the Honorable Robert C. “Bobby” Scott (Chairman of the Subcommittee) presiding.

Present: Representatives Scott, Pierluisi, Nadler, Lofgren, Jackson Lee, Waters, Quigley, Gohmert, Poe, and Rooney.

Staff Present: (Majority) Bobby Vassar, Subcommittee Chief Counsel; Jesselyn McCurdy, Counsel; Ron LeGrand, Counsel; Karen Wilkinson, (Fellow) Federal Public Defender Office Detailee; Veronica Eligan, Professional Staff Member; (Minority) Caroline Lynch, Counsel; and Kelsey Whitlock, Staff Assistant.

Mr. SCOTT. Good afternoon. The Subcommittee on Crime, Terrorism, and Homeland Security will come to order.

We are going to begin today’s proceedings with an oversight hearing on “Over-Criminalization of Conduct/Over-Federalization of Criminal Law.” When we have an appropriate quorum, we will suspend the hearing and go into markup on the crack cocaine bill.

We will begin today’s hearing about Over-Criminalization of Conduct/Over-Federalization of Criminal Law.

The issue comes after a series of conversations that the Ranking Member and I have had with former Attorneys General, a coalition of organizations, including the Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the Heritage Foundation, the ACLU, Constitution Project, the Cato Institute, the American Bar Association, the Federalist Society, and others.

They have come out of concern for what they and many others view as an astounding rate of growth for the Federal Criminal Code. They question the wisdom of continued expansion of the Criminal Code without taking the time to consider and review the process by which crime legislation is enacted.

But more than the rate of growth in the Code, those concerned citizens and groups are concerned about the deterioration of what has occurred in the standards for what even constitutes a criminal offense. There is great concern of the overreach and perceived lack of specificity in criminal law standards, perceived vagueness, and

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

The *mens rea* requirement has long served an important role in protecting those who do not intend to commit wrongful or criminal acts from prosecution and conviction. Mens rea elements, such as specific intent, willful intent, and knowledge of the specific facts constituting the offense, are part of nearly all common law crimes. It serves as a means of protecting society; and, without these elements, honest citizens are at risk of falling into traps and being victimized and criminalized by poorly crafted legislation and overzealous prosecutors. There are a number of examples, and we are going to hear some of those examples today.

When we enact criminal legislation, there is an issue of need: Do we need to enact more laws at the Federal level for a particular subject? That is, is there a valid purpose to be served by creating the crime at the Federal level, particularly if it duplicates crimes at the State level, or would it be better to just provide resources to States to enforce their own laws?

Why should there be a Federal offense of car jacking? State and local laws have been investigating and prosecuting those cases long before Congress made it a Federal crime, and they have been doing the job much better. In fact, when you are a victim of car jacking, you do not call the FBI; you call the local police. Wouldn't it be better in such a situation for the Federal Government to provide resources in the form of training, professional development, use of crime labs, consultation about best practices in law enforcement investigations, and other assistance?

These are the kinds of questions we should be asking before we enact more Federal criminal laws. We should also be asking those questions about the laws that we already have on the books.

We are honored today to have a panel that includes distinguished experts, practitioners who have long grappled with these issues, as well as two individuals, private citizens, who will share their personal stories of the dangers of engaging in seemingly innocent conduct only to have their lives shattered when they were investigated, prosecuted, and incarcerated for offenses that many would scratch their heads and wonder, where is the crime?

Some of the questions their testimony will raise is whether Congress should authorize a review of existing Federal laws, with specific emphasis on those laws that have been enacted but are not being enforced; reconsider how to best fight crime within the Federal system; reconsider the true Federal interests in crime control versus the risks of federalization of local crime; articulate general principles which should guide Congress in determining whether or not new crimes should be implemented and to implement mechanisms to foster restraint on further federalization; enact sunset provisions with respect to both existing laws that are not being enforced and new laws; and whether the proper response to Federal safety concerns is enactment of new Federal crime legislation or increased Federal support for State and local crime control efforts. Those are some of the questions that we will be considering today.

But it is now my pleasure to recognize the esteemed Ranking Member of the Subcommittee, the gentleman from Texas, Judge Gohmert.

Mr. GOHMERT. Thank you, Chairman Scott. I don't know how esteemed, but there are times I am steamed, anyway.

I am pleased that the Subcommittee is holding this hearing today on a topic that is of particular importance to me and one on which I and my colleague, Chairman Scott, both agree on, and that doesn't happen terribly often.

But the Federal Code contains nearly 4,500 Federal crimes. Recent studies estimate there are nearly 56.5 new Federal crimes enacted each year. Over the past three decades, Congress has averaged 500 new crimes per decade, this despite the fact that the Federal Government lacks a general police power.

As the Supreme Court noted back in 1903 in *Champion v. Ames*, "To hold the Congress has general police power would be to hold that it may accomplish objects not entrusted to the general government and to defeat the operation of the 10th amendment declaring that the powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people."

Yet Congress' continuous enactment of new Federal crimes has systematically overturned this principle, securing a de facto Federal police power under which virtually all criminal conduct can be federally regulated. Many of these laws overlap with existing State laws and blur the lines between traditional Federal and State jurisdiction. Part of this trend toward over-federalization and over-criminalization is the growing expectation that Congress is the arbiter of criminal conduct.

Unfortunately, Congress has responded to this pressure with zeal, often legislating in a vacuum with little regard for existing laws or the tenets of proper criminal statutes. The result is a labyrinth of Federal criminal laws scattered throughout many of the 50 titles of the U.S. Code.

The current Code is riddled with laws that are outdated, redundant, or inconsistent with other provisions in the Code. It has been over 50 years since the Criminal Code was last revised.

Our colleague, Mr. Sensenbrenner, is co-sponsoring legislation to simplify and modernize the Criminal Code which would cut over one-third of the existing Criminal Code, eliminate competing or duplicative definitions, and consolidate the criminal offenses all into Title 18. Such a rewrite would be a tremendous undertaking but one that would be invaluable to both practitioners and Members of Congress.

Unfortunately, many of the new laws enacted by Congress are not targeting what we consider to be criminal conduct such as homicide, assault, or burglary. Many of these laws impose criminal penalties, often felony penalties, for violations of Federal regulations. But there is a significant element missing from many of these provisions, criminal intent.

Some of us may not have thought much about the *mens rea* requirements since our law school days, but it is a cornerstone of criminal law, and it is eroding as regulatory crimes are being prosecuted under reduced or even nonexistent mental states or intent.

For example, a 1993 decision by the Ninth Circuit, which speaks for itself, in *U.S. v. Wiesenfeld* held that criminal sanctions are to be imposed on an individual who knowingly engages in conduct

that results in a permit violation under the Clean Water Act, regardless of whether the polluter is cognizant of the requirements or even the existence of the permit.

The Clean Water Act has always been interpreted to allow a construction supervisor to be sentenced to 6 months imprisonment after one of his employees accidentally ruptured an oil pipeline with a backhoe, and a Michigan landowner was convicted under the Clean Water Act for moving sand onto his property without a Federal permit.

Today, we are joined by two individuals with firsthand experience with this phenomenon. Mr. Krister Evertson was sentenced to 21 months in Federal prison for illegally transporting chemicals to a storage facility a half mile from his home in Idaho.

Mr. George Norris, who is joined today by his wife Kathy, was sentenced to 17 months in Federal prison for what amounts to incorrect paperwork for importing orchids into the United States.

I appreciate them joining us today to share those stories.

I also can't resist—we are talking about over-criminalization. We have got a bill that may expand over-criminalization to new heights, for example, basically criminalizing all rape. But that is under the hate crime bill that is going through Congress now. I can't resist mentioning that in the topic of over-criminalization.

Anyway, I do wish to acknowledge the efforts of the coalition, which include the Heritage Foundation, the ACLU, the Cato Institute, the National Association of Criminal Defense Attorneys, the American Bar Association, and others. But individually I also want to acknowledge our friend, Attorney General Ed Meese. What a great diplomat and thinker he is and what a pleasure to work with him.

General Thornburgh, it is great to have you here.

I will tell you, the level of minds that have been contributing to this, it has just really made me feel like the donkey entered into the Kentucky Derby. Comparatively, I don't stand a chance, but the company is wonderful.

I appreciate all of you participating.

With that, I yield back.

Mr. SCOTT. Our first witness is the Honorable Richard Thornburgh. He served as the Governor of the Commonwealth of Pennsylvania, as Attorney General of the United States under Presidents Reagan and George H.W. Bush, and Undersecretary General for the United Nations during a public service career which spanned more than 25 years. He is currently counsel with the international law firm of K&L Gates LLP in Washington, D.C.

Our second witness today is Timothy Lynch. Under the direction of Tim Lynch, Cato's project on criminal justice has become a leading voice in support of the Bill of Rights and civil liberties. His research interests include the war on terrorism, over-criminalization, the drug war, militarization of police tactics, and gun control. He has also filed several amicus briefs in the U.S. Supreme Court, including constitutional rights.

Our third witness will be Kathy Norris, a founder and director of Real World Resources, a nonprofit faith-based organization that helps recently released prisoners reestablish themselves and reintegrate into the community. She has served in a number of con-

flict resolution initiatives, including the Houston Chapter of the Association of Conflict Resolution, Equal Employment Opportunity Commission's Pilot Mediation Project, the Alternative Dispute Resolution Committee, the Council of the ADR Section of the Texas Bar, Texas Mediator Trainer's Roundtable. She is a graduate of the University of Texas, where she studied English and education. She studied conflict resolution at Antioch University and is certified in choice therapy and reality therapy by the William Glasser Institute.

Krister Evertson, our next witness, is a former owner and president of SBH Corporation, an Idaho-based corporation engaged in developing a process to reduce the cost of producing sodium borohydride, a chemical compound that is used to power hydrogen fuel cells. Fuel cells are a key component of the next generation of low-emission automobiles. He will speak about his experience with the Federal criminal justice system.

The next witness is Professor James Strazzella. He teaches at Temple University Law School in Philadelphia, where he holds a James G. Schmidt Chair in law. He has been involved in both academic aspects of criminal law and practical attempts to improve the court system. Before entering teaching, he was a prosecutor in Washington, D.C., serving as Assistant U.S. Attorney for Washington, D.C. He is author of numerous publications, including several on the growth of Federal criminal law. In 1977 and 1978, he served and was a reporter for the American Bar Association's Bipartisan Task Force on the Federalization of Criminal Law.

Our final witness will be Stephen A. Saltzburg, who has been the Wallace and Beverly Woodbury University Professor at George Washington University of Law since 2004. From 1990 to 2004, he was professor of trial advocacy, litigation, and professional responsibility. He is the author of numerous books and articles on evidence, procedure, and litigation. He chaired the ABA Justice Kennedy Commission, which examined criminal law issues relating to punishment, sentencing, incarceration, racial disparity, commutations, pardons, compassionate release, prison conditions, and reentry. He also co-chaired the ABA Commission on Effective Criminal Sanctions, the successor of the Kennedy Commission.

Each of our witnesses' written statements will be entered into the record in its entirety. I would ask each witness to summarize their testimony in 5 minutes or less, and to help stay within that timeframe there is a timing device at the table which will start with the green light. When it goes to yellow, 1 minute is remaining and will turn to red when the 5 minutes have expired.

General Thornburgh.

**TESTIMONY OF THE HONORABLE RICHARD THORNBURGH,  
FORMER U.S. ATTORNEY GENERAL, PRESENTLY WITH K&L  
GATES LLP, WASHINGTON, DC**

Mr. THORNBURGH. Thank you, Chairman Scott and Ranking Member Gohmert, for giving me the opportunity to speak with you about this important topic.

I have served on both sides of the Federal criminal aisle, as a Federal prosecutor for many years and currently as a defense attorney involved in proceedings adverse to the Department of Justice.

I believe I have a balanced view of the issues before this Subcommittee and hope I can provide some insight and suggest some ideas to deal with the current phenomenon of over-criminalization.

Those of us concerned about this subject share a common goal, to have criminal statutes that punish actual criminal acts and do not seek to criminalize conduct that is better dealt with by the seeking of regulatory and civil remedies. The criminal sanction is a unique one in American law; and the stigma, public condemnation, and potential deprivation of liberty that go along with that sanction demand that it should be utilized only when specific mental states and behaviors are present.

Make no mistake, when individuals commit crimes, they should be held responsible and punished accordingly. The line has become blurred, however, on what constitutes a crime, particularly in corporate criminal cases, and this line needs to be redrawn and re-clarified.

The unfortunate reality is that the Congress has effectively delegated some of its most important authority to regulate crime in this country to Federal prosecutors who are given an immense amount of latitude and discretion to construe Federal crimes and not always with the clearest motives or intentions.

A striking example of this is the “honest services” mail and wire fraud statute. Justice Scalia observed that the state of the law for honest services fraud was chaos and stated the practical reality of the statute as currently applied in a recent Supreme Court case, and I am quoting.

The Justice said, “without some coherent limiting principle to define what the intangible right of honest services is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, State legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.”

Since 1909, corporations have routinely been held criminally liable for the acts of its employees under the doctrine of respondeat superior. In recent history, one of the more significant cases is Arthur Andersen, a case with which this Committee is no doubt aware, in which a business entity received effectively a death sentence based on the acts of isolated employees over a limited period of time. A political cartoon that was published after the Supreme Court reversed the company’s conviction showed a man in a judicial robe standing by the tombstone of Arthur Andersen who simply said, oops, sorry. That apology didn’t put the tens of thousands of partners and employees of that firm back to work. This simply cannot be repeated, and reform is needed to make sure there are no future abuses of this sort.

What can be done to curb future abuses?

First, I have advocated for many years that we adopt a true Federal Criminal Code in place of the current hodgepodge of some 4,450 separate enactments with no coherent sense of organization. There is a template in existence, the Model Penal Code, that can act as a sensible start to an organized Criminal Code and which has formed the basis for many efforts to establish State criminal codes in this country.

What is needed is a clear, integrated compendium of the totality of the Federal criminal law, combining general provisions, all serious forms of penal offenses, and closely related administrative provisions into an orderly structure which would be, in short, a true Federal Criminal Code.

I suggested a commission should be constituted, perhaps in connection with Senator Webb's National Criminal Justice Commission Act, to review the Federal Criminal Code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated *mens rea* requirements, and consider over-criminalization issues.

This is not a new idea. Congress has tried in the past to reform the Federal Criminal Code, most notably through the efforts of the Brown Commission in 1971. The legislative initiatives based on that Commission's work, in which I participated as then Assistant Attorney General in the Criminal Division, failed, despite widespread recognition of their work.

I suggest that it is incumbent on the Congress to seek to make sense out of our laws and make sure that average, ordinary citizens can be familiar with what conduct actually constitutes a crime in this country.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties that are not enacted by Congress. Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is there are a staggering 300,000 criminal regulatory offenses created by agencies without congressional review, some of which you will hear about today.

This tendency, together with the lack of any congressional requirement that legislation pass through the Judiciary Committee, those of you who are responsible for keeping an eye on the rationality of traditional criminal offenses, has led to the evolution of a new and troublesome catalogue of criminal offenses. Congress should not delegate such an important function to agencies.

In this area, one solution that a renowned expert and former colleague from the Department of Justice, Ronald Gainer, who is with us here today, has advocated, is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches. It would be accompanied by a general provision removing all criminal penalties from regulatory violations, notwithstanding the language of the regulatory statutes, except in two instances.

The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests, the traditional reach of the criminal law. The second exception would permit criminal prosecution not for breach of the remaining regulatory provisions but for a pattern of intentional, repeated breaches.

This relatively simple reform could provide a much sounder foundation for the American approach to regulatory crime than previously has existed.

Third, and finally, Congress should also reconsider whether it is time to address whether respondeat superior should be the stand-

ard for holding companies criminally responsible for acts of its employees.

As this Committee is certainly aware, the Department of Justice has been troubled by this issue and has issued a succession of memoranda from Deputies Attorney General during the last decade addressing critical issues regarding charging corporations, particularly regarding the protection of the attorney-client privilege. The current guidelines may not be sufficient, because they continue to vest an unacceptable discretion in Federal prosecutors. A law, in short, is needed to ensure uniformity in this critical area so the guidelines and standards do not continue to change at the rate of four times every 10 years.

Indeed, if an employee was truly a rogue or acting in violation of corporate policies and procedures, Congress can protect a well-intentioned and otherwise law-abiding corporation by enacting a law that holds the individual rather than the corporation responsible for the criminal conduct without subjecting the corporation and the fortunes of its shareholders to the whims of any particular Federal prosecutor.

Before I close, I want to personally commend Chairman Scott and other Members of this Subcommittee for your role in securing unanimous House passage of the Attorney-Client Privilege Act of 2007 in November of that year. The privilege is one that goes back to Elizabethan times, and the preservation of that privilege is something about which I have expressed concern for many years.

Mr. Chairman, your recognition of the issue and your legislation to stop coercive waivers and overreaching to gain access to privileged communications is precisely the type of legislation needed to protect this important privilege.

With respect to the problem of over-criminalization, let me repeat that reform is needed. True crimes should be met with true punishment. While we must be tough on crime, we must also be intellectually honest. Those acts that are not criminal should be countered with civil or administrative penalties to ensure that true criminality retains its importance and value in the legal system.

Thank you, Mr. Chairman and Ranking Member Gohmert, for giving me the opportunity to address this Committee this afternoon on this important issue.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF THE HONORABLE RICHARD THORNBURGH

“OVERCRIMINALIZATION AND THE NEED FOR LEGISLATIVE REFORM”

TESTIMONY BEFORE THE SUBCOMMITTEE ON CRIME, TERRORISM, AND  
HOMELAND SECURITY

COMMITTEE ON THE JUDICIARY  
UNITED STATES HOUSE OF REPRESENTATIVES

DICK THORNBURGH  
FORMER ATTORNEY GENERAL OF  
THE UNITED STATES  
COUNSEL, K&L GATES LLP

WEDNESDAY, JULY 22, 2009

Thank you Chairman Scott, Ranking Member Gohmert, and Members of the Committee for giving me the opportunity to speak with you about this important topic. I have served on both sides of the federal criminal aisle – as a federal prosecutor for many years and currently as a defense attorney involved in proceedings adverse to the Department of Justice. I believe I have a balanced view of the issues before the Committee and hope I can provide some insight and suggest some ideas to deal with the current phenomenon of overcriminalization.

The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree – witness the broad and strong support from such varied groups as the Heritage Foundation, Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the ABA, the Cato Institute, the Federalist Society and the ACLU.

These groups share a common goal: to have criminal statutes that punish *actual criminal acts*, and do not seek to criminalize conduct that is better dealt with by the seeking of civil and regulatory remedies. The criminal sanction is a unique one in American law, and the stigma, public condemnation and potential deprivation of liberty that go along with that sanction demand that it should be utilized only when specific mental states and behaviors are present.<sup>1</sup>

By way of background, let me briefly remind you of some fundamentals of the criminal law. Traditional criminal law encompasses various acts, which may or may not cause results, and mental states, which indicate volition or awareness on the part of the actor. These factors are

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<sup>1</sup> See Erik Luna, “The Overcriminalization Phenomenon,” *American University Law Review*, Vol. 54:703, 713. Professor Luna stated that “[g]iven the moral gravity of decision-making in criminal justice and the unparalleled consequences that flow from such determinations, criminal liability and punishment must always be justifiable in inception and application.” *Id.* at 714; see also Julie O’Sullivan, “Symposium 2006: The Changing Face of White-Collar Crime: The Federal Criminal ‘Code’ is a Disgrace” *Obstruction Statutes as a Case Study*, 96 *J. Crim. L. & Criminology* 643, 657 (2006) (stating that “[c]riminal liability imports a condemnation, the gravest we permit ourselves to make. To condemn when fault is absent is barbaric.”).

commonly known as the requirements of an *mens rea*, and *actus reus*, or an “evil-meaning mind [and] an evil-doing hand.”<sup>2</sup>

With respect to what has now become known as “overcriminalization,” objections are focused on those offenses that go beyond these traditional, fundamental principles and are grounded more on what were historically civil or regulatory offenses without the mental states required for criminal convictions.

My fellow panelists will be discussing the *mens rea* requirement for federal crimes, and the need to reform statutes that lack such a requirement. Without a clear *mens rea* requirement, citizens are not able to govern themselves in a way that assures them of following the law, and many actors are held criminally responsible for actions that do not require a wrongful intent. Indeed, a recent Federalist Society report states that federal statutes provide for over 100 separate terms to denote the required mental state with which an offense may be committed,<sup>3</sup> and the Heritage Foundation issued a report stating that 17 of the 91 federal criminal offenses enacted between 2000 and 2007 *had no mens rea requirement at all*.<sup>4</sup> This trend cannot continue, and suggested legislative reform in the nature of a default *mens rea* requirement when a statute does not require it is worthy of consideration.<sup>5</sup>

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<sup>2</sup> See *Morissette v. United States*, 342 U.S. 246, 251 (1952).

<sup>3</sup> See John S. Baker, Jr., “Measuring the Explosive Growth of Federal Crime Legislation,” Federalist Society for Law and Public Policy Studies, May 2004, at 10.

<sup>4</sup> See John S. Baker, Jr., “Revisiting the Explosive Growth of Federal Crimes,” The Heritage Foundation Legal Memorandum, No. 26, June 16, 2008, at 7.

<sup>5</sup> See Brian W. Walsh, “Enacting Principled, Nonpartisan Criminal-law Reform,” The Heritage Foundation, January 9, 2009, at 2-3 (stating that possible reforms to remedying offenses with unclear or non-existent criminal intent requirements are to apply a default criminal-intent to criminal statutes that do not have any such requirement, to mandate that any introductory or blanket criminal intent requirement be applied to all material elements of the criminal offense, and to codify the rule of lenity, which resolves ambiguity in criminal statutes in favor of the defendant.)

Although many scholars and the Department of Justice have tried to count the total number of federal crimes, only rough estimates have emerged. The current “estimate” is a staggering 4,450 crimes on the books. If legal scholars and researchers and the Department of Justice itself cannot accurately count the number of federal crimes, how do we expect ordinary American citizens to be able to be aware of them?<sup>6</sup> One criminal law expert stated that we can no longer say with confidence the long-standing legal maxim that “ignorance of the law is no excuse,” because the average American citizen cannot actually know how many criminal laws there actually are.<sup>7</sup>

Although I could probably spend my whole panel time citing you the often-mentioned, truly absurd examples of overcriminalization, such as using the character of “Woodsy Owl” or the slogan “Give a Hoot, Don’t Pollute” without authorization; mixing two kinds of turpentine; or wearing a postal uniform in a theatrical production that discredits the postal service, the dangers of overcriminalization for more serious offenses are real and impact real people such as the individuals before you today and corporations, which I will discuss later in these remarks.

Make no mistake, when individuals commit crimes they should be held responsible and punished accordingly. The line has become blurred, however, on what conduct constitutes a crime, particularly in corporate criminal cases, and this line needs to be redrawn and reclarified. The unfortunate reality is that Congress has effectively delegated some of its important authority to

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<sup>6</sup> See Brian Walsh, “Exploring the National Criminal Justice Commission Act of 2009,” Congressional Testimony before the Subcommittee on Crime and Drugs of the Committee on the Judiciary, United States Senate, June 11, 2009 at 14 (stating that “[i]f criminal-law experts and the Justice Department itself cannot ever count them, the average American has no chance of knowing what she must do to avoid violating federal criminal law.”).

<sup>7</sup> See Paul Rosenzweig, “Overcriminalization: An Agenda for Change,” *American University Law Review*, Vol. 54:809, 819. Professor Rosenzweig also stated that although many scholars have sought to provide an estimate on the number of federal crimes, the Congressional Research Service, the arm of Congress charged with conducting research, “has proffered that it is impossible to know the exact number.” *Id.*

regulate crime in this country to federal prosecutors, who are given an immense amount of latitude and discretion to construe federal crimes, and not always with the clearest motives or intentions.<sup>8</sup>

A striking example of this is the “honest services” mail and wire fraud statute, 18 U.S.C. §1346. That statute has been subject to scrutiny because of its expansion from traditional public corruption cases to private acts in business or industry that are deemed to be criminal almost exclusively at the whim of the individual prosecutor who is investigating the case.

Indeed, in a recent dissenting opinion on a denial of a writ of certiorari in the Supreme Court in an honest services case, Justice Scalia stated that the state of the law for honest services fraud was “chaos,” and stated the practical reality of the statute as currently applied:

[w]ithout some coherent limiting principle to define what “the intangible right of honest services” is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEO’s who engage in any manner of unappealing or ethically questionable conduct.<sup>9</sup>

This overbreadth leads to a near paranoid corporate culture that is constantly looking over its shoulder for the “long arm of the law” and wondering whether a good faith business decision will be interpreted by an ambitious prosecutor as a crime. Perhaps even more significant is the impact on corporate innovation – if an idea or concept is novel or beyond prior models, a corporation may

<sup>8</sup> See Luna, *supra* Note 1, at 722 (“[L]ike all other professionals, police and prosecutors seek the personal esteem and promotion that accompany success, typically measured by the number of arrests for the former and convictions for the latter. To put it bluntly, beat cops do not become homicide detectives by helping little old ladies across the street, and district attorneys are not reelected for dismissing cases or slugging off acquittals.”).

<sup>9</sup> See *Sorich v. United States*, 129 S.Ct. 1308, 1310 (2009) (Scalia, J., dissenting). Justice Scalia also quoted a recent dissent in the Second Circuit Court of Appeals that asked “[h]ow can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?” (citing *United States v. Rybicki*, 354 F.3d 124, 160 (Jacobs, J., dissenting)); see also Judge Alex Kozinski and Misha Tscytlin, “You’re (Probably) a Federal Criminal,” *In the Name of Justice*, (Timothy Lynch, Ed.) (2009) (stating that “[c]ourts have had little success limiting the ‘intangible right to honest services’ doctrine,” and “it is unsurprising that courts have been unable to successfully confine this doctrine, since any number of actions could reasonably be seen as depriving an employer or agent of ‘the intangible right to honest services.’”).

stifle it if they are concerned about potential criminal penalties. This stifling may render some corporations unable to compete in a global marketplace just to ensure compliance with the laws – certainly a “cutting off one’s nose to spite the corporate face.”

Justice Scalia further stated in his dissent that “[i]t is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail.”<sup>10</sup> I couldn’t agree more. This type of overbroad, arbitrary use of a federal criminal law demonstrates the dangers of overcriminalization and simply must be remedied.<sup>11</sup>

As noted, the issue of overcriminalization is especially poignant in corporate crime. A corporation is an “artificial entity.” The legal persona of a corporation is wholly dependent on the laws that formed it. Thus, a corporation is a stable being separate and distinct from the human beings that perform its functions. The corporation is, in the eyes of the law, very much an *entity*.

Nevertheless, in 1909, the Supreme Court held in a railroad regulation case that a corporation could be held criminally liable for the acts of its agents under a theory of what is known as “*respondeat superior*,” or, in non-legalese, “the superior must answer,” or an employer is responsible for the actions of employees performed within the course of their employment.<sup>12</sup>

Since 1909, corporations have routinely been held criminally liable for the acts of its employees. In recent history, one of the more significant cases is Arthur Andersen, a case of which the Committee is no doubt aware, in which a business entity received effectively a death sentence based on the acts of isolated employees over a limited period of time. As this case

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<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> O’Sullivan, *supra* Note 1 at 670 (stating that “[t]he same principles that demand that Congress take the laboring oar in identifying the conduct that will be subject to penal sanction – beforehand and with reasonable specificity and clarity – also, of course, bars prosecution law-making.”).

<sup>12</sup> See *New York Central & Hudson River Railroad v. United States*, 212 U.S. 481 (1909).

illustrates, this is not a partisan issue – Arthur Andersen was prosecuted under a Republican administration.

I gave a speech at the Georgetown Law Center in 2007 regarding overcriminalization,<sup>13</sup> and mentioned the Arthur Andersen case and referenced a political cartoon that was published after the Supreme Court reversed the company’s conviction in which a man in a judicial robe was standing by the tombstone for Arthur Andersen and said “*Oops. Sorry.*”<sup>14</sup> That apology didn’t put the tens of thousands of partners and employees of that Firm back to work. This simply cannot be repeated, and reform is needed to make sure there are no future abuses.

What can be done to curb future abuses? First, I have advocated for many years that we adopt a true Federal Criminal Code. While this may not be the first thing that comes to mind when analyzing the issues of concern in the criminal justice system, it is an important one that should be undertaken without delay. As I mentioned, there are now some 4,450 or more separate statutes – a hodgepodge without a coherent sense of organization. There is a template in existence, the Model Penal Code, that can act as a sensible start to an organized criminal code, and has formed the basis for many efforts to establish state criminal codes in this country. What is needed is a clear, integrated compendium of the totality of the federal criminal law, combining general provisions, all serious forms of penal offenses, and closely related administrative provisions into an orderly structure, which would be, in short, a true Federal Criminal Code.<sup>15</sup>

<sup>13</sup> See Dick Thornburgh, “The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes,” *American Criminal Law Review*, Volume 44, Fall 2007.

<sup>14</sup> See Politicalcartoons.com, <http://www.politicalcartoons.com/cartoon/5b7d87f6-41b7-9c8f-cfa126a1776d.html> (last visited July 15, 2009).

<sup>15</sup> See Thornburgh, *supra* note 13 at 1285; see also O’Sullivan, *supra* Note 1, at 643 (stating that “[t]here actually is no federal criminal ‘code’ worthy of the name. A criminal code is defined as ‘a systematic collection, compendium, or revision of laws.’ What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law.”). Professor

A Commission should be constituted, perhaps in connection with Senator Webb's National Criminal Justice Commission Act, to review the federal criminal code, collect all similar criminal offenses in a single chapter of the United States Code, consolidate overlapping provisions, revise those with unclear or unstated *mens rea* requirements, and consider overcriminalization issues.<sup>16</sup> This is not a new idea – Congress has tried in the past to reform the federal criminal code, most notably through the efforts of the “Brown Commission” in 1971.<sup>17</sup> The legislative initiatives based on that Commission's work failed despite widespread recognition of its worth. It is incumbent on this Congress to seek to make sense out of our laws and make sure that average ordinary citizens can be familiar with what conduct actually constitutes a crime in this country.

Second, Congress needs to rein in the continuing proliferation of criminal regulatory offenses. Regulatory agencies routinely promulgate rules that impose criminal penalties that are not enacted by Congress.<sup>18</sup> Indeed, criminalization of new regulatory provisions has become seemingly mechanical. One estimate is that there are a staggering **300,000** criminal regulatory offenses created by agencies.

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O'Sullivan also stated that “our failure to have in place even a the modestly coherent code makes a mockery of United States much-vaunted commitments to justice, the rule of law, and human rights.” *Id.* at 644.

<sup>16</sup> See Walsh, *supra* Note 5 at 2 (stating that “[t]he American Law Institute's Model Penal Code includes key provisions standardizing how courts interpret criminal statutes that have unclear or nonexistent criminal-intent requirements. Federal law should include similar provisions.”).

<sup>17</sup> See generally Ronald L. Gainer, “Federal Criminal Code Reform: Past and Future,” 2 *Buffalo Criminal Law Review* 45 (1998).

<sup>18</sup> See Washington Legal Foundation, “Federal Erosion of Business Civil Liberties,” 2008 Special Report at 1-5 (stating that “regulatory agencies promulgate rules that not only depart from the intent of Congress, but also impose criminal penalties that dispense with the showing of criminal intent,” and referenced a speech made by the former General Counsel of the Treasury about the agency's “invention” of a bank regulation designed to prevent a particular form of money laundering by eliminating *mens rea* and making bank employees strictly liable, contrary to the intent of Congress.).

This tendency, together with the lack of any congressional requirement that the legislation pass through the judiciary committees - which are responsible for keeping an eye on the rationality of the traditional criminal offenses - has led to an evolution of a new and troublesome catalogue of criminal offenses. Congress should not delegate such an important function to agencies. Indeed, in remedial legislation introduced in 2005 entitled the "Congressional Responsibility Act of 2005," the Bill sought to ensure that Federal regulations would not take effect unless passed by a majority of the members of the Senate and House and signed by the President.<sup>19</sup> Thus, the Bill sought to "end the practice whereby Congress delegates its responsibility for making laws to unelected, unaccountable officials of the executive branch and requires that regulations proposed by agencies of the executive branch be affirmatively enacted by Congress before they become effective."<sup>20</sup> This type of legislation deserves reconsideration.

In this area, one solution that a reknown expert and former colleague from the Department of Justice, Ronald Gainer, has advocated is to enact a general statute providing administrative procedures and sanctions for all regulatory breaches.<sup>21</sup> It would be accompanied by a general provision removing all criminal penalties from regulatory violations, notwithstanding the language of the regulatory statutes, except in two instances. The first exception would encompass conduct involving significant harm to persons, property interests, and institutions designed to protect persons and property interests - the traditional reach of criminal law. The second exception would permit criminal prosecution, not for breach of the remaining regulatory provisions, but for a pattern

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<sup>19</sup> See Congressional Responsibility Act of 2005 (H.R. 931), introduced by Rep. J.D. Hayworth (R-AZ).

<sup>20</sup> *Id.* at p. 2.

<sup>21</sup> See generally, Ronald L. Gainer, *Creeping Criminalization and Its Social Costs*, Legal Backgrounder, Washington Legal Foundation, Vol. 34 No. 13, Oct. 2, 1998.

of intentional, repeated breaches. This relatively simple reform could provide a much sounder foundation for the American approach to regulatory crime than previously has existed.

Third, Congress should also consider whether it is time to address whether “*respondeat superior*” should be the standard for holding companies criminally responsible for acts of its employees. As the Committee is certainly aware, the Department of Justice has issued a succession of Memoranda from Deputy Attorneys General during the past ten years, from one issued by current Attorney General Holder in 1999, to the Thompson Memorandum in 2003 by former Deputy Attorney General Larry D. Thompson to the McNulty Memorandum in 2006 by former Deputy Attorney General Paul J. McNulty, to the most recent Filip Memorandum authored by former Deputy Attorney General Mark Filip. Although these Memoranda have evolved over time and addressed critical issues regarding charging corporations, particularly regarding the protection of the attorney-client privilege, the current Guidelines may not be sufficient because they continue to vest an unacceptable amount of discretion in federal prosecutors.<sup>22</sup>

A law is needed to ensure uniformity in this critical area so that the guidelines and standards do not continue to change at the rate of four times in ten years. Indeed, if an employee was truly a “rogue” or acting in violation of corporate policies and procedures, Congress can protect a well-intentioned and otherwise law abiding corporation by enacting a law that holds the

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<sup>22</sup> The Filip Memo revised the Principles of Federal Prosecution of Business Organizations, and the Principles are set forth in the *United States Attorney's Manual*. Section 9-28.500 (A) of the Manual, entitled “Pervasiveness of Wrongdoing Within the Corporation,” states that “[a] corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee.” *Id.* (emphasis added); see also August 28, 2008 Memorandum by Mark Filip, Deputy Attorney General, available at [www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf](http://www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf) (last viewed July 20, 2009).

individual rather than the corporation responsible for the criminal conduct without subjecting the corporation to the whims of any particular federal prosecutor.

Before I close, I wanted to commend Chairman Scott and other members of this Subcommittee for your role in securing passage of the Attorney-Client Privilege Act of 2007 in November 2007. The privilege is one that goes back to Elizabethan times, and the preservation of that privilege is something about which I have expressed concern for many years. Mr. Chairman, your recognition of the issue and legislation to stop “coercive waivers” and overreaching to gain access to privileged communications is precisely the type of legislation needed to protect this important privilege.<sup>23</sup>

With respect to the problem of overcriminalization, let me report that reform is needed. True crimes should be met with true punishment. While we must be “tough on crime,” we must also be intellectually honest. Those acts that are not criminal should be countered with civil or administrative penalties to ensure that true criminality retains its importance and value in the legal system.

Thank you Mr. Chairman, Ranking Member Gohmert and Members of the Committee for giving me this opportunity to address the Committee on this important issue.

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<sup>23</sup> See Walsh, *supra* Note 5 at 4 (stating that “[w]hat is needed [regarding the attorney-client privilege] is a permanent solution with the force of law that applies to all federal agencies – *i.e.*, comprehensive legislation with provisions like those in the bipartisan Attorney-Client Privilege Protection Act that passed the House last year by a unanimous voice vote.”).

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Mr. SCOTT. Thank you, General Thornburgh.  
We have votes pending. There are six votes, which will take us  
at least half an hour, and we will be back as soon as we can.  
[Recess.]  
[5 p.m.]

Mr. SCOTT. The Subcommittee will now resume its hearing. We will have testimony from Mr. Lynch.

**TESTIMONY OF TIMOTHY LYNCH, CATO INSTITUTE,  
WASHINGTON, DC**

Mr. LYNCH. Thank you, Mr. Chairman. I appreciate the invitation to appear here today.

Before I get to the subject of *mens rea* and criminal intent, let me start off by explaining my general approach to the criminal law. My analysis of these issues begins with three facts that I think are important to keep in mind at all times.

First, the power wielded by police and prosecutors is truly immense. We have to remember that all it takes is one raid on a home or business, one high-profile arrest, or a single indictment announced before the TV cameras on the courthouse steps and a person's life can be forever changed. Reputation gone, job gone, friends gone, and that is before you even get the opportunity to go into court to mount a defense. These things have already happened. Your life has already been altered.

Second, as Attorney General Thornburgh mentioned, the term "criminal" carries a stigma. The term implies that the culprit has done something that is blameworthy. Now, that most definitely, is usually the case, but the term should not be twisted so as to apply in cases where there is no blameworthy choice. Criminality should be a situation where there is a clear line between lawful conduct and unlawful conduct and the person crossed over that line knowing what he or she was doing.

Third, the Constitution contains many provisions that restrict the application of the criminal law. It restricts the power to search, it restricts excessive fines, it sets forth certain procedures about the notification of charges, it sets forth procedures for jury trials, speedy trials, the right to confront witnesses and so forth. Those safeguards amount to very little if the government can create very expansive theories of criminal liability that essentially obliterate traditional legal defenses, such as the ability to go into court to argue that you are doing something in good faith. If we are serious about maintaining constitutional safeguards, we have to keep a close eye on how the government creates and defines criminal offenses.

With that background in mind, I want to briefly pinpoint the areas of our law where the problems of *mens rea* and criminal intent are especially acute.

First, everybody here has heard of the old legal maxim that "ignorance of the law is no excuse." But, Mr. Chairman, with the shelves and shelves of law books that can be found in libraries across the country, this doctrine no longer makes any sense. Even attorneys like us, it is impossible for us to keep up with the law these days. So, it is an old doctrine that no longer makes any sense, and the result of keeping this old doctrine on the law results in unjust prosecutions.

My written testimony highlights the case of one Carlton Wilson. Mr. Wilson purchased a firearm. It was a perfectly lawful purchase. But, years later, when he was in divorce proceedings, a judge issued a restraining order; and nobody informed Mr. Wilson

that he had a legal obligation, once the restraining order was issued, that he had to surrender his firearm. The judge didn't tell him. His own attorney didn't tell him. And the terms of the restraining order itself didn't say you had to turn in your firearm.

Mr. Wilson got caught up in a Federal indictment and is serving 3 years in a Federal prison for violating a law that he had no reason to know about. And the Federal prosecutors just shrugged and said, well, "ignorance of the law is no excuse."

It is time to discard this old doctrine by requiring prosecutors to prove that regulatory violations like this were willful.

Again, in my written testimony, I show that this case against Mr. Wilson was not just an aberrational case where one prosecutor exercised poor judgment. There are many other cases like this; and, again, that is in my written testimony.

Another problem area concerns the area of vague criminal statutes. In the situations where a particular law is brought to our attention, we still need to be able to understand the terms of that statute. We should be able to find that bright line between the conduct that is lawful and the conduct that is unlawful.

In my written testimony, I direct the Committee to a situation where the Environmental Protection Agency (EPA) created a special hotline for the Resource, Conservation, and Recovery Act. They set up a special hotline to field questions, because they were getting lots of inquiries from people that wanted to know how that law applied in different situations. But there was a catch. The EPA said that it could not guarantee that the information given over this hotline would be correct, and prosecutors made it known that reliance on incorrect information would not be a defense in an enforcement action.

Now, Congress should disavow situations like this, where ordinary citizens are relying on the government for guidance on what conduct is lawful and unlawful.

Another thing Congress can do in this area is to direct the courts to follow the rule of lenity. The rule of lenity, you may recall, basically says that when a statute is ambiguous you give the benefit of the doubt to the defendant, not to the government.

Mr. Gohmert mentioned we are going back to law schools to review some of these concepts. You might recall that in contracts, when a contractual provision was ambiguous, you would resolve that against the person who drafted the contract. So the rule of lenity is basically the same idea. When a criminal law is ambiguous, you give the benefit of the doubt to the citizen, not to the prosecutors and the government.

Congress should also revisit the most expansive theories of criminal liability that have crept into our law. Under theories of strict liability and vicarious liability, persons can be labeled "criminals" but the defendants are barred from bringing in the extenuating circumstances of their cases to bring these to the attention of juries. That is because prosecutors and judges will make it clear even before the trial begins, that facts such as extenuating circumstances or somebody acting in good faith, these factors are irrelevant in a strict liability case.

Let me provide you with one example to show you how this can produce an injustice.

My written testimony highlights the case of one Dane Yirkovsky. He is now serving a 15-year mandatory minimum sentence; and, according to the reported decision in the case, here are the circumstances of his “crime.”

He was re-carpeting a room where he was living, and he found a bullet as he was pulling up the carpet. He took the bullet and put it in a box on top of his dresser.

Months later, he got into a dispute with his ex-girlfriend about some property that she said he should not have taken, so he allowed a police detective into his room to show that he didn’t have the property that she was talking about. But as the detective was walking around the room, he discovered this bullet; and suddenly this man, Yirkovsky, found himself caught up in a Federal indictment for possession of “illegal ammunition.”

He could not bring his innocent intentions or the extenuating circumstances of this case to the attention of the jury because they said it wouldn’t make any difference. You are a felon. He had served his time. He was coming back trying to reestablish himself into the community. And, under the law, it is very strict. If you are felon, you can’t possess illegal ammunition; and he couldn’t bring the extenuating circumstances of his case to the attention of the jury. They just said it was irrelevant.

Mr. Chairman, I have more examples and I go into more detail in my written testimony, but let me quickly conclude by affirming what Mr. Gohmert and what Mr. Thornburgh said earlier: The Federal Criminal Code is presently a mess.

At a minimum, I think Congress should take, at a minimum, take the following steps:

Discard the old rule that “ignorance of the law is no excuse.” It doesn’t make any sense anymore.

Second, Congress should establish the rule of lenity into our law. Right now, the courts are applying this rule haphazardly. Sometimes there is a favorable decision where they are applying the rule of lenity, but it is not applied uniformly in all Federal criminal cases, and that is something Congress can change by enacting a law.

Third, Congress can abolish these most expansive theories of criminal liability such as strict and vicarious liability. They are inconsistent with the American legal tradition, and they hand too much power over to prosecutors, who can then coerce plea deals.

Thank you very much.

[The prepared statement of Mr. Lynch follows:]

PREPARED STATEMENT OF TIMOTHY LYNCH

STATEMENT

of

Timothy Lynch  
Director, Project on Criminal Justice  
Cato Institute  
Washington, D.C.

before the

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

July 22, 2009

**Over-Criminalization of Conduct/Over-Federalization of Criminal Law**

Mr. Chairman, distinguished members of the subcommittee:

My name is Tim Lynch. I am the director of the Cato Institute's Project on Criminal Justice. Before I get into some of the nitty-gritty details of legal doctrine, let me begin by thanking you for the invitation to testify this afternoon. Although I believe the problems of Over-Criminalization of Conduct and Over-Federalization of Criminal Law are among the most serious problems facing the Congress today,<sup>1</sup> my role this afternoon, as I understand it, is to highlight a related trend in the law—and that is the drift away from the idea of blameworthiness as a first principle of American criminal justice. That is, too often the government seeks to deny the proposition that it is unjust to inflict criminal punishment on people who are not blameworthy. My remarks will thus focus on that particular subject.

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<sup>1</sup> For a detailed discussion of these issues, see Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law* (Chicago: American Bar Association, 1998); John Baker, "Measuring the Explosive Growth of Federal Crime Legislation," (The Federalist Society for Law and Public Policy Studies (May 2004)); John Baker, "Nationalizing Criminal Law: Does Organized Crime Make It Necessary or Proper?" *Rutgers Law Journal* 16 (1985): 495; Brian Walsh, "Doing Violence to the Law: The Over-Federalization of Crime," *Federal Sentencing Reporter* 20 (June 2008): 295; Erik Luna, "The Overcriminalization Phenomenon," *American University Law Review* 54 (2005): 703.

## I. Introduction and Background

My approach to the criminal law begins with three basic propositions. First, the power that is wielded by police and prosecutors is truly immense. A dramatic raid, arrest, or indictment can bring enormous damage to a person's life—even before he or she has an opportunity to mount a defense in court. Second, the term “criminal” carries a stigma. It implies that the culprit has done something that is blameworthy. Third—and relatedly—it is important to keep a close eye on the manner in which the government creates and defines “criminal offenses.” For as Harvard Law Professor Henry Hart once noted, “What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?”<sup>2</sup> In my view, all persons of goodwill ought to be disturbed by the fact that the government is now bypassing the procedural protections of the Bill of Rights and attaching the “criminal” label to people who are not truly blameworthy.

Let me begin by trying to clarify some terminology. In our law schools today, the terms “intent” and “*mens rea*” are commonly used in a very broad manner—as concepts that include a spectrum of mental states (ranging from purposeful conduct to strict or vicarious liability) to be defined in statutes by policymakers. But for purposes of my testimony today, I will be using those terms in a more narrow sense. As Justice Potter Stewart once observed, “Whether postulated as a problem of ‘*mens rea*,’ of ‘willfulness,’ of ‘criminal responsibility,’ or of ‘scienter,’ the infliction of criminal punishment upon the unaware has long troubled the fair administration of justice.”<sup>3</sup> Today I want to advance the claim that it is wrong to criminally punish those who were “unaware” of the facts or rules that made their conduct unlawful. The remainder of my testimony will pinpoint the areas of our law where this problem is especially acute.

## II. The Problem Areas

### A. Ignorance of the Law is No Excuse

The sheer volume of modern law makes it impossible for an ordinary American household to stay informed. And yet, prosecutors vigorously defend the old legal maxim that “ignorance of the law is no excuse.”<sup>4</sup> That maxim may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. As Professor Henry M. Hart opined, “In no respect is contemporary law subject to greater reproach than for its obtuseness to this fact.”<sup>5</sup>

<sup>2</sup> Henry M. Hart, Jr., “The Aims of the Criminal Law,” reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 6.

<sup>3</sup> *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971) (Stewart, J., dissenting).

<sup>4</sup> See Timothy Lynch, “Ignorance of the Law: Sometimes a Valid Defense,” *Legal Times*, April 4, 1994.

<sup>5</sup> Hart, “The Aims of the Criminal Law,” p. 19.

To illustrate the rank injustice that can and does occur, take the case of Carlton Wilson, who was prosecuted because he possessed a firearm. Wilson's purchase of the firearm was perfectly legal, but, years later, he didn't know that he had to give it up after a judge issued a restraining order during his divorce proceedings. When Wilson protested that the judge never informed him of that obligation and that the restraining order itself said nothing about firearms, prosecutors shrugged, "ignorance of the law is no excuse."<sup>6</sup> Although the courts upheld Wilson's conviction, Judge Richard Posner filed a dissent: "We want people to familiarize themselves with the laws bearing on their activities. But a reasonable opportunity doesn't mean being able to go to the local law library and read Title 18. It would be preposterous to suppose that someone from Wilson's milieu is able to take advantage of such an opportunity."<sup>7</sup> Judge Posner noted that Wilson would serve more than three years in a federal penitentiary for an omission that he "could not have suspected was a crime or even a civil wrong."<sup>8</sup>

It is simply outrageous for the government to impose a legal duty on every citizen to "know" all of the mind-boggling rules and regulations that have been promulgated over the years. Policymakers can and should discard the "ignorance-is-no-excuse" maxim by enacting a law that would require prosecutors to prove that regulatory violations are "willful" or, in the alternative, that would permit a good-faith belief in the legality of one's conduct to be pleaded and proved as a defense. The former rule is already in place for our complicated tax laws—but it should also shield unwary Americans from all of the laws and regulations as well.<sup>9</sup>

### B. Vague Statutes

Even if there were but a few crimes on the books, the terms of such laws need to be drafted with precision. There is precious little difference between a secret law and a published regulation that cannot be understood. History is filled with examples of oppressive governments that persecuted unpopular groups and innocent individuals by keeping the law's requirements from the people. For example, the Roman emperor Caligula posted new laws high on the columns of buildings so that ordinary citizens could not study the laws. Such abominable policies were discarded during the Age of Enlightenment, and a new set of principles—known generally as the "rule of law"—took hold. Those principles included the requirements of legality and specificity.

"Legality" means a regularized process, ideally rooted in moral principle, by which crimes are designated and prosecuted by the government. The Enlightenment

<sup>6</sup> *United States v. Wilson*, 159 F.3d 280 (1998).

<sup>7</sup> *Ibid.*, p. 296 (Posner, J., dissenting).

<sup>8</sup> *Ibid.* The Wilson prosecution was *not* a case of one prosecutor using poor judgment and abusing his power. See, for example, *United States v. Emerson*, 46 F.Supp. 2d 598 (1999).

<sup>9</sup> See, generally, Ronald A. Cass, "Ignorance of the Law: A Maxim Reexamined," *William and Mary Law Review* 17 (1976): 671.

philosophy was expressed by the maxim *nullum crimen sine lege* (there is no crime without a law). In other words, people can be punished only for conduct previously prohibited by law. That principle is clearly enunciated in the ex post facto clause of the U.S. Constitution (article I, section 9). But the purpose of the ex post facto clause can be subverted if the legislature can enact a criminal law that condemns conduct in general terms, such as “dangerous and harmful” behavior. Such a law would not give people fair warning of the prohibited conduct. To guard against the risk of arbitrary enforcement, the Supreme Court has said that the law must be clear:

A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another.<sup>10</sup>

The principles of legality and specificity operate together to reduce the likelihood of arbitrary and discriminatory application of the law by keeping policy matters away from police officers, administrative bureaucrats, prosecutors, judges, and members of juries, who would have to resolve ambiguities on an ad hoc and subjective basis.

Although the legality and specificity requirements are supposed to be among the first principles of American criminal law, a “regulatory” exception has crept into modern jurisprudence. The Supreme Court has unfortunately allowed “greater leeway” in regulatory matters because the practicalities of modern governance supposedly limit “the specificity with which legislators can spell out prohibitions.”<sup>11</sup> During the past 50 years, fuzzy legal standards, such as “unreasonable,” “unusual,” and “excessive,” have withstood constitutional challenge.

The Framers of the American Constitution understood that democracy alone was no guarantor of justice. As James Madison noted, “It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.”<sup>12</sup> Unfortunately, Madison’s vision of unbridled lawmaking is an apt description of our modern regulatory

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<sup>10</sup> *Connally v. General Construction Company*, 269 U.S. 385, 393 (1926) (internal quotation marks omitted).

<sup>11</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-163 (1972).

<sup>12</sup> James Madison, “Federalist Paper 62,” in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), p. 381.

state.<sup>13</sup> For example, the Environmental Protection Agency received so many queries about the meaning of the Resource Conservation and Recovery Act that it set up a special hotline for questions. Note, however, that the “EPA itself does not guarantee that its answers are correct, and reliance on wrong information given over the RCRA hotline is no defense to an enforcement action.”<sup>14</sup> The situation is so bad that even many prosecutors are acknowledging that there is simply too much uncertainty in criminal law. Former Massachusetts Attorney General Scott Harshbarger concedes, “One thing we haven’t done well in government is make it very clear, with bright lines, what kinds of activity will subject you to . . . criminal or civil prosecution.”<sup>15</sup>

The first step toward addressing the problem of vague and ambiguous criminal laws would be for the Congress to direct the courts to follow the rule of lenity in all criminal cases.<sup>16</sup> Legal uncertainties should be resolved in favor of private individuals and organizations, not the government.

### C. Strict Liability

Two basic premises that undergird Anglo-American criminal law are the requirements of *mens rea* (guilty mind) and *actus reus* (guilty act).<sup>17</sup> The first requirement says that for an act to constitute a crime there must be “bad intent.” Dean Roscoe Pound of Harvard Law School writes, “Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.”<sup>18</sup> According to that view, a man could not be prosecuted for leaving an airport with the luggage of another if he mistakenly believed that he owned the luggage. As the Utah Supreme Court noted in *State v. Blue* (1898), *mens rea* was considered an indispensable element of a criminal offense. “To prevent the punishment of the innocent, there has been ingrafted into our system of jurisprudence, as presumably in every other, the principle that the wrongful or criminal intent is the essence of crime, without which it cannot exist.”<sup>19</sup>

By the same token, bad thoughts alone do not constitute a crime if there is no “bad act.” If a police officer discovers a diary that someone mistakenly left behind in a coffee shop, and the contents include references to wanting to steal the possessions of

<sup>13</sup> See Robert A. Anthony, “Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty,” Cato Institute Policy Analysis no. 312, August 11, 1998.

<sup>14</sup> William L. Gardner and Adam H. Steinman, “‘Knowing’ Remains the Key Word,” *National Law Journal*, September 2, 1991, p. 28.

<sup>15</sup> Quoted in William P. Kucewicz, “Crime and Punishment,” *ECO* (June 1993): 54.

<sup>16</sup> Pennsylvania has protected its citizens from overzealous prosecutors with such a law for many years. See 1 Pa.C.S.A. 1208.

<sup>17</sup> Wayne R. LaFare and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), pp. 193–94.

<sup>18</sup> Quoted in *Morissette v. United States*, 342 U.S. 246, 250 n. 4 (1952).

<sup>19</sup> *Utah v. Blue*, 53 Pac. 978, 980 (1898).

another, the author cannot be prosecuted for a crime. Even if an off-duty police officer overhears two men in a tavern discussing their hatred of the police and their desire to kill a cop, no lawful arrest can be made if the men do not take action to further their cop-killing scheme. The basic idea, of course, is that the government should not be in the business of punishing “bad thoughts.”

When *mens rea* and *actus reus* were fundamental prerequisites for criminal activity, no person could be branded a “criminal” until a prosecutor could persuade a jury that the accused possessed “an evil-meaning mind with an evil-doing hand.”<sup>20</sup> That understanding of crime—as a compound concept—was firmly entrenched in the English common law at the time of the American Revolution.

Over the years, however, the moral underpinnings of the Anglo-American view of criminal law fell into disfavor. The *mens rea* and *actus reus* requirements came to be viewed as burdensome restraints on well-meaning lawmakers who wanted to solve social problems through administrative regulations. As Professor Richard G. Singer has written, “Criminal law . . . has come to be seen as merely one more method used by society to achieve social control.”<sup>21</sup>

The change began innocently enough. To protect young girls, statutory rape laws were enacted that flatly prohibited sex with girls under the age of legal consent. Those groundbreaking laws applied even if the girl lied about her age and consented to sex and if the man reasonably believed the girl to be over the age of consent. Once the courts accepted that exception to the *mens rea* principle, legislators began to identify other activities that had to be stamped out—even at the cost of convicting innocent-minded people.

The number of strict liability criminal offenses grew during the 20th century as legislators created scores of “public welfare offenses” relating to health and safety. Each time a person sought to prove an innocent state-of-mind, the Supreme Court responded that there is “wide latitude” in the legislative power to create offenses and “to exclude elements of knowledge and diligence from [their] definition.”<sup>22</sup> Those strict liability rulings have been sharply criticized by legal commentators. Professor Herbert Packer argues that the creation of strict liability crimes is both inefficacious and unjust.

It 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, nor does it single him out as a socially dangerous

<sup>20</sup> *Morissette v. United States*, 342 U.S. 246, 251 (1952).

<sup>21</sup> Richard G. Singer, “The Resurgence of *Mens Rea*: III—The Rise and Fall of Strict Criminal Liability,” *Boston College Law Review* 30 (1989): 337. See also *Special Report: Federal Erosion of Business Civil Liberties* (Washington: Washington Legal Foundation, 2008).

<sup>22</sup> *Lambert v. California*, 355 U.S. 225, 228 (1957).

individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventative or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of mens rea.<sup>23</sup>

A dramatic illustration of the problem was presented in *Thorpe v. Florida* (1979).<sup>24</sup> John Thorpe was confronted by a thief who brandished a gun. Thorpe got into a scuffle with the thief and wrested the gun away from him. When the police arrived on the scene, Thorpe was arrested and prosecuted under a law that made it illegal for any felon to possess a firearm. Thorpe tried to challenge the application of that law by pointing to the extenuating circumstances of his case. The appellate court acknowledged the “harsh result,” but noted that the law did not require a vicious will or criminal intent. Thus, self-defense was not “available as a defense to the crime.”<sup>25</sup>

True, *Thorpe* was a state case from 1979. The point here is simply to show the drift of our law. As Judge Benjamin Cardozo once quipped, once a principle or precedent gets established, it is usually taken to the “limit of its logic.” For a more recent federal case, consider what happened to Dane Allen Yirkovsky. Yirkovsky was convicted of possessing one round of .22 caliber ammunition and for that he received minimum mandatory 15-year sentence.<sup>26</sup> Here are the reported circumstances surrounding his “crime.”

In late fall or early winter of 1998, Yirkovsky was living with Edith Turkington at her home in Cedar Rapids, Iowa. Instead of paying rent, Yirkovsky agreed to remodel a bathroom at the home and to lay new carpeting in the living room and hallway. While in the process of removing the old carpet, Yirkovsky found a Winchester .22 caliber, super x, round. Yirkovsky put the round in a small box and kept it in the room in which he was living in Turkington's house.

Subsequently, Yirkovsky's ex-girlfriend filed a complaint alleging that Yirkovsky had [some of] her property in his possession. A police detective spoke to Yirkovsky regarding the ex-girlfriend's property, and Yirkovsky granted him permission to search his room in Turkington's house. During this search, the detective located the .22 round. Yirkovsky admitted to police that he had placed the round where it was found by the detective.

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<sup>23</sup> Herbert Packer, “Mens Rea and the Supreme Court,” *Supreme Court Review* (1962): 109. See also Jeffrey S. Parker, “The Economics of Mens Rea,” *Virginia Law Review* 79 (1993): 741; Craig S. Lerner and Moin A. Yahya, “‘Left Behind’ After Sarbanes-Oxley,” *American Criminal Law Review* 44 (2007): 1383.

<sup>24</sup> *Thorpe v. Florida*, 377 So.2d 221 (1979).

<sup>25</sup> *Ibid.*, p. 223.

<sup>26</sup> See *United States v. Yirkovsky*, 259 F.3d 704 (2001).

The appellate court found the penalty to be “extreme,” but affirmed Yirkovsky’s sentence as consistent with existing law.<sup>27</sup>

Strict liability laws should be abolished because their very purpose is to divorce a person’s intentions from his actions. But if the criminal sanction imports blame—and it does—it is a perversion to apply that sanction to self-defense and other acts that are not blameworthy. Our criminal law should reflect the old Latin maxim, *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).<sup>28</sup>

#### D. Vicarious Liability

Everyone agrees with the proposition that if a person commands, pays, or induces another to commit a crime on that person’s behalf, the person should be treated as having committed the act.<sup>29</sup> Thus, if a husband hires a man to kill his wife, the husband is also guilty of murder. But it is another matter entirely to hold one person criminally responsible for the *unauthorized* acts of another. “Vicarious liability,” the legal doctrine under which a person may be held responsible for the criminal acts of another, was once “repugnant to every instinct of the criminal jurist.”<sup>30</sup> Alas, the modern trend in American criminal law is to embrace vicarious criminal liability.

Vicarious liability initially crept into regulations that were deemed necessary to control business enterprises. One of the key cases was *United States v. Park* (1975).<sup>31</sup> John Park was the president of Acme Markets Inc., a large national food chain. When the

<sup>27</sup> In my view, Congress should not stand by secure in the knowledge that such precedents exist. Justice Anthony Kennedy has made this point quite well: “The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. . . . Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.” Anthony M. Kennedy, “An Address to the American Bar Association Annual Meeting,” reprinted in *In the Name of Justice* (Washington, D.C.: Cato Institute, 2009), p. 193.

<sup>28</sup> See Wayne R. LaFare and Austin W. Scott Jr., *Criminal Law*, 2nd. ed. (St. Paul, MN: West Publishing Co., 1986), p. 212.

<sup>29</sup> Francis Bowes Sayre, “Criminal Responsibility for the Acts of Another,” *Harvard Law Review* 43 (1930): 689, 690.

<sup>30</sup> *Ibid.*, p. 702.

<sup>31</sup> *United States v. Park*, 421 U.S. 658 (1975). Although many state courts have followed the reasoning of the *Park* decision with respect to their own state constitutions, some courts have recoiled from the far-reaching implications of vicarious criminal liability. For example, the Pennsylvania Supreme Court has held that “a man’s liberty cannot rest on so frail a reed as whether his employee will commit a mistake in judgment.” *Commonwealth v. Koczwara*, 155 A.2d 825, 830 (1959). That Pennsylvania ruling, it must be emphasized, is an aberration. It is a remnant of the common law tradition that virtually every other jurisdiction views as passe’.

Food and Drug Administration found unsanitary conditions at a warehouse in April 1970, it sent Park a letter demanding corrective action. Park referred the matter to Acme's vice president for legal affairs. When Park was informed that the regional vice president was investigating the situation and would take corrective action, Park thought that was the end of the matter. But when unsanitary warehouse conditions were found on a subsequent inspection, prosecutors indicted both Acme and Park for violations of the Federal Food, Drug and Cosmetic Act.

An appellate court overturned Park's conviction because it found that the trial court's legal instructions could have "left the jury with the erroneous impression that [Park] could be found guilty in the absence of 'wrongful action' on his part" and that proof of that element was constitutionally mandated by due process.<sup>32</sup> The Supreme Court, however, reversed the appellate ruling. Chief Justice Warren Burger opined that the legislature could impose criminal liability on "those who voluntarily assume positions of authority in business enterprises" because such people have a duty "to devise whatever measures [are] necessary to ensure compliance" with regulations.<sup>33</sup> Thus, under the rationale of *Park*, an honest executive can be branded a criminal if a low-level employee in a different city disobeys a supervisor's instructions and violates a regulation—even if the violation causes no harm whatsoever.<sup>34</sup>

In 1994, Edward Hanousek was employed as a roadmaster for a railroad company. In that capacity, Hanousek supervised a rock quarrying project near an Alaska river. During rock removal operations, a backhoe operator accidentally ruptured a pipeline—and that mistake led to an oil spill into the nearby river. Hanousek was prosecuted under the Clean Water Act even though he was off duty and at home when the accident occurred. The case prompted Justice Clarence Thomas to express alarm at the direction of the law: "I think we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."<sup>35</sup>

Note that vicarious liability has *not* been confined to the commercial regulation context.<sup>36</sup> Tina Bennis lost her car to the police because of the actions of her husband. The police found him in the vehicle with a prostitute.<sup>37</sup> Pearlle Rucker was evicted from

<sup>32</sup> *United States v. Park*, 421 U.S. 658, 666 (1975).

<sup>33</sup> *Ibid.*, p. 672.

<sup>34</sup> "[T]he willfulness or negligence of the actor [will] be imputed to him by virtue of his position of responsibility." *United States v. Brittain*, 931 F.2d 1413, 1419 (1991); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 665 n. 3 (1984). See generally Joseph G. Block and Nancy A. Voisin, "The Responsible Corporate Officer Doctrine—Can You Go to Jail for What You *Don't* Know?" *Environmental Law* (Fall 1992).

<sup>35</sup> *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting from the denial of certiorari).

<sup>36</sup> See Susan S. Kuo, "A Little Privacy, Please: Should We Punish Parents for Teenage Sex?" *Kentucky Law Journal* 89 (2000): 135.

<sup>37</sup> *Bennis v. Michigan*, 516 U.S. 442 (1996).

her apartment in a public housing complex because her daughter was involved with illicit drugs. To crack down on the drug trade, Congress enacted a law that was so strict that tenants could be evicted if one of their household members or guests used drugs. The eviction could proceed even if the drug activity took place outside the residence. Also under that federal law, it did not matter if the tenant was totally *unaware* of the drug activity.<sup>38</sup>

Further, in some jurisdictions, the drivers of vehicles are exposed to criminal liability if any passenger brings contraband—such as a marijuana joint—into an automobile even if there is no proof that the driver was aware of the contraband’s existence.<sup>39</sup>

### III. Conclusion

The federal criminal code has become so voluminous that it not only bewilders the average citizen, but also the most able attorney. Our courthouses have become so clogged that there is no longer adequate time for trials. And our penitentiaries are now operating well beyond their design capacity—many are simply overflowing with inmates. These developments evince a criminal law that is adrift. To get our federal system back “on track,” Congress should take the following actions:

- Discard the old maxim that “ignorance of the law is no excuse.” Given the enormous body of law presently on the books, this doctrine no longer makes any sense.
- Minimize the injustice of vaguely written rules by restoring traditional legal defenses such as diligence, good-faith, and actual knowledge.
- Restore the rule of lenity for criminal cases by enacting a statute that will explicitly provide for the “strict construction” of federal criminal laws.
- Abolish the doctrine of strict criminal liability as well as the doctrine of vicarious liability. Those theories of criminal liability are inconsistent with the Anglo-American tradition and have no place in a free society.

As noted earlier, these reform measures should be only the beginning of a fundamental reexamination of the role of the federal government, as well as the role of the criminal sanction, in American law.

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<sup>38</sup> *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002).

<sup>39</sup> See e.g. *Maryland v. Smith*, 823 A.2d 644, 678 (2003) (“[T]he knowledge of the contents of the vehicle can be imputed to the driver of the vehicle.”).

Mr. SCOTT. Thank you.  
Mrs. Norris.

**TESTIMONY OF KATHY NORRIS, VICTIM/PERSONAL IMPACT**

Mrs. NORRIS. Good afternoon, Mr. Chairman and Ranking Member Gohmert and Members of the Subcommittee.

I am here today to tell you about the consequences for my family when my husband George was arrested and imprisoned for a minor paperwork violation. It is not just the so-called criminals that suffer. It is the family as well.

On October 28, 2003, our home was raided by Federal agents. I was at work, and one of my neighbors called and said, what is going on at your house?

I said, what do you mean?

And she said, well, there is a guy out in the street and he is stopping us as we go by, asking what we know about the criminal activity at your house.

I thought, holy heavens. So I called my house five times before someone finally answered; and when they answered, they said, who is this?

And I said, George?

And they said, who is this?

And I said, well, I have called my house. If you are not George, I have no clue who you are, so I think I am going to call up and call 911 and get the police over there to find out who you are and what you have done to my husband.

"I am a Federal officer."

I said, okay, now we are making some progress, I guess.

He never identified himself by name, he never gave me any information about who he was, and it took about 5 minutes of talking with him to get him to let me speak with my husband, who was told to sit in a kitchen chair, was not allowed to move out of it.

It went on for about 4 hours. They ransacked our house. We had no clue what this was about, why they were there. And when I finally talked to my husband, he was sitting there, and he was frightened, and he was confused, and there was no telling what this was about.

So they eventually left. They took 37 boxes of documents out of our house and George's computer. Eventually, they returned eight boxes and the broken computer. It took us about another 4 hours to clean the house up from what they had done.

I called the clerk of the Federal court the next morning to ask what it is about; and they said, it is a sealed indictment. You don't need to know. You can't know.

So for about 5 months we had no idea why they had been at the house and what they were doing. It is pretty scary to be that much in the dark.

Yes, this case is about orchids. It is not about guns or drugs or anything else. George had had a passion for flowers and for orchids for years, and he eventually built it into a small business. It was operated out of our backyard. He imported orchids from all over the world, primarily species, and we sold them to people that wanted to hybridize orchids and develop new kinds of species.

All orchids are covered by the Convention on International Trade and Endangered Species. Even though they are not endangered, they fall under that convention, and that makes life working with the CITES Convention really delicate, because you never know when you are on track, off track, on the right page or off the right page.

So as we eventually found out, George and our supplier from Peru, Manuel Arias Silva, who is an orchid producer and shipper, had shipped some of the orchids under a wrong name on the Customs document. What we assume is that the Federal Government wanted to make an example of someone in the orchid community, and they choose George.

George is sitting over there in a blue shirt. We have been through this together all the time, and I wanted him here with me today.

Our lives have never been the same, and they won't ever be the same. We had to fly to Miami because we weren't given a change of venue. My understanding is that normally when there is a crime and it is seen in one place that they give you a change of venue closer to where you live, which would have saved us a lot of money in flying back and forth to Miami. It would have given us a chance to find an attorney in a place where we actually knew some people. We are from the Houston area. There are competent attorneys there, and we at least know some people we could have asked.

At first, we were going to fight the charges. We hired a lawyer, and we spent a lot of money traveling back and forth to hearings. Most of the time, we had 3 or 4 days' notice, so all of our flight time was at full fare, not reduced fares. Then it became apparent that we needed to find a more expert lawyer, and we found one, but, unfortunately, he was monumentally out of our ability to pay.

So George pled guilty. He was sentenced to 17 months in Federal prison, and he served that. Money was really tight. Our business was gone. George's Social Security stopped while he was in prison. Then I got told that if I wanted him to be insurable after he got out of prison, I had to pay his Medicare premiums while he was in prison. So we had that on top of everything else. He had to have some money in prison, so I had to send him a little bit to buy things at the commissary, like paper and stamps and some food that he could actually eat. This was done on my salary running a mediation center.

You know, it is one thing to lose your life savings when you are 40. But when you are 60 and 65, it is really tough, because you don't have any years to go back and rebuild it. So now we are kind of stuck with no money and a felon for a husband.

There was a ton of grieving through all this, for me and for our children and grandchildren. The younger grandchildren were just told Papa George was traveling, and the older kids knew what was going on, and they went through their own grieving.

George was in prison barely getting by. They sent him to a Federal medical facility. He is diabetic. He has got cardiac complications, arthritis, and Parkinson's disease.

We kept wondering about his treatment in prison. We weren't getting normal treatment from his doctor there, so George would phone me, and he would tell me what was going on sympto-

matically, and I would call his doctor, and they would tell me, you know, up this drug, down this drug, stop that drug, see if you can get one like this. And when George would call me back, then I would relay that information to him, and he would go to the doctor and suggest those things, and the doctor would say, oh, sounds like a good idea.

Well, about 3 or 4 months after George was released from prison, the doctor was taken out in shackles because it turned out he wasn't a doctor. He had immigrated to Canada, gotten doctors' papers and moved into the United States where he obviously couldn't pass medical exams, but he was hired by the Bureau of Prisons to be the doctor.

It was kind of a thing, but, you know, we did actually make it through it, and George is still alive, and here we are.

Those kind of are the easy things to describe. The hardest part is I lost the man I married. He came home from prison and he ate and he slept and he sat on the couch and looked at the TV, but he wasn't really watching it. We went through about 4-1/2 months of having him just kind of be there. It was like having him in a coma, almost. He wouldn't water a plant, he wouldn't call the grandkids, he wouldn't invite a friend over, he didn't want to go out to dinner. Nothing.

He eventually got sort of reinterested in woodworking, which has been one of his hobbies, so his world expanded to include the house, the TV set, meals, and the shop where he worked on the wood. He still has prison nightmares.

My world shrank, too, because I was there trying to figure out how to pay the bills, how to keep the house running, how to hold down my job, how to do what I could for the kids and grandkids, how to visit George in prison, and by the time I got all that done, there really wasn't a whole lot of time for anything else. And that went on for months and months.

George is out of prison now, and he is doing some better. The remaining part is the paranoia. We both really are still looking over our shoulder waiting for the other shoe to drop, wondering what will happen next. There was some real concern when we were asked to come and testify here about are we painting a bull's eye on his back, will there be retaliation from the Department of Justice. We were assured it probably wouldn't, but that is the level of paranoia. I never would have thought to ask that question before.

Mr. SCOTT. If you will summarize the rest of your testimony.

Mrs. NORRIS. I will do it very quickly.

I grew up in a country that wasn't like this. I grew up in a good part of Dallas. I didn't know anybody that had been arrested or put in jail. Neither had George. And to have a group of people storm the house in kevlar vests with guns drawn and change our lives forever just simply isn't something that should have happened. This was about orchids. It was about I think a total of 75 orchids, worth \$8 apiece.

I guess what I want to tell you is that the crime, the criminal and the punishment didn't just affect him. It affected our entire family. It strained all of our family, and henceforth he is a felon. He is not allowed to do anything with his grandkids like hunt. He is not allowed to have alcohol in the house. He is not allowed to

have a bow and arrow. There is this whole list of can't's; and, quite frankly, the one-size-fits-all list of can't's doesn't fit my husband or our family.

I am told that to get a pardon you have to have completed your sentence by 5 years. Well, he got released from probation last December, so 5 years from that we can apply for one to the Department of Justice. Oh, goody. I can tell you what confidence I have in that process.

So there is no way to get back. There is no way to retrench from this.

I also want to tell you how much I appreciate the opportunity to talk here. It has been a long time. We were not allowed a voice. If you said anything to newspapers or anyone else, the retaliation was really severe. So this is the first time I have actually had a chance to sit and talk to people that might have a chance at doing something different in the future, and I am incredibly grateful for that. Thank you.

[The prepared statement of Mrs. Norris follows:]

*Congressional Testimony*

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**The Overcriminalization of Conduct:  
Consequences for One  
American Family**

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

**July 22, 2009**

**Kathy Norris**

This hearing is long overdue.

The word “overcriminalization” did not mean a thing to me or my husband, George, until 2003, when we learned what it means all too well. Our home was ransacked by federal agents, my husband was prosecuted and imprisoned, and our family is still suffering the consequences—all because my husband imported a few legal orchids into the United States with improper paperwork. This “crime” is one committed by everyone who imports orchids because otherwise it would be impossible to do business at all with most foreign sellers.

But in 2003, the U.S. Fish and Wildlife Service decided it wanted to “make an example” of an orchid dealer after years of ignoring the orchid community, and, for reasons that I do not know, they chose my husband. He went to jail because we didn’t have enough money to fight the charges, even after spending our life savings. And now he is a felon. I was raised in a strong community where nobody had been arrested for anything, and never imagined that I would be married to a felon—it was inconceivable. But now I am.

Until it happened, I thought the government didn’t do this kind of thing to regular people. It wasn’t part of anything in my civics books in school. But now I know that every single person is at risk because almost anything can be charged as a crime.

I hope that my testimony will educate Congress about the real-life consequences of overcriminalization, how well-meaning criminal laws can have unintended consequences for regular citizens and families. This is something that Congress, like most Americans, probably does not understand.

If any good is to come of what happened to my family, it will be that we help to make sure that more families don’t suffer as we have. That is why George and I are here today.

On October 28, 2003, I received a phone call at my office from my neighbor. “What’s going on at your house?” she asked. I didn’t know what she was talking about and said so. She explained that someone was standing in the street in front of our house, stopping cars and asking people what they knew about criminal activity in our house.

I hung up and called my husband, who was at home. There was no answer, and I tried again and again—four times, in all. On the fifth call, someone answered and said, “Who is this?” It was not my husband.

Startled, I said, “George?” In response, the voice on the other end repeated his question: “Who is this?”

I said that if this was not George then I was hanging up and phoning the police to go to my home

to see who was there and what had happened to my husband. The voice then said that he was a federal officer, but he wouldn't tell me anything else, not even his name or any other kind of identification.

I asked to speak to George. The answer, at first, was no, but after some wrangling, I was able to get him on the phone. On the other end of the line, George was confused and frightened. He was not under arrest, but he was not allowed to get out of the kitchen chair where the agents had ordered him to sit. He told me that they had a search warrant, but that it was sealed, so he had no idea what this was all about. George said that he could hear them ransacking the house. He had no idea what they were looking for.

After four hours, they left with 37 boxes of documents and George's computer. We were left with a receipt and a trashed house to clean up. We spent the rest of the day picking up the mess they had left and trying to see what exactly they had taken.

The next morning, I stayed home from work and phoned the Clerk of Court for the Southern District of Texas. The clerk confirmed that the indictment was sealed and that we could obtain no information about it.

And that was how we stayed for the next five months—scared and in the dark.

My husband's part-time orchid business was nearly destroyed because of the raid. But thanks to friends in the community, he was slowly able to build it back up. After a few weeks, the government returned George's computer, broken. To this day, we have only received 8 of the 37 boxes that were taken in the raid.

We learned what the investigation was about the following March, at the Miami Orchid Show. Our close family friend Manuel Arias Silva, an orchid grower from Peru, had flown into town and planned to make some sales at the show. He was arrested the day before it began. Everyone thought that George would be next.

We scrambled to sell Arias's flowers for him to earn enough money to pay his expenses and get him out of jail. We guaranteed his \$25,000 bail and \$175,000 surety bond, because he was a close friend and there was no one else in the country to do it.

George was indicted a week later. He was charged with one count of conspiracy to violate the Endangered Species Act (ESA), five counts of violating the requirements of the Convention on International Trade in Endangered Species (CITES) and the ESA, and one count of making a false statement to a government official. According to the indictment, George and Manuel had mislabeled some of the orchids that Manuel had shipped to George from Peru.

Let me be clear that none of these flowers—and there weren't that many of them—were rare or really endangered. Almost all of them were grown in Manuel's greenhouses. Manuel and George probably could have gotten the right paperwork for all of them, but it would have taken months and cost a fair amount—that's how foreign governments work. So this really was a paperwork

violation.

On March 17th, we flew back to Miami, and George voluntarily surrendered. The marshals put him in handcuffs and leg shackles and threw him in a holding cell with one person suspected of murder and two suspected of dealing drugs.

The next day, George pled not guilty. A day after that, he was released on bond. We flew back home to Spring, Texas. Our finances were already suffering due to all the flying back and forth, the loss of George's business, and the cost of hiring an attorney. It would only get worse.

For reasons unknown to me, we were not granted a change of venue from Miami to Houston, which is near our home. This kind of transfer is routinely granted, I have been told. That meant we had to travel to Miami, paying for airfare, hotels, rental cars or taxis, and meals each time there was a hearing. We rarely had more than four days advance notice, so we paid full airfare most of the time.

We were forced to find an attorney in Miami. But we knew few people in Miami and didn't know anyone who might know an attorney competent to handle a truly unique and complicated case. Given our limited resources, we did the best we could do. Then there was the issue of communicating long distance. For a person above 60, texting and email are not the way to build a relationship as critical as the one with one's attorney. It was frequently strained and occasionally impossible. Miscommunications were happening all the time.

We also had the feeling that the government was monitoring many of the communications into and out of our home. It was difficult to find ways to convey confidential information to our attorneys, and we never felt safe in communicating with family and friends. This went on for about a year.

Because the case involved environmental law, international law, and trade law, we needed to hire an attorney with experience in those fields. We found only one, and his fees were completely out of our price range. As the bills piled up, it became apparent that we could not afford to go up against the government, which doesn't have to worry about bills. George took the only option left and pled guilty. He said it was the hardest thing he's ever done in his life, because he didn't believe that he had done anything wrong.

This affair cost us our life savings. We lost our business. George's Social Security income stopped when he was in prison, but I had to pay his Medicare premiums in order for him to be insurable after his release. We refinanced the house and took the tiny bit of equity we had built up since we rebuilt it after it took nine feet of water in the flood of 1994.

Money was tight. I cut out every unnecessary expense I could find and found ways to simply do without. It was impossible for George to live on prison food and he needed stamps and envelopes, so I also came up with money to send him to use in the commissary. Some of our friends kicked in money to support his prison needs. It might be possible to recover from such losses had we been younger, but at the ages of 71 and 66, there is not enough time and health to

regain the loss.

*But those are the easy losses.*

The most difficult of all the consequences is that I lost the man I married. He came home from prison and ate and slept and sat on the couch, staring at the TV—not really watching it. He would not water a plant, invite a friend over, initiate contact with the kids and grandkids. Nothing. And this went on for months. I began looking for a counselor who had experience with felons. Gradually, George regained his interest in wood working. So his world expanded to include his shop behind the garage. He was a recluse with the beginnings of a hobby, but it was still an improvement.

Meanwhile, my world shrank as well. During the time George was in prison my life consisted of scrimping to pay bills, keeping our home going, and traveling to the prison in Fort Worth to visit each week. Every time, I came home to all the chores, a full time job, and no husband. I was going through all the stages of grief with no support. My cousin, who was like a sister to me, died while George was in prison, and then I had real grief. At night, I could manage only two to three hours of sleep. During the day, I was exhausted.

Our younger grandchildren were not told where Papa George was—he was just traveling. The older ones knew the story and had their own grief and anger and frustration to handle. Our children were also struggling with their own feelings of anger and loss and with explaining it all to their children. Everyone was stressed, and our family ties were seriously tested. Today, after his release from prison, the burden of being the only felon in his family, whose history dates back to the first arrival in America in 1634, weighs heavily on George.

Another family consequence is that, as a felon, George is not allowed to possess firearms. So he cannot go hunting with his children or grandchildren. Hunting has been a part of George's family for generations, and this loss has been devastating to him. He is also not allowed to be around people who have weapons, which makes it difficult to visit members of our family and friends. Technically, we are not allowed to have alcohol in the house. He cannot vote or serve on a jury. The list of "can'ts" goes on and on, despite the fact that George's crime had nothing to do with guns, drugs, or alcohol. The "one-size-fits-all" approach simply doesn't work for people like us. George's 66 years as a responsible member of society count for absolutely nothing.

It is important to talk about the impact of four-and-a-half years of this on our health. George is diabetic, with cardiac complications. He also has arthritis, glaucoma, and Parkinson's disease. Though he was sent to a Federal Medical Facility to serve his time, his treatment there was poor, and his "doctor" at the facility was later arrested—seems he was not a doctor at all, which explains his inability to handle George's drugs and conditions.

We had to go to great lengths to make sure that George got the care he needed. Whenever he was ill, George would call me and describe his symptoms. I would call his doctor on the outside and relay the information. The doctor would then tell me what drugs to adjust or discontinue. I would tell George, and he would tell his prison doctor. It was difficult and time-consuming, but this

system probably saved George's life. I don't know how someone in George's position without a dedicated friend or family member on the outside could manage.

The most difficult day for me was when George had a serious attack of atrial fibrillation, a type of abnormal heart rhythm, in the visitation room and had to be wheeled out to the infirmary. There was no way for me to get information on his condition; I had to just wait until he was well and could call me. Had he died, I suppose the call would have come from his counselor later. No family member should be treated this way.

While he was in prison, George's health seriously declined. He had nothing to do but sleep and eat and walk across the compound to get his medications. For a man of his age and health, and especially one who is not used to prison-type conditions, this kind of sentence could be debilitating or worse.

My health also suffered. I caught some form of bronchitis the first time I visited George, and it took three months of treatment to cure it. I couldn't sleep. I developed a form of arthritis for which I am now on infusion treatments.

Today, after this ordeal, both of us are on medication for depression.

For a while, about a year after George entered prison, it looked like there would be a reprieve. In April, after he was incarcerated, we filed an appeal. Oral argument was set for December. Within 30 minutes of the conclusion of the oral argument hearing, the judges resurrected a denied motion for George's release pending the appeal and ordered his immediate release. That was a Thursday, and in the prison system, "immediate" meant the following Tuesday. I waited days for him to actually be released. At one point, I was told I could not sit in the prison lobby and wait for George, so I walked out to the parking lot and sat in my car. Then I was told I could not park on federal property, so I drove down the hill to the parking lot for a city soccer field. That's where I had to wait until they finally let him out.

It took six-and-a-half months for the final opinion to be published, and it upheld the original sentence. So George, who had scored the highest marks possible as a prisoner and been granted one of only two furloughs given by the warden that year, was to go back prison to serve the remainder of his sentence. He returned to prison in January, 2007, with one week's worth of his prescription medications. Among them was Ambien, a non-narcotic sleep aid. For that, he was charged with a "narcotics" violation and put in solitary confinement, for 71 days in total, and then 30 days in the infirmary. He learned from other prisoners that the prison officials were angry about his temporary release during the appeal.

After George returned to prison, I was not allowed to visit him, and for a number of weeks there was no contact at all. Eventually I received letters from George. The prison was so overcrowded that he had roommates in solitary. At one point, his roommate was an arsonist. This is just what a wife wants to hear: that her husband is locked in a small cell with someone who sets fires.

It didn't have to be this way. I kept thinking that someone might find alternative sentencing

attractive, so I wrote two scenarios for George. One would have had him creating, at his own time and expense, an orchid house for Mercer Arboretum in Houston. That would provide a new resource for the entire Houston community and use George's expertise to create that benefit. The other scenario was to find and create garden spots for senior citizens and low-income families in Montgomery County. He is a master gardener and could have used his skills to benefit those populations. These ideas were not well-received.

George was finally released from prison at the end of April in 2007, but that was not the end. This experience has changed us both for good.

A lasting part of this ordeal for George and me is paranoia. After what happened to us, we are always looking over our shoulders, waiting for some additional charge or penalty from the government. George is afraid to drive lest he get in a wreck. He has taken up bonsai, but many of the plants are native to other countries and buying them from sellers here in the U.S. is just too risky for us now. So most of the plants he is working with are from the woods behind our house. When George bought an orchid at Home Depot last month, I could not suppress my panic.

Even testifying before this committee has us wondering if we have just painted a bull's eye on George's back. We never expected we would carry this burden of fear in our "golden years."

The hardest part about this whole thing is that I was raised in a country that wasn't like this. I grew up in a reasonably affluent part of Dallas. I came from a family in which nobody had ever been indicted or arrested, and so did George. And the government didn't do this stuff to people. It certainly wasn't part of anything in my civics books. Over the entrance to my high school were the words "Enter to learn. Go forth to serve." I have been doing that all of my adult life. Now I wish I could believe that it had done more good.

Recounting all this is painful, and it is something that I would rather not do. But I could not turn down this opportunity to make a difference for families who might one day find themselves in a situation just like ours. I don't want them to have to experience this pain and the unending losses.

If there is a lesson here, it is that overcriminalization has very real, very serious consequences for American families. That is what I hope this Subcommittee takes away from the hearing today. And I hope that you will take actions in the future which will reduce the risk of this happening to others.

Thank you for the opportunity to share our story with you.

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Mr. SCOTT. Thank you.  
Mr. Evertson.

**TESTIMONY OF KRISTER EVERTSON,  
VICTIM/PERSONAL IMPACT**

Mr. EVERTSON. Good afternoon, Mr. Chairman, Ranking Member Gohmert, and Members of the Subcommittee.

Thank you for holding this hearing. I only wish that you had held it a few years ago before I became a victim of over-criminalization.

What I have experienced in these past years is something that should scare you and all Americans.

I worked on my invention in my mother's garage, and it was my American dream. And, instead, my dream and hard work, it turned into a prison term for doing something that no one would dream would be a crime.

Please excuse me if I stutter a bit, but I have stuttered all my life. But being here is more important to me than not stuttering.

I try to be an inventor, and I have done it since I was a kid. In school, I won the science fairs at my intermediate school and high school every year, and I won the third place at the Hawaii State Science Fair, which is pretty good at the State level, and that year I made a fuel cell battery using coconut milk. That was in 1971.

When I started working with fuel cells, they were beginning to be big news, but they were expensive, so I was working on a new way to make a chemical called sodium borohydride that could be used to power fuel cells, and it is much more safe than other ways of making the hydrogen that you need to run the fuel cells.

In 2000, I started a company to perfect my invention. I spent all my time working on it, but the money ran out, so I packed all my chemicals and equipment in stainless steel tanks and paid someone to watch over them.

On May 27, 2004, my American dream about inventing turned into a nightmare. Two black SUVs pushed my car off the road. Federal agents, just like with her, dressed in black, jumped out with machine guns. I was arrested, interrogated, and I was thrown into jail.

The charge was that I didn't put the right label on a box that I had lawfully sold on E-Bay. Sodium can be hazardous, so it has to be shipped by ground or on cargo planes. I checked "ground" on the shipping label when I shipped it. I didn't know that, in Alaska, UPS shipped ground by plane.

Instead of a civil penalty for an innocent mistake, which I did at the time, the government prosecuted me. The prosecutors pushed me to plead guilty, but I refused to plead guilty because I knew I was innocent.

But it didn't end there. While I was in jail on the box label charge, the EPA ripped open my storage tanks and declared everything inside them to be toxic waste and threw everything away. The EPA spent almost half a million dollars destroying everything I had worked on for almost 2 years. Nobody told me about what was happening when the EPA was doing this or asked me about the tanks. They just went ahead and did everything.

After I was acquitted by a jury on the label charges, the government brought new charges for storing hazardous waste without a permit.

Mr. GOHMERT. I am sorry, Mr. Chairman, the acoustics in here are such that conversations are really distracting. I am having trouble hearing.

Mr. SCOTT. Go ahead.

Mr. EVERTSON. After I was acquitted, the government brought new charges. That was ridiculous. Mr. Timothy mentioned RCRA, and I was the same. The same charges were RCRA.

I knew nothing was waste. My materials were extremely valuable and worth a lot of money. Why would I abandon valuable materials? I paid for them and intended to return to work on my invention. And they weren't hazardous. The tanks were sealed tight. Nothing ever leaked. No person was ever put in harm's way. There was no risk to the environment.

So I pled not guilty again, because I knew I wasn't guilty, and if I pled guilty I would be lying. I had not abandoned my materials. But the judge said that the government didn't have to prove that my materials were hazardous waste. It was enough that the EPA said so.

No one could defend himself against such charges, so I was convicted, and I served 18 months in Federal prison. Now I am in a halfway house and will be released in about a week. But I will always be a felon. I never wanted to be a felon. Unless the Supreme Court takes my case, I will not regain my rights to vote or to serve on a jury to possibly help other innocent people. And I am losing other rights. I was working on fuel cells, trying to improve the environment. I am an American inventor and a law-abiding citizen pursuing my dream, and I wound up in prison.

My story proves that these things can happen to anyone. There are too many laws that put ordinary, well-meaning Americans at risk of criminal prosecution and conviction.

An old saying comes to mind: One man's trash is another man's treasure. I had treasure on my invention, and the EPA said it was trash, and so I lost my treasure. That is why I am testifying today in Congress.

Please protect our American treasures and our American freedoms.

Thank you again, Mr. Chairman.

[The prepared statement of Mr. Evertson follows.]

*Congressional Testimony*

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**The Overcriminalization of Conduct:  
Consequences for an American Inventor**

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

**July 22, 2009**

**Krister Evertson**

Chairman Scott and Ranking Member Gohmert, thank you for holding this hearing on this very important topic. I only wish that you had held it five years ago, before I became a victim of overcriminalization. What I have experienced over these last five years is something that should frighten this subcommittee, Congress, and all Americans. Ordinary citizens, even people trying to do good, are at great risk of criminal prosecution, conviction, and imprisonment.

I know this first-hand, because it happened to me. I have stuttered all my life, but the experiences I want to share are greater than my desire not to talk publicly. I hope that my story helps you to understand the severe consequences of criminalizing ordinary, unobjectionable conduct.

First, some background: I have always strived to be an upright, law-abiding citizen of this beautiful and great land. I am an Eagle Scout. I am a member of the National Honor Society. I served a two-year mission for my church in California and Indiana serving the deaf and the hearing. I helped open the Indiana Mission for the deaf. Until 2004, I had had no brushes with the law and no criminal record. My total experience with law-enforcement was one or two parking tickets—probably less than most people.

I have had an interest in science all my life, and particularly chemistry. When I was just six-years-old, I was already tinkering and sketching out inventions. Soon I was able to build them.

I dove into science and inventing because I was interested and because I had the aptitude for it. My blessed mother taught me to never waste anything, not even my food, and so I didn't. If I was good at science, then that is what I would do.

As a teenager, I entered the Hawaiian Science Fairs held at my high school every year. For three years in a row, my experiments took first place. In 1971, when I was still in high school, I won third place in the Hawaiian State Science Fair, going up against students from all over the state. My entry to the statewide fair was called "The Electrochemical Oxidation of Bacterially Produced Formic Acid." In layman's terms, it was a fuel-cell battery powered with coconut milk. My thought was that, in the unlikely event of being shipwrecked on a deserted island (and there are a few near Hawaii), a person could use wild coconuts to power a simple radio and listen to the news back home.

Although that may sound fantastical, the science was actually quite advanced for the day. This was during the infancy of fuel cells, when not many people were working on them and they had found few applications. In recent years, of course, all that has changed.

Because of my coconut-milk fuel cell, I was named "Citizen of the Day" by a local Oahu radio station. I won a trip on a nuclear submarine in Pearl Harbor. Not only did I enjoy my experimenting, but I also learned that others were interested in my work and that it could have real benefits.

With a 4.0 GPA and many advanced credits, I had the opportunity to skip the 12th grade and attend the University of Hawaii. Later, I enrolled at Brigham Young University. Throughout, I continued my tinkering and inventing.

And I kept an eye on fuel-cell technology. In the 1990s, the federal government began a big push to jumpstart the “hydrogen economy,” in which gasoline would gradually be replaced by hydrogen, which is clean, safe, inexpensive, and plentiful. Lots of money was going into the field, but progress was slow because manufacturers just couldn’t bring down the price of making the fuel cells.

In 1996, I had the idea of inventing a better process to produce a chemical called sodium borohydride to power hydrogen fuel cells. Sodium borohydride is an especially good choice for fuel cells because it is safe and produces no harmful emissions when used. Specifically, this chemical could avoid the need to use pressurized (at 3,000 p.s.i.) or liquefied (at -200°C) hydrogen, either of which can be explosive. Sodium borohydride dissolves easily in water and gives off only pure, drinkable water. The only problem, for the time being, is that this chemical is expensive. My idea was to create a process to make it cheaper and speed the way to an environmentally-friendly hydrogen economy.

Like an old-time inventor, I patiently worked on my invention for many winters in my mother’s garage. It was my American dream, the idea that an individual could tinker in the garage, work hard, and come up with the next big invention to help humanity.

From the garage, I graduated to a larger space. In 2000, with some investment money from family, I was able to purchase the equipment to build out my process and refine it. We named the company SBH, for sodium borohydride. We were going to do good and, if we got it right, build a strong business.

But before I could finish developing the process, the money ran out. So I did what I had done before for money: join my mother in Alaska and mine for gold. When I had earned enough money, I thought, I would return to Idaho and resume work on my invention. In the meantime, I carefully packed up all the chemicals and equipment in stainless steel tanks, which were sealed shut to prevent any accidents. A friend offered to store the tanks at his company lot; I paid him for the trouble and told him that I would return when I had enough money to get back to business.

That plan fell apart on May 27, 2004. That is when my American dream turned into a nightmare, one that continues to this day.

On that day, my life became surreal, the kind of thing that only happens in the movies. Two black SUVs ran my car off the road as I made the trip to the local dump. Federal agents spilled out and pointed their weapons at me. I was arrested, then I was interrogated, and then I was thrown into jail.

For months, I was in a daze. It was like being sucked into a rabbit hole of contradictions and injustice. I remember thinking that this is how the fictional Alice must have felt when she fell into the rabbit hole—up was down, right was wrong. Nothing was like it appears or should be. I desperately wanted out of this hole. I did not want to be Alice.

But it didn't stop. The charge against me was that I hadn't put the right label on the box when I shipped some raw sodium that I had sold on eBay. Stored improperly, sodium can be hazardous, so it usually has to be shipped by ground. I carefully packaged the sodium that I sold and even checked "ground transportation" on the bill when I went to ship the packages. But what I didn't know was that, in Alaska, UPS actually ships its "ground" packages by air. And that was against the law.

Rather than charge me with a violation and collect a fine, the government decided to bring the full weight of the law down upon me. I refused to plead guilty, because I was not, and so the prosecution pushed for years in prison. It took two years, but finally the jury acquitted me of every charge.

My ordeal, it turned out, was nowhere near over.

I made a mistake that day that the agents arrested me in 2004: I told the truth. They wanted to know my source for the sodium—which, incidentally, is perfectly legal to possess—and I told them about my business and our plans to revolutionize the fuel-cell industry. But all they heard, it turned out, was that I had *even more* chemicals in storage.

Armed with that information, the Environmental Protection Agency swooped into the lot where the chemicals and equipment from my business had been stored. EPA agents cut open the tanks, declared everything inside—all my valuable supplies—to be toxic waste, and disposed of it all. In all, the EPA spent \$430,000 destroying my life's work.

Meanwhile, while all this was happening, I was in jail on the box-label charge. Nobody told me about what was happening at the time; they just went ahead and did it. Nobody asked me what was in the tanks or if I wanted my supplies and equipment.

After I was acquitted in Alaska, federal prosecutors filed new charges against me, for transporting my materials the half-mile to their storage space and improperly disposing of hazardous waste.

Let me make a point here: My chemicals and equipment were not hazardous and they were not waste. Far from being hazardous, everything was sealed tight in tanks. Nothing leaked, and the government never even claimed that a single person was put in harm's way by my materials. Nor was the environment ever at risk of any harm or damage.

And far from being waste, the materials were quite valuable. Most of the materials needed to make the sodium borohydride were brand new, unopened, and on pallets. There were also three brand new trailers, supplies of borax and mineral oil, some sodium hydroxide, and several stainless steel mixer tanks that were built specially for my process. Over \$100,000 was invested in this "waste."

So I had simply done what any responsible businessman who had suffered a setback might do:

Put everything safely on ice and earn some more capital in the meantime. Except I was being prosecuted for it.

According to the EPA, all this stuff was hazardous waste because... the EPA said so. The agency said that the materials were hazardous because some of the chemicals, just like many of the chemicals in high school labs, were caustic. And they were waste because I had abandoned them, even though I hadn't done any such thing. Finally, I didn't have the proper permits for handling hazardous waste. This put me in violation of a federal law called the Resource Conservation and Recovery Act (RCRA), which has civil and criminal penalties.

Again, rather than fine me, the federal government chose to prosecute.

I felt helpless. I had nowhere to turn. I was an ordinary American citizen with ordinary resources. The agencies involved were purely adversarial. I could not talk with them, and it probably wasn't safe to, anyway—they would use any slip against me. An inventor—someone with a good idea that needs some time and hard work to grow—doesn't stand a chance going up against the government.

But I didn't give in and didn't plead guilty, because I was not guilty and because the materials weren't abandoned or waste in the first place. But the trial judge said the government didn't have to prove to the jury that my materials were "hazardous waste," only that the EPA classified them that way. So the jury never got to rule on whether I had actually abandoned anything or whether my valuable materials were even waste. No surprise, without my strongest defenses, I was convicted.

Think about that: All the government has to do is declare some chemicals—perhaps antifreeze or old paint in your garage—to be hazardous waste, and then there's nothing you can do to defend yourself.

On January 23, 2008, I reported to the Sheridan Prison Camp in Idaho to serve my sentence. And now I am under the jurisdiction of a halfway house, for about another 10 days.

I will be a felon, however, for the rest of my life. Unless the Supreme Court takes my case, which I'm told is unlikely, I will not regain my rights to vote, to serve on a jury, to own firearms, and so many others.

This is not how criminal justice is supposed to work in the land of the free. I felt the injustice of being treated by the EPA as being guilty before being proved innocent. As a child, I was taught that it was the other way around. Even now that I'm out of prison, I feel that I've lost some of the freedoms that I once thought I had. It is very sobering and outright scary.

The criminal law has become a trap for the unwary, people just like me who become ensnared in vague and overbroad criminal laws. I was working on a hydrogen fuel cell invention, trying to improve the environment and the world. I was an American inventor. And for pursuing my dream, I wound up in prison.

If I had chosen to watch TV on a couch instead, I would never have experienced this ordeal.

What can Congress do? To prevent what happened to me from happening to other people, Congress should fix RCRA to require that waste actually be waste—that is, worthless material that a person intended to throw away.

But the problem isn't just RCRA. It's all these laws that put ordinary, well-meaning Americans at risk of criminal prosecution and conviction.

My story proves that these things can happen to any person, no matter the good deeds he's done, no matter his intentions, and no matter his law-abiding nature.

That isn't the way that it's supposed to be.

An old saying comes to mind: "One man's trash is another man's treasure." I had treasure, the EPA said it was trash. And so I lost my treasure. And that is why I am testifying today. Please protect our treasure. We worked so hard for it.

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Mr. SCOTT. Thank you, Mr. Evertson.  
Professor Saltzburg.

**TESTIMONY OF STEPHEN A. SALTZBURG, PROFESSOR,  
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASH-  
INGTON, DC**

Mr. SALTZBURG. Mr. Chairman, Ranking Member Gohmert, Members of the Committee, thank you for having me here today.

I represent the American Bar Association at the request of Tommy Wells, its President. In my written statement you will see I described, along with the other members of the panel, how we came to be where we are with 2.3 million Americans confined in jail or prison on any given day, one-quarter of the Earth's prison population, in the land of the free and the home of brave.

I was asked to talk about mandatory minimum sentences and how they contribute to over-criminalization and actually overpopulating our jails and prisons. I want to do that, but I also would like to say that I had the privilege of serving as Deputy Assistant Attorney General for General Thornburgh, and General Thornburgh named me his ex-officio representative to the United States Sentencing Commission.

And while it is not part of my testimony today, I can say this: It didn't matter whether you were a Republican or a Democrat. When he was Attorney General, these things, if they came to his attention, would never have happened. There was a time when people understood what serious crime was and what petty prosecution was that should never be dishonored by the Federal Government. It is heartbreaking to hear these stories, but all too true.

Mandatory minimum sentences in their own way are heartbreaking. Why do we have them? We have them because there was a time in the mid-1980's, particularly 1986, where Members of Congress believed that at least some Federal judges were sentencing criminal defendants too lightly. At the time, there was no appellate review of sentencing. There was nothing that could be done if a judge gave a defendant probation or a light sentence.

So we ended up with the Drug Control Act, which gave us our first drug mandatory minimum sentences. And the end result, as I discovered when I was a sentencing commissioner, was that all of the sentences that we prescribed were driven upward, much higher than past practice, because of having to deal with mandatory minimums. That is, in order to grade offenses and treat more serious offenses with a higher punishment, the Commission had to take into account these mandatory minimums.

Now, what is wrong with them? Well, in 1991, the Sentencing Commission issued a report; and the Sentencing Commission said exactly what justice Kennedy would say to the ABA 12 years later. What is wrong with them is it takes sentencing discretion away from judges and gives them to prosecutors, who often are younger and have much less experience. That is number one.

Number two, it has a dramatically racially disparate impact on the system, particularly with respect to the crack cocaine mandatory minimum, which this Committee is well aware of, given the vote it just took on the bill that we heard about.

Number three, the Sentencing Commission in 1991 said, when you have mandatory minimums, it is like driving a car up to a cliff. If you don't go over the edge, you are fine. Judges have discretion. The moment your tire goes over, you are down and the mandatory

minimum kicks in, and it is a sentence that may have absolutely no bearing with respect to culpability versus the person whose tires stop short. It is arbitrary. It produces sentences that are too long.

And how do I know that? For this reason.

If a sentencing judge says 2 years, 5 years, 10 years, 15 years, the mandatory minimums we have heard about are not necessary in a case. Today, if a judge didn't have these mandatory minimum sentences and the judge gave a lower sentence, the United States could appeal.

We now have a system which has other defects that the Committee might want to take up at another time, but we have a system of controlled discretion. The sentencing guidelines tell judges where they need to start. Now, they are advisory, no longer mandatory, but they provide a starting point, and judges are required to consider the guidelines and to calculate a guideline sentence before finally determining what a sentence will be.

We have appellate review at the behest of both the government and the defendant. That is, no trial judge, whether he or she is too severe or, in the eyes of a Congress, too lenient, no trial judge is a law unto himself or herself any longer. So we do not need mandatory minimum sentences. They drive up the prison population in two ways, and both of these ways are unnecessary.

First, people go to prison who might not go at all. That is, a trial judge, but for the mandatory minimum, might conclude that someone could go to jail, and probation, someone could be put on probation.

Second, the trial judge who might impose a sentence of a year may have to impose a 5-year sentence, and so the individual serves five times the sentence that the judge believes is appropriate.

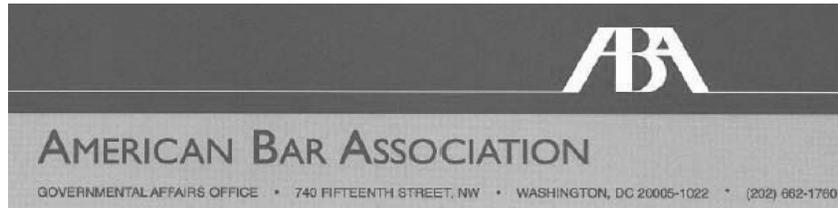
Mandatory minimum sentences may have been something that reasonable Congressmen would have thought were necessary at a time when there was no check on judicial discretion. We have a check. We have structure. We have balance. And still we have mandatory minimum sentences at a time that we don't need them.

They are not necessary to deter crime. They are not necessary to control judges. They are not a good thing for American criminal justice. And one the best things Congress could do is to abolish the mandatory minimums, trust the Sentencing Commission to then readjust the sentences so we could have a system that makes sense, and let judges exercise discretion, not prosecutors, subject, of course, to review by appellate courts.

That is the ABA position, and I urge you to take it seriously.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT OF STEPHEN A. SALTZBURG



**TESTIMONY OF  
STEPHEN A. SALTZBURG**

**On behalf of the  
AMERICAN BAR ASSOCIATION**

**Before the  
SUBCOMMITTEE ON CRIME, TERRORISM, AND  
HOMELAND SECURITY  
COMMITTEE ON THE JUDICIARY**

**of the  
UNISTED STATES HOUSE OF REPRESENTATIVES**

**on  
Over Criminalization of Conduct and Over-Federalization of Criminal  
Law**

**July 22, 2009**

Chairman Scott, Ranking Member Gohmert and Members of the Subcommittee:

**Representing the American Bar Association**

My name is Stephen Saltzburg, and I am the Wallace and Beverly Woodbury University Professor of Law at the George Washington University School of Law. I am also the immediate past-Chair of the American Bar Association (ABA) Criminal Justice Section, and I served as the Chair of the ABA Justice Kennedy Commission, which I will reference throughout my statement. I am appearing on behalf of the ABA, at the request of its President, H. Thomas Wells, Jr., to address the role of mandatory minimum sentencing laws in the over-criminalization of our justice system.

**The Growth in Federal Criminal Statutes**

In 1998, the American Bar Association's Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, issued a report entitled "The Federalization of Criminal Law." In order to describe the growth in federal criminal law, the Task Force encountered the problem of identifying the number of federal crimes enacted over periods of time. The Task Force decided, however, not to "undertake a section by section review of every printed federal statutory section," because this would have been too "massive" an undertaking given the Task Force's "limited purpose." Although the ABA Report did not actually count the number of crimes, it drew the following dramatic conclusion from the available data:

The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*

Other observers have reported that the pace of new federal criminal law enactment since the 1998 report has continued unabated.

**Shift from Indeterminate to Determinate Sentencing**

This era of expanding federal criminal law has coincided with a profound shift in sentencing policy. For most of the twentieth century prior to the Sentencing Reform Act of 1984 (the "SRA") and sentencing reform measures enacted in many states, the rehabilitative or "medical" model of sentencing prevailed in the federal (and state) courts. The assumption upon which sentencing rested was that, through a combination of deterrence, motivated by the unpleasant experience of incarceration, and personal renewal -- spurred by counseling, drug treatment, job training and the like -- criminal deviance could be treated like any other disorder. The system recognized, albeit grudgingly, that some defendants were, in effect, "incurable" and thus could only be quarantined through lengthy or life sentences, and that in a few cases the crime was so egregious that the public demand for retribution outweighed rehabilitative considerations. But the dominant paradigm was rehabilitative. Therefore, sentences were supposed to be "individualized," in the way that medical treatment is individualized, according to the symptoms and pathology of the offender.

Before the advent of guideline systems of sentencing, state and federal sentences were described as "indeterminate," a word often used to refer to two different, but related, ideas in the sentencing context.

First, an indeterminate sentencing system is one in which the judge sentences a defendant either to a specified term, or to a range of years (e.g., 5-20), but the number of years the defendant *actually* serves is determined later by an administrative body like a parole board. For most of the twentieth century, state and federal sentencing was indeterminate in this sense and still is in many states for some or all crimes. For example, a federal judge would sentence a federal defendant to a specific term of years, but the proportion of the announced term that the defendant would actually spend in a cell was controlled primarily by the United States Parole Commission. The Parole Commission, an executive branch agency, not only created its own guidelines for determining release dates, but retained discretionary power to set individual release dates anywhere within the broad parameters dictated by those guidelines.

Second, federal sentencing before the Guidelines was said to be “indeterminate” in the sense that the judge had virtually unlimited discretion to sentence a convicted defendant anywhere within the range created by the statutory maximum and minimum penalties for the offense or offenses of conviction. As long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence. There was no limitation on either the type or quality of information a judge could consider at sentencing. None of this information was subject to filtering by the rules of evidence, and the judge was not required to make findings of fact. Moreover, so long as the final sentence was within statutory limits, it was essentially unreviewable by a court of appeals.

In the 1970s and 1980s, the rehabilitative model of sentencing fell into disfavor among some legislators and judges for a variety of reasons, including rising crime, mounting evidence that prisoners were not being rehabilitated, and increasing concern that indeterminate sentencing produced unjust disparities among similarly situated offenders. A combination of conservatives inclined toward tougher sentences and liberals inclined toward checking sentencing disparity coalesced to produce sentencing reform in the federal system and in many states. The result was the determinate sentencing revolution, which has been characterized by (a) limitations on front-end judicial sentencing discretion through passage of mandatory minimum sentences for certain offenses and sentencing guidelines that narrow the scope of unconstrained judicial sentencing discretion for all offenses, (b) elimination of or drastic limitations on parole or other forms of administrative early release authority, thus requiring defendants to serve a larger proportion of their judicially imposed sentences, and (c) in most places, increases in the statutory and guidelines penalties for most serious crimes, particularly violent crimes involving firearms and drug offenses.

#### **Effect of Incarceration Rates**

The effect on sentencing decisions was enormous. Beginning in the late 1970s, the United States began to respond to concerns about rising crime by implementing an array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in prosecutions, convictions and individuals sentenced to incarceration. By mid-year 2008, the combined number of inmates in federal and state prisons and jails throughout the United States exceeded 2.3 million. This means that 1 of every 131 Americans is incarcerated in prison or jail. Between 1970 and 2008, the number of inmates in federal and state prisons increased nearly seven-fold from less than 200,000 in 1970 to 1,540,805 by midyear 2008. Between 1974 and

2008, the rate of imprisonment rose from 149 inmates to 762 inmates per 100,000 population, a more than five-fold increase. Jail populations have also increased markedly. Between 1985 and 2008, the number of persons held in local jails more than tripled, from 256,615 to 785,556,475.

The average length of time spent in prison has also increased. The average time served in prison was about five years between 1992 and 2001. Between 1980 and 1992, the average time served was only 18 months. Today, prison sentences of more than ten years are commonplace.

These numbers are unprecedented in American history and represent a marked departure from a long period of relative stability in imprisonment rates. During the 45-year period leading up to the 1970s, rates of imprisonment in the U.S. (excluding jail populations) held roughly steady at about 110 per 100,000.

Current rates of incarceration in the United States are not only remarkably high in terms of this country's history, but they also are strikingly different from those seen in most of the rest of the world, particularly in comparison with other developed countries. The United States now imprisons a higher percentage of its residents than any other country, surpassing Russia, South Africa, and the states of the former Soviet Union. And the United States incarcerates its residents at a rate roughly five to eight times higher than the countries of Western Europe, and twelve times higher than Japan.

#### **Heavy Costs of Incarceration**

The costs of the American experiment in mass incarceration have been high. Between 1982 and 2006, direct expenditures by federal, state, and local governments on corrections jumped from \$9 billion to \$68.7 billion, an increase of over 618%. During the same period, combined criminal justice expenditures (for police, judicial, and corrections activities) by federal, state, county, and municipal governments rose from \$35.7 billion in 1982 to \$214.3 billion in 2006. Moreover, the costs of an aggressive program of incarceration extend beyond the direct dollar outlays of governments on functions easily identifiable as part of the criminal justice system. Governments themselves incur a variety of collateral costs when a defendant is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates, lost tax revenues from income that would have been earned or expenditures that would have been made by defendants left free in the community.

Finally, and not least, the families and communities from which inmates come suffer a wide variety of tangible and intangible harms from the absence of the inmate. These include the emotional, economic, and developmental damage to the children of incarcerated offenders, and the disenfranchisement and consequent political alienation of a significant portion of the young men in the minority communities in which both crime and punishment are most frequent.

Overall, more than three percent of American adults were incarcerated or under criminal justice supervision in 2002. The likelihood of an American going to prison sometime in his or her life more than tripled to 6.6 percent between 1974 and 2001. For an African American male born in 2004, the likelihood of being incarcerated sometime during his lifetime is 32.2 percent.

### **Mandatory Minimum Sentences**

The ABA has devoted significant time and interest to the broad subject of federal sentencing reform and has done so with a sense of urgency in recent years particularly through the work of its membership Section of Criminal Justice, its Justice Kennedy Commission and its Commission on Effective Criminal Sanctions (which I co-chaired).

At the ABA's August 2003 Annual Meeting in San Francisco, United States Supreme Court Justice Anthony M. Kennedy challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He continued that "[i]n too many cases, mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a Commission (the ABA Justice Kennedy Commission) to investigate the state of sentencing and corrections in the United States and to make recommendations on how to ameliorate or correct the problems Justice Kennedy identified. One year to the day that Justice Kennedy addressed the ABA, the ABA House of Delegates approved a series of policy recommendations submitted by the Kennedy Commission. Resolution 121 A, approved August 9, 2004, urged all jurisdictions, including the federal government, to "[r]epeal mandatory minimum sentence statutes." The same resolution calls upon Congress to "[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently."

The Kennedy Commission resolution re-emphasized the strong position that the ABA traditionally has taken in opposition to mandatory minimum sentences. The 1994 *Standards for Criminal Justice on Sentencing* (3d ed.) state clearly that "[a] legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21 (b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized," and "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account."

Mandatory minimum sentences raise serious issues of public policy. Basic dictates of fairness, due process and the rule of law require that criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with both commands of just sentencing.

Mandatory minimum sentences have resulted in excessively severe sentences. They operate as a mandatory floor for sentencing, and as a result, all sentences for a mandatory minimum offense must be at the floor or above regardless of the circumstances of the crime. This is a one-way ratchet upward and, as the Kennedy Commission found, is one of the reasons why the average length of sentence in the United States has increased threefold since the adoption of mandatory minimums. Not only are mandatory minimum sentences often harsher than necessary, they too frequently are arbitrary, because they are based solely on "offense characteristics" and ignore

“offender characteristics.” Consider, for example, an individual who sells narcotics to feed a habit. She may be subject to a mandatory minimum term of incarceration even though drug treatment might be less expensive and more likely to prevent recidivism.

In addition, mandatory minimum sentences can actually increase the very sentencing disparities that they, in theory at least, are intended to reduce. The reason is that they shift sentencing discretion away from judges toward prosecutors. This is because it is the prosecutor who chooses to charge a crime with a mandatory minimum sentence. If the prosecutor chooses to do so, the judge’s hands are tied upon conviction no matter how unjust a judge believes a particular sentence might be. And these decisions can exacerbate the problem of sentencing disparity because these decisions of prosecutors are hidden from public view and are not subject to appellate review.

At great cost to taxpayers, mandatory minimums have forced judges to sentence thousands of first-time, non-violent drug offenders to unconscionably long prison terms. The Judicial Conferences of all 12 federal circuits have urged the repeal of mandatory minimum sentences, after concluding that they are unfair and ineffective. Commenting on a minor, first-time drug offender sentenced to life imprisonment, Supreme Court Chief Justice William Rehnquist called mandatory drug sentencing a “good example of the law of unintended consequences.” Numerous studies, including those by the Department of Justice and the U.S. Sentencing Commission, indicate that mandatory minimum sentencing is not an effective instrument for deterring crime, and a RAND Corporation study found that drug treatment is seven times more cost-effective than mandatory minimum sentencing for a large majority of offenders.

#### **Mandatory Minimum Cocaine Sentences**

Justice Kennedy’s 2003 address to the ABA specifically noted the harsh consequences of mandatory minimum cocaine sentences:

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D.C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

\*\*\*Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U. S. Attorney, often not much older than the defendant, is misguided. Often these attorneys try in good faith to be fair in the exercise of discretion. The policy, nonetheless, gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors.

Justice Kennedy's views are consistent with ABA policy.

The 2004 Report accompany ABA Resolution 121A emphasized the dangers of shifting sentencing authority from judges to prosecutors and the special danger that sentencing of minority offenders will be disproportionately harsh:

Aside from the fact that mandatory minimums are inconsistent with the notion that sentences should consider all of the relevant circumstances of an offense by an offender, they tend to shift sentencing discretion away from courts to prosecutors. Prosecutors do not charge all defendants who are eligible for mandatory minimum sentences with crimes triggering those sentences. If the prosecutor charges a crime carrying a mandatory minimum sentence, the judge has no discretion in most jurisdictions to impose a lower sentence. If the prosecutor chooses not to charge a crime carrying a mandatory minimum sentence, the normal sentencing rules apply. Although prosecutors have discretion throughout the criminal justice system not to charge offenses that could be charged and thereby to affect sentences, their discretion is pronounced in the case of mandatory minimums because of the inability of judges to depart downward.

Federal drug sentences also illustrate some of possible effects of mandatory minimum sentences on racial disparity. When compared either to state sentences or to other federal sentences, federal drug sentences are emphatically longer. For example, in 2000, the average imposed felony drug trafficking sentence in state courts was 35 months, while the average imposed federal drug trafficking sentence was 75 months. In 2001, the average federal drug trafficking sentence was 72.7 months, the average federal manslaughter sentence was 34.3 months, the average assault sentence was 37.7 months, and the average sexual abuse sentence was 65.2 months.

These lengthy sentences largely result from the impact of the Anti-Drug Abuse Act of 1986 (ADAA). The ADAA created a system of quantity-based mandatory minimum sentences for federal drug offenses that increased sentences for drug offenses beyond the prevailing norms for all offenders. Its differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.

The Act set forth different quantity-based mandatory minimum sentences for crack and powder cocaine, with crack cocaine disfavored by a 100-to-1 ratio when compared to powder cocaine. Thus, it takes 100 times the amount of powder cocaine to trigger the same five-year and ten-year minimum mandatory sentences as for crack cocaine. The Act does three other things: (1) It triggers the mandatory minimums for very small quantities of crack -- five grams for a mandatory five-year sentence and 500 grams generates a ten-year term. (2) It makes crack one of only two drugs for which possession is a felony. (3) It prescribes crack as the only drug that triggers a mandatory minimum sentence for mere possession.

The overwhelming majority of crack defendants are African-American, while the overwhelming majority of powder cocaine defendants are white or Hispanic. In 1992, 91.4% of crack offenders were African-American, and in 2000, 84.7% were African-

American. The disproportionate penalties for crack offenses obviously have a great impact on African-American defendants in federal prosecutions. (Footnotes omitted)

The ABA has long recognized that legislation is needed to end the disparity in crack versus powder cocaine sentencing. At its August meeting in 1995, the House of Delegates of the American Bar Association approved a resolution endorsing the proposal submitted by the U.S. Sentencing Commission to Congress which would have resulted in crack and powder cocaine offenses being treated similarly and would have taken into account in sentencing aggravating factors such as weapons use, violence, or injury to another person.

The American Bar Association has not departed from the position that it took in 1995, and the U.S. Sentencing Commission's May 2002 *Report to the Congress: Cocaine and Federal Sentencing Policy* confirms the ABA's judgment that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders. We continue to believe that Congress should amend federal statutes to eliminate the mandatory differential between crack and powder cocaine and urge that the Subcommittee respond favorably to the May 2007 recommendation of the U.S. Sentencing Commission to enact legislation that treats both types of cocaine similarly.

Not only do we believe that the crack-powder distinction is arbitrary and unjust, but we find that it has a large, disparate effect on minorities that calls into question whether the United States is adequately concerned with equal justice under law.

It is important to emphasize, however, that the ABA not only opposes the crack-powder differential, but we also strongly oppose the mandatory minimum sentences that are imposed for all cocaine offenses. The ABA believes that, if the differential penalty structure is modified so that crack and powder offenses are dealt with in a similar manner, the resulting sentencing system would remain badly flawed as long as mandatory minimum sentences are prescribed by statute.

#### **The Extra-Effect of Drug Mandatory Minimums**

I had the honor serving as the Attorney General's ex officio representative on the United States Sentencing Commission in 1989-1990. As a result, I had first-hand familiarity with the rationales for decisions made by the Commission that have had a continuing effect over the years.

There is no doubt that when Congress enacted the mandatory minimum drug sentences in 1986, they had an overall impact on increasing federal sentences virtually across the board. By imposing penalties higher than the penalties that had been imposed by federal courts over many years, Congress impelled the Commission to increase many sentences to maintain some consistency in the Guidelines. Had Congress not enacted mandatory minimum penalties in 1986, it is clear, I believe, that the sentencing guidelines overall would have been less harsh and offenders would have received lower sentences in many cases.

Thus, the effect of the mandatory minimums is not simply to incarcerate individuals who receive these sentences longer than a judge would have regarded as necessary. It is to

incarcerate many individuals who do not receive mandatory minimum sentences for longer than necessary as a result of the impact that the mandatory minimum sentences have had on the federal sentencing guidelines.

#### **Increased Use of Alternatives to Incarceration**

The federal sentencing system could greatly benefit from increased use of effective alternatives to incarceration, such as drug courts, intensive supervised treatment programs, diversionary programs, home confinement, GPS monitoring, and probation. Incarceration does not always rehabilitate – and sometimes has the opposite effect. Many state criminal justice systems derive great benefit from a variety of alternatives to incarceration, but ever since the advent of the sentencing guidelines the federal system has focused almost exclusively on imprisonment. Prior to the guidelines, more than 30% of federal defendants were sentenced to probation without any term of imprisonment.<sup>1</sup> By 2007, that figure had dwindled to a mere 7.7%, as 92.3% of offenders were sentenced to imprisonment.<sup>2</sup> The data reflects a marked and consistent trend away from the use of alternatives to incarceration.<sup>3</sup> This dramatic curtailment of alternatives to incarceration was not dictated by the Sentencing Reform Act of 1984. Indeed, 28 U.S.C. § 994(j) provides that “[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense ....” In view of this statute, as well as the purposes of sentencing set forth in 18 U.S.C. Section 3553(a), it is not necessary to imprison 92.3% of defendants. In addition to the direct costs associated with these sentences, the negative impact on defendants’ prospects for rehabilitation is significant. Even a brief period of incarceration often causes the defendant to suffer loss of employment and family support, the two factors most likely to

<sup>1</sup>United States Sentencing Commission, *Fifteen Years of Guideline Sentencing*, Fig.2.2, p.43 (Nov. 2004).

<sup>2</sup>2007 Sourcebook of Federal Sentencing Statistics, Fig. D & Table 12.

<sup>3</sup>The percentage of defendants sentenced to imprisonment has increased nearly every year for which data is available on the Commission’s website:

2007:	92.3%	
2006:		92.5%
2005 post-Booker:	92.1%	
2005 pre-Booker:	91.9%	
2004 post-Blakely:	91.0%	
2004 pre-Blakely:	91.3%	
2003:		91.0%
2002:		90.9%
2001:	91.2%	
2000:		90.6%
1999:	89.6%	
1998:	89.0%	
1997:	87.0%	
1996:		88.1%
1995:		86.4%

Source: For 1998-2007, *Annual Sourcebooks of Federal Sentencing Statistics*; for 1995-1998, [www.ussc.gov/linktop.htm](http://www.ussc.gov/linktop.htm).

promote rehabilitation and prevent recidivism. Federal sentencing policy would greatly benefit from a renewed commitment to alternatives to imprisonment, particularly if coupled with careful data collection and analysis to determine those alternatives that work best for given categories of offenses and offenders.

#### **State Prosecutors Have Recognized the Importance of Alternatives**

Some individuals deserve to be locked up for long periods of time. No other penalty would appropriately recognize the nature of their crimes and adequately protect the community. The ABA Kennedy Commission recognized this as one of its “Ten Basic Principles”: “For offenders who commit the most serious criminal acts, particularly acts of violence against others, lengthy terms of incarceration are generally warranted to recognize the magnitude of the antisocial act (or as retribution or ‘just desserts’), incapacitate the offender for the safety of the community, and send a deterrent signal to others.”

But, not every offender needs to be incarcerated. State prosecutors in many jurisdictions have decided that locking up as many people as possible makes little sense and does not reduce crime. They have supported drug courts, drug treatment, mental health courts, homeless courts, and are innovating with concepts like a veterans’ court. The goal of a criminal justice system ought to be to reduce crime by appropriately dealing with those who break the law.

The ABA Justice Kennedy Commission offered four basic principles that are relevant to today’s discussion. Participants in criminal justice from across the political spectrum should be able to support them all:

(1) There is no universally accepted view of what the goal or purpose of punishment is, but there is something of a growing consensus that (a) while incarceration is an appropriate punishment for many crimes, it is not the only punishment option that should be available in a comprehensive sentencing system; (b) when incarceration is imposed as all or part of a sentence, society and offenders benefit when offenders are prepared to reenter society upon release from incarceration; (c) while there is a place for harsh punishment in a sentencing system, there also is a place for rehabilitation of offenders; and (d) community-based treatment alternatives to prison may be both cost-effective and conducive to safer communities.

(2) It is possible to differentiate among crimes, rank them in relative order of seriousness, and tailor sentences in order to further public safety, economic efficiency, and the ends of justice. Some crimes, but not all, involve egregious conduct. Some crimes, but not all, pose grave danger to the community. Criminal codes in the United States have become enormously complex and cover an incredible array of human conduct. Some crimes require no mens rea at all, while others require specific intent. Some crimes have no readily identifiable victims, while others have identifiable victims who have lost lives, health and property.

\* \* \*

(4) As the seriousness of crime and threat of harm diminishes, the need for lengthy periods of incarceration also diminishes. Indeed, in many instances society may conserve scarce resources, provide greater rehabilitation, decrease the probability of recidivism and increase the likelihood of restitution if it utilizes alternatives to incarceration like drug treatment. For treatment type alternatives to work, a genuine program must be established and sufficient resources must be devoted to it.

(5) Sentencing guidelines or other systems that guide sentencing courts in sentencing can, as the ABA Standards for Criminal Justice: Sentencing (3d ed. 1994) recognized, help to minimize unwarranted and unjustified disparities in punishment among similarly situated offenders. However, any system that guides the discretion of sentencing courts runs a risk of becoming too wooden unless it permits sentencing courts to take into account individual characteristics of an offense or offender that support an increase or decrease in the guideline or presumptive sentence that might otherwise be imposed. A combination of guidance and an ability to depart offers some hope of a sentencing system in which like offenders are treated alike, while differences among offenders are not overlooked. There is no need for mandatory minimum sentences in a guided sentencing system. As long as there is transparency – i.e., judges explain an increase or decrease in an otherwise applicable sentence – and review of such decisions, the right balance between avoiding unwarranted disparities while recognizing individual characteristics of offenses and offenders can be maintained, and judges can be held accountable for their decisions. This balance can be aided if there is an entity provided with sufficient resources and charged with monitoring the sentencing system, providing public reports on its operation, and recommending changes in light of crime rates, observed sentencing patterns, racial disparity in sentencing and the availability of sentencing alternatives. Guided discretion may also be useful when probation and parole revocation decisions are made.

**Conclusion**

In conclusion, the American Bar Association appreciates the effort of the Subcommittee to bring attention to problems attendant to the over-criminalization of federal law and the crucial contributing role of federal mandatory minimum sentencing laws. We support the repeal of mandatory minimum laws. We urge the Judiciary Committee to conduct further hearings on this subject. In addition, we believe there is a growing consensus in the current Congress to act to end the crack-powder disparity in sentencing and to repeal specific mandatory minimum sentences for simple cocaine possession. We urge the Subcommittee to move forward and to approve such legislation.

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Mr. SCOTT. Thank you.  
Mr. Strazzella.

**TESTIMONY OF JAMES A. STRAZZELLA, TEMPLE UNIVERSITY  
BEASLEY SCHOOL OF LAW, PHILADELPHIA, PA**

Mr. STRAZZELLA. Mr. Chairman, Ranking Member Gohmert, thank you for your invitation to submit written testimony and to make some remarks.

I will try to be brief, but I appreciate the chance to say a few words in the context of this broader hearing about what should be criminalized and talk particularly about the federalization of criminal law, which is increasing. That is, what should be made a criminal act under the Federal law, rather than under State law?

My particular concern—and I want to emphasize that I speak for myself today. Although I obviously draw on my experiences, including as a reporter for the ABA's Task Force on Federalization, my appearance here today is on my own behalf. I have drawn on that report and referred to it in my written statement.

My particular concern and the concern of that report had to do with a narrow band of activity that was already criminalized by State law, is traditionally criminalized by State law, has serious penalties, and is in the general run of cases very zealously prosecuted, and then for one reason or another, which I am sure Congressmen and women can identify quickly with, gets criminalized on the Federal side. That presents serious problems in this system that we have, a dual system that is quite delicate and important to us governmentally.

It would be very difficult I think to explain to the average citizen—if you put aside crimes involving real Federal or international issues, if we put them aside, it would be very difficult I think to explain to the average citizen today whether we would ever initially set up a system that made the same core conduct criminal under two sets of prohibitions, either in the same statute books or statute books next to each other, particularly because those two prohibitions, as do the State and duplicative Federal statutes, particularly because they have serious consequences that are disparate.

One of them is that the Federal statutes tend to be much more severe in terms of penalty, which is why many of these cases are brought. They kick the cases into Federal courts rather than State courts. They give a different jury pool than the State cases do. They kick in different rules of evidence, different procedures, all sorts of different consequences, and they take the defendants out of the system and put them into Federal jails.

I should underscore, of course, that this duplication doesn't mean either/or. It can be both. That is, you can be prosecuted under our double jeopardy interpretations for both of those, compounding the sentences and the time.

That system is the system, however, even though we wouldn't initially think that up, that has grown more and more common under our growing patchwork of accumulating Federal law.

A number of people have referred today to the large number of Federal offenses that exist. There are many of us who think it is not possible to count them, there are so many of them. The accumulation of them I think is well-known to this Committee and is demonstrated elsewhere, including in the ABA's federalization report. That accumulation, as far as the local type of crime, which

often at its core is highly visible and violent in nature, has come about in just the last decades.

Any crime legislation is popular. I certainly don't need to suggest to this Committee the pressures on the Committee and on Congress to vote that some conduct that isn't desirable should be criminalized, and many people somehow make the leap from that that if it is not desirable that it also should be criminalized under Federal law.

It is hard to vote against crime legislation, I realize. But the principled assessment of whether there is a Federal need referred to in the Chairman's statement and whether these activities which we can condemn very often ought to be made Federal is a really serious question.

It is a serious question because I think there is a temptation to think that voting yes on a Federal crime bill is in many ways cost-free; and I think, as the ABA report tries to itemize, that is certainly not the case. There is a human toll, much of which you have heard about today. There is a toll in terms of disparity. These decisions are made by prosecutors, sometimes low level, sometimes high level.

I like prosecutors a lot. I was one myself in the U.S. Attorney's Office in this city. But the idea that that decision would be made without basic review, which is the case, no judicial review, is troubling in its own way, because it kicks in lots of consequences.

There are cost consequences. They end up in Federal jail, many of these defendants. There are certainly consequences in terms of the rights and privileges you would get in the process. There are disparities in sentencing, as you hear.

There are also major consequences to our Federal-State governmental system. In the initial setup of the country, it looked to me like there were 17 Federal crimes. They were very site oriented in some respects, like governmental Federal-function oriented. That is no longer true. So a lot of these cases that end up in Federal Court sound to the Federal judges, I think, as though they are trying State cases.

I just want to itemize quickly one more cost, which is the terrific penalty that Federal courts pay by having to take on these cases and deciding them, pushing other civil cases to the back or other truly Federal interest cases as well.

I should close, if I can, by saying that the task force I think has identified a worthwhile notion in saying that, in the important debate about how to curb crime, it is critical, crucial, that the American justice system not be harmed in the process. It is a very important process to us. In the end, the ultimate safeguard for maintaining this valued constitutional system must be principled recognition by Congress of the long-range damage to real crime control and to the Nation's structure caused by inappropriate federalization.

So I add my voice to the list that the Chairman identified of the real need to pay attention to whether there really is some Federal interest involved; and the examples he gave—and car jacking I think is one of those—serve well to illustrate that, and that the Congress uses devices that are identified in the report of the ABA

and elsewhere to try to make it clear that if legislation is to result in a Federal crime it be carefully considered and strongly approved. I thank you again for having me.  
[The prepared statement of Mr. Strazzella follows:]

PREPARED STATEMENT OF JAMES A. STRAZZELLA

Written statement of

**James A. Strazzella\***

to the

**Subcommittee on Crime, Terrorism, and Homeland Security**  
Judiciary Committee  
United States House of Representatives  
July 22, 2009 Hearing on  
Over-Criminalization of Conduct/Over-Federalization of Criminal Law

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\* James A. Strazzella  
Professor of Law/James G. Schmidt Chair in Law  
Beasley School of Law  
Temple University  
1719 N. Broad Street  
Philadelphia, PA 19122  
I appreciate the Committee's invitation to testify on the important topic of the increasing

federalization of substantive criminal law, held in the context of the Committee's examination of even wider questions about the increasing criminalization of conduct. I will try to be brief and confine myself here to only part of what might be said about this fundamental issue.

I should note that I am not representing any group or organization in these remarks. My views have obviously been formed over many years and in many meetings and discussions with others. This includes my work as a prosecutor and work with state court systems. It also includes my efforts with the American Bar Association Task Force on the Federalization of Criminal Law, for which I served as Reporter.<sup>1</sup> Nevertheless, I do not purport to speak for anyone other than myself today.

I acknowledge the importance of federal criminal law and the important sphere of federal law enforcement. Indeed, especially in an era of limited resources, as well as expanding national and international concerns, the resources of federal courts, agencies and other entities (including – if I may respectfully suggest it – the critical attention of important committees such as this) can best be focused on issues of truly national or international federal interest, not ones that appropriately belong with the state offense systems. I want to emphasize why this is so, largely because there are easily overlooked but serious systematic and practical costs to the increasingly troubling federalization of conduct formerly left to the states.

The many public servant-oriented people who work in the field of criminal law for the benefit of our citizens deserve great respect, as does the law itself. As do others, I recognize the important role and power of the criminal law in general. It has great importance in maintaining a just society for our citizens and it has, as well, an awesome power that can be brought against the Nation's individuals. Such power needs to be as responsible, as principled, and as just as it can be, as Professor Herbert Wechsler noted so articulately.<sup>2</sup> Discerning the proper limits of the criminal law is a difficult task compounded by the state-federal system of our nation.

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<sup>1</sup> REPORT ON THE FEDERALIZATION OF CRIMINAL LAW (ABA 1998) (James Strazzella, Reporter). Unsurprisingly, my remarks at this hearing draw on what was written there (often in greater detail); references to "ABA REPORT" are to that publication.

The 17-member task force was bipartisan in nature. It was initiated by then ABA Criminal Justice Section leader William W. Taylor, III, and chaired by former Attorney General Edwin Meese III. The task force met over many months and was composed of federal and state prosecutors, legislators from both parties, state and federal judges, law enforcement representatives, and others with wide experience in the criminal law field.

<sup>2</sup> Whatever views one holds about the penal law, no one will question its importance in society.

This is the law on which people place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be.

Nowhere in the entire legal field is more at stake for the community or for the individual.

Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)

In its proper sphere, federal criminal law is important and occupies a vital place in our society.<sup>3</sup> In fact, precisely because federal law has such important work to do, it is essential that it not wander into unnecessary or improvident or diverting areas, including into areas that best reside with state law or areas best left to other restraining devices (civil remedies, regulatory systems, moral restraints, etc. – this latter being the subject of other inquiries at this hearing).

These remarks focus on the increasing overlap of federal criminal law with traditionally state law concerning essentially local crime. In this area, serious trouble has arisen and continues to mount with the piece-by-piece accumulation of more and more federal criminal law directed at essentially local conduct.

A governmental system such as ours, one that affords a set of laws side by side – federal and state – is already a delicate system. It is one that needs to be finely tuned, well-thought-out, and intently guarded. With the growth of federal law demonstratively covering more and more traditionally state-crime areas, a mounting and duplicating patchwork of crimes has grown up in the last few decades. In this area – whatever the theoretical jurisdictional hook on which Congress hangs its constitutional power to enact such legislation – the conduct involved is often, at its core, essentially local in nature (car-jacking or drive-by shootings, already crimes of robbery/assault in all states, are examples) and usually does not want for zealous prosecution by state agencies. There is a widespread bipartisan belief that in many areas of traditional state crime, the impact of federalization continues to produce a worrisome effect on the American criminal justice system and it undermines its principled future. Beyond matters of principle, the practical effects can be gripping and troubling. There is a widening, optionally-selected system of parallel legal consequences for essentially the same conduct developing.

Putting aside those federal crimes that sensibly worry about intrusions on federal functions, sites or agents, today it would be difficult to explain to the average citizen the line between many other federal and state crimes. No one would think it initially wise to set up a governmental system in which the same governmental state or nation was given the power to choose from two offense lists, charging either of two offenses for the same conduct (or indeed compounding both offenses), with the two parallel options providing penalties of different severity range and different court systems, juries, evidentiary rules, and other important consequences – the choice being left to the basically nonreviewable discretion of law enforcement. That, however, is the dual system that is more and more emerging as the federal overlap mounts. Professor Sara Sun Beale of Duke Law School has noted this phenomenon as well. It was articulated in the ABA REPORT in this way: In many areas of criminal law, the nation is rapidly progressing toward “two broadly overlapping, parallel, and essentially

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<sup>3</sup> As the *Preface* to the ABA REPORT put it. “It is precisely because federal law enforcement is so necessary in dealing with indisputable federal interests that a legislative instruction to federal prosecutors to utilize their time and resources to prosecute relabeled common law crimes ought to be restrained.” ABA REPORT, pp. 3-4.

redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct. Such a system has little to commend it and much to condemn it."<sup>4</sup>

The amount of individual citizen conduct that is now potentially subject to federal criminal control has increased in startling proportions in the last several decades, beyond any understandable interest in dealing with federal programs, truly interstate issues, or international crime. The reasons for this growth have been extensively discussed elsewhere and are undoubtedly familiar to the Committee. However, it seems safe to say that a major factor in this growth has been the pressure on Congress to "do something" (or appear to be doing something) about the subject of violent or highly visible crime. No one knows such pressures better than the Members of this Committee. Crime legislation certainly seems politically popular. I acknowledge the difficulty and challenge of resisting unwarranted legislation.

Of course, simply legislating a crime does not mean that it will be prosecuted or otherwise effectively enforced. In fact, limited resources on the investigative, prosecutorial and judicial sides will mandate that only a limited number of federal crimes will be enforced at any given time, in light of the selective prioritization that investigative agencies and federal prosecutors must necessarily employ. But there are important down-sides to this increasing accumulation of federal law, so it is important to emphasize the easy-to-overlook reality that the enactment of such overlapping federal and state crime does have serious adverse consequences.

Despite the tendency to think that enacting a new crime may be "cost-free," this is not the case. Some of the real costs are to our valued American governmental system and the criminal justice system as a whole; some are costs to the federal courts and other agencies; some are human tolls; some are financial.

To give a short list, one can borrow from the ABA REPORT'S crystalized list of these costs (p. 50) in underscoring the detrimental long-term effects of federalization where there is no

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<sup>4</sup> ABA REPORT, p. 55. The Report continued (id.):

The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kind of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.

important federal interest, only a view that the conduct is wrong and should be punished.

- Overall, inappropriate federalization constitutes an unwise allocation of scarce resources that are needed to meet the genuine issues of crime.
- Some of the particular costs of unwarranted federalization are important systematic effects: It can undermine the delicate balance of federal and state systems and have a detrimental effect on state judicial, prosecutorial and investigative personnel, who bear the major responsibility for enforcement of criminal law; it can dissipate citizen power and move more decision-making to the federal level.
- Other important costs are placed upon federal judicial and law enforcement institutions: It throws more locally-oriented cases into the federal trial and appeal courts, jostling for federal court resources and potentially delaying other cases of a true federal interest (criminal or non-criminal); to some degree it adds these cases to the already expensive federal prison system; since criminalizing conduct empowers agencies to investigate the condemned conduct, more federal criminal offenses both empower federal agencies and divert their attention from working on more truly federal-interest crimes.
- Some of these costs are also real in terms of accused persons, whose fate and potential sentence will often unequally rest on a prosecutorial decision to select the same essential conduct for prosecution in federal or state court, or both.
- Of course, there is also an effect on the Legislative Branch, with the accumulation of a larger and larger body of law that requires more and more Congressional attention to monitoring agencies and considering federal criminal statute amendments.

Thank you again for your invitation to make a few remarks on this complicated and difficult, but very important, issue. Our complex criminal justice system is valuable and worth constant improvement. It is also worth remembering that "In the important debate about how to curb crime, it is crucial that the American justice system not be harmed in the process" (as the ABA REPORT p. 56 put it). "The nation has long justifiably relied on a careful distribution of powers to the national government and to state governments. In the end, the ultimate safeguard for maintaining this valued constitutional system must be the principled recognition by Congress of the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."

I would be pleased to answer the Committee's questions.

Mr. SCOTT. Thank you.

We will now recognize the Members under the 5 minute rule.

I will begin by asking General Thornburgh—and thank you. I understand you had to change your schedule because of the votes. I appreciate you remaining. If you have to leave, we certainly understand.

Comments have been made about the fact that a lot of regulatory violations are subject to criminal sanctions. If they were just civil

and not criminal, would they be a sufficient deterrent to people who might think of violating the regulatory rules?

Mr. THORNBURGH. I think the suggestion that I referred to that was made by Mr. Gainer would address that in terms of separating out those regulatory violations that were of sufficient gravity to justify a criminal penalty. I would remind the Committee that that would encompass those that were posing a real threat to persons, injury or other kinds of afflictions, to property interests, and to institutions designed to protect persons and property interests, number one.

Secondly, a regulatory violation would qualify for criminal prosecution if there were a pattern of repeated intentional breaches of the regulation in question.

Otherwise, I think when you absent those two characteristics from a regulatory violation you are left with a regulatory violation. And while there would be a deterrent capability by having someone be subject to a fine or an administrative penalty, you would not impose the Draconian type of hardship that has been described by the witnesses who appeared today.

Mr. SCOTT. Thank you.

You recommended the creation of a review panel or commission to review the Federal Criminal Code. How feasible is this and what happened the last time that was tried?

Mr. THORNBURGH. I am a dreamer, Mr. Chairman. I have been through this drill for now probably 30 years, going back to my time in the Criminal Division, and we got just that close with the Brown Commission legislation in the bill identified as S.1, but for a number of reasons having very little to do with the merits, it fell short.

I still look for someone with the courage and the tenacity to come out of this Congress and tackle this important task, because I think if we don't soon engage the problem of this sprawling mass of statutes layered one on another over a period of years we will eventually cause an erosion in the credibility of the criminal law altogether.

Again, I would refer to the poignant tales you have heard today from individuals who were caught up in the system. When you have duplication, overlap, when you have ill-defined terms, when you have no need to reconcile individual criminal legislation with the overall goals, for example, of the Judiciary Committees in both Houses who are schooled and expert in those things, then you get the current—I can't think of appropriately strong words to characterize it. I will be gentle and say mishmash of what we have in the criminal law today.

Maybe I am not realistic. Maybe that is not going to happen. But we have faced up to these kinds of things.

I remember when I was a law student in Pennsylvania, we studied the Uniform Commercial Code, except we were reminded that it was uniform only in Pennsylvania. Now it is uniform throughout the United States, and somebody had the wisdom and the tenacity and the backing of the American Law Institute, which constituted that, to have a Code that makes sense, that doesn't promote the kind of disparity on the commercial side that we see on the criminal side.

It is a worthy cause for someone young enough and tough enough to take on; and observing the leadership of this Committee, I would say you folks qualify. Anyway, I hope so. It is a general source of concern. It doesn't make headlines. It is not the top of the 6 o'clock news. But for those of us who practice in the criminal courts, it would be a tonic for practice and attract I think more people into that area.

Mr. SCOTT. Thank you.

Mr. THORNBURGH. I am going to take you up on your invitation, Mr. Chairman. I apologize for having to leave, but I didn't take account of the fact that occasionally votes interrupt your proceedings. But I thank you very much for the opportunity for me to be here.

Mr. SCOTT. Thank you.

Mr. GOHMERT. Thank you so much.

Mr. THORNBURGH. Thank you to the Members as well.

Mr. SCOTT. Professor Saltzburg, you mentioned mandatory minimums which proscribe a specific minimum punishment based on the Code section that is violated. I frequently note that the Code section that covers consensual sex between a 19-year-old high school student and a 15-year-old high school student is the same Code section that deals with a 40-year-old having sex with a 13-year-old.

What is wrong with the mandatory minimum being based solely on the Code section, without regard to culpability, the roles, the remorse, responsibilities and that sort of thing?

Mr. SALTZBURG. Well, that is what mandatory minimums exclude, and there is no regard at all for the offender. It is totally focused on the offense. In the statute you described, a judge ought to be able to consider the circumstances and whether or not there is grave abuse or not.

Similarly, in a drug case, we have got addicts who have distributed drugs, a serious problem in the States now. State prosecutors have taken to drug treatment as an alternative. It is seven times less expensive—I should say one-seventh of the cost. Good programs work. It can't be done in the Federal system, where the judge has to impose a mandatory minimum sentence.

If I might add just one point in the response to the question you asked my former Attorney General, and that is whether it can be done, reform of the Federal Criminal Code. There is one thing that we have today that didn't exist at the time of the Brown Commission, didn't exist when S.1 was proposed or "Son of S.1," as we used to call it, and that is the Sentencing Commission has already graded all Federal offenses.

The sentencing guidelines—while there are problems with them—the sentencing guidelines serve as a basically a formula to figure out how to reform the Federal Criminal Code. They have grouped the offenses. They have said these are the offenses that are serious, that are equally serious or close to being equally. It is all there.

If Congress decided it was serious and wanted the input of the American Law Institute and the various other groups, including the American Bar Association, we would give it to you and say, start with the guidelines, not necessarily the penalties that are associated with them at the current time, but start with them, and

I think you could get that statute done much more easily than 30 years ago.

Mr. SCOTT. Thank you.

The gentleman from Texas.

Mr. GOHMERT. Thank you, Chairman.

I do appreciate everybody's testimony and appreciate your patience waiting through a vote. I regret that General Thornburgh had to leave, but I am grateful that you all have been able to stay.

For one thing, one of the comments that has been made is that the Federal law has not done a good job distinguishing between what should be a civil penalty and what should be a criminal penalty. It is something that in my first 2 years here, when my party was in the majority, I didn't approve; and I got headwards with some of our leadership who were wanting to criminalize what should have been a civil penalty. And it just seems like we could do ourselves a favor if we would make that distinction, so that you don't have people come do a take-down over failure to put a sticker on a package or checking the wrong box, something of that nature.

I did want to ask Mr. Evertson, who was it that did the arrest of you? Was it the FBI or who?

Mr. EVERTSON. I will never forget that minute that it took, really. When they turned around after everything happened, it was big letters, FBI.

Mr. GOHMERT. FBI on them.

Mr. POE. Just like on TV.

Mr. GOHMERT. Mrs. Norris, who was it that arrested your husband? You mentioned EPA.

Mrs. NORRIS. U.S. Fish and Wildlife.

Mr. GOHMERT. U.S. Fish and Wildlife. U.S. Fish and Wildlife.

Mrs. NORRIS. They had five people.

Mr. GOHMERT. They have police. As I understand it, there are a number of Federal agencies that may not have police, but they want them. They want the black Suburbans, they want the lights, they want the guns, they want to take people down to the ground, and it certainly seems that is something we ought to avoid.

My experience with FBI agents back in Texas was they display a little more professionalism than what we were hearing, and I was concerned that perhaps it was a different agency that came after you.

Mr. LYNCH, you mentioned we need to discard the old rule "ignorance of the law is no defense", and that is a rule that sometimes has a very unfair result. But then again, as a former judge, sitting up here with another former judge, I know how many people would come in and say, you mean it was against the law to shoot him? I didn't know. Nobody told me that.

Mr. POE. You have been asked that already.

Mr. GOHMERT. I have heard that. They say, Judge, I just didn't know I couldn't shoot him.

So it creates special problems if you completely discard that rule, because there was a reason for it.

How do we get around every defendant coming in and saying, who knew I wasn't supposed to rape this girl?

Mr. LYNCH. Thank you for asking the question, because it is a common query that comes up—to say people will start feigning ig-

norance and we will have all sorts of problems. But we already have a very good model.

Mr. GOHMERT. But they won't start. I have already experienced that. It is an ongoing thing.

Mr. LYNCH. I have heard that complaint by prosecutors and other judges before, that we can't discard the rule. But I think we have got a very good model already with our tax laws. The tax laws are very complicated. It is complicated for lay people to understand. So we know some people want to evade taxes, and we also know other people are trying to work their way through the tax Code and do it honestly, but they make lots of mistakes.

We have got a willfulness requirement for our tax laws, where basically the prosecutors have to prove that it was a willful violation in order for them to prove that the person is a real tax evader that needs to go to jail. So the tax money is continuing to flow to Washington, tax evaders continue to go to jail, and I think we should expand this model beyond our tax code, which is very complicated for lay people, even lawyers, to understand, to all the other complicated rules we have on the books.

I think it is working within the tax code, and I think that is strong evidence that it will work in other areas as well, that the real culprit—prosecutors will be able to gather evidence, but people who are trying to struggle and try to understand regulations, they will not be swept up in Federal indictments.

Mr. GOHMERT. Let me ask quickly, as my time is running out, Professor Strazzella, if I heard you correctly, you said there were Federal judges trying cases as if they were State judges. What did you mean by that? Keep in mind you have two former State judges up here. I wasn't sure I heard you correctly.

Mr. STRAZZELLA. I may have misspoken myself. I was referring to the fact that when I speak to Federal judges, what many of them tell me is I feel like a State judge. I am trying State crimes.

In fact, I talked to somebody not long ago who was an assistant district attorney in one of the cities of the United States. Their job is to try car theft cases. The Chairman has already referred to the fact that a car jacking is a Federal crime. There is not a high rate of prosecution. They are usually very visible cases with a desire to take a bad actor and give him more time.

That assistant district attorney, State district attorney, is designated in Federal Court as a Special Assistant U.S. Attorney. Some days she goes over and tries exactly the same kind of case there.

Mr. GOHMERT. As a judge, we had that, and I couldn't agree more. There were too many times Federal judges were required to try cases that should have been tried by State judges.

I just want to be clear. Because there were times, having tried cases in Federal Court and in State court and having been a judge, I can tell you I preferred the requirements of the Texas State judges, in that we could not comment on the weight of the evidence, whereas Federal judges take a great deal, some of them, take that to an extreme. "You mean that is all you got, and you are going to go to the jury with that?" That would be reversible error in the State court.

So, anyway, I always appreciated the fairness that I saw in State courts that was not always afforded in Federal Court. But thank you.

I yield back.

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

I now recognize the gentelady from Texas. We didn't have statements in the markup on the crack bill, but she has done a tremendous amount of work on that bill, and I recognize her at this point for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman; and I thank the witnesses as well.

As I listened to the recounting of the experience, I think the horror stories that your husband went through, and Mr. Evertson, I think it is important to highlight again the position that I have taken with H.R. 3245 and reassert the position that I would assert in the markup that marked up H.R. 3245, which to you is only numbers but which has to do with evening or recognizing that disparities between crack cocaine is also—even though those were certainly not offenses you were engaged in—but recognize the failures of that system, particularly as people would come with the differing amounts and they would be penalized at such a high level, which, Mrs. Norris and Mr. Evertson, means people could not even rehabilitate themselves or make an argument, couldn't make a community argument, that, for example, Mr. Norris should have been able to make a community argument under circumstances of his arrest and ultimate prosecution. So I am asserting my position on H.R. 3245 by asking you questions that pertain to your particular dilemma.

Mrs. Norris, what was the exact offense that your husband was ultimately indicted for? There was an indictment?

Mrs. NORRIS. I have to be honest with you. There were seven counts, and I don't remember which they were. Primarily, it came down—by the time we got through it, it came down to a Customs violation. As I understand it, the final judgment was that he had falsified a Customs document.

Ms. JACKSON LEE. What he was bringing in? Was he a storekeeper that had items?

Mrs. NORRIS. No, he had a greenhouse. We imported orchids from other countries and then we sold them.

Ms. JACKSON LEE. So he wrote something on those imported—

Mrs. NORRIS. He didn't exactly, because they came from Peru, and the people in Peru filled out the Customs documents.

Ms. JACKSON LEE. I got you. So it was a document he received that had been written by someone else.

Mr. Evertson, likewise, frame what your situation was in terms of your indictment.

Mr. EVERTSON. I was working on my invention. I left to make some more money; and, in the meantime, the EPA went and took everything and destroyed everything. And the EPA said in my indictment, they said, any material that is intended to be disposed of would be hazardous waste.

Ms. JACKSON LEE. You didn't dispose of it?

Mr. EVERTSON. No. Disposal under RCRA means spilling it or releasing it into the atmosphere or somehow escaping.

Ms. JACKSON LEE. But you left it where?

Mr. EVERTSON. At a storage facility. I paid the rent and everything.

Ms. JACKSON LEE. Who was the whistle-blower? How did they know it was there?

Mr. EVERTSON. When the FBI came about me with the wrong label—or I didn't need a label, but they said I did—I freely told them, because I didn't think anything of it. I didn't think anything was wrong.

Ms. JACKSON LEE. Let me make sure I am posing the question correctly.

Professor Saltzburg, what do you think of those two cases?

Mr. SALTZBURG. I think they illustrate about as well as you can illustrate the overreach of Federal criminal law. It is necessary to have Customs forms, but it makes no sense to punish people criminally for a mistake. So what we are seeing is several factors that the witnesses have talked about: the absence of a *mens rea* requirement in some of these statutes; basically the use of the criminal law when a civil sanction would do just as well; and one thing that you can't regulate and that is the common sense of prosecutors.

These cases should not have been prosecuted. They didn't have to bring a criminal prosecution. But every once in awhile somebody decides they want to send a message to orchid growers? Of all the things in this country we need to worry about, we need to worry about the disparities between crack cocaine and powdered cocaine, but in places where I live, nobody is running around talking about "send a message to orchid growers."

Ms. JACKSON LEE. Or send a message to what seems to be a harmless inventor.

Let me just finish this point, if I could. You said I think the exact right thing for the record: Where is the judgment and where is the common sense?

I think the other point of it is, even though tomorrow someone may have a valid new bill for a valid criminal offense, I don't think this hearing should be stifling that kind of cerebral thought, but I believe what you have said is that the dichotomy between civil and criminal, we need to get a handle around it.

And I will end by saying this cowboy—and I love cowboys—approach to civilians, with guns and black jackets and all of that, is too gestapo, and we need to stop it. And I think we can at least begin to handle that. We don't want to endanger law enforcement officers, but an orchid grower, I think they could have knocked on the front door.

With that, Mr. Chairman, I will yield back.

Mr. SCOTT. Thank you.

The gentleman from Texas, Judge Poe.

Mr. POE. Thank you, Mr. Chairman.

Thank you all for your patience.

Like my friend, Mr. Gohmert, I served on the bench in Houston for 22 years, and I only tried criminal cases, only felons. And everything is a felony in Texas. Wire cutters in your saddle bags will get you in jail because the cattle industry doesn't want their barbed wire being cut.

But I say that to say my philosophy is we have too many Federal crimes. We started out with piracy. That was the number one crime prosecuted in this country. Now we have 4,450, with 50 more every year. So many Federal crimes that many of them are never prosecuted because they just aren't.

It just seems to me that we first have to have a way to look at those 4,450 crimes and start eliminating them or categorizing them or coming up with a system that the bad guys, we need to lock them up and throw the key away, and these others things maybe shouldn't be crimes and certainly should go to civil sanctions over putting folks in the do-right hotel, as I call the penitentiary.

I think judges need to have more discretion. Federal judges, you cannot make a bad judge be a good judge by regulating punishment. You have to come up with a good judge. That is what these Senate hearings are all about. And if you have a bad judge, you have to figure out how to get rid of him.

But they need more discretion to do the right thing and punishment, and not have to put somebody in jail for growing flowers or bringing them in just because the law makes them. That is not justice. That is injustice.

Mrs. Norris, in your husband's case, if he had even been convicted, I would have had him provide a community garden in the neighborhood and grow food for some people in the neighborhood. You are familiar with some of those things I did when I was a judge on the bench there. You have to use a little sense that I think judges should have the discretion to do.

In Mr. Evertson's case, I would have ordered you to come up with a fuel cell. I would have sent you to Lamar University. They are working on the same thing right now.

Mr. EVERTSON. I want to. I want to.

Mr. POE. Well, it just seems like that is what judges ought to have the discretion of doing if you ever end up in the criminal justice system.

And I certainly think we ought to have a *mens rea*. What has occurred now is in the criminal justice system in Federal Court is strict liability. If you do this act, it doesn't make any difference if you had the intent to commit a crime or not; it is strict liability. And I am one that thinks we ought to have a guilty mind.

Those are some of my comments. But I do have this question for the Professor, Mr. Saltzburg. Do you think judges need more discretion, Federal judges specifically?

Mr. SALTZBURG. Yes, I do. As I said, the American Bar Association's position has been consistent for decades now. That is, judges should have discretion. It ought to be controlled to some extent, guidelines, advisory. And now that we have appellate review, if you have a judge who is off the reservation, way high, way low, there is a way to deal with that. And the refreshing thing here is—

Mr. POE. As in appealing abusive discretion to the Circuit Court?

Mr. SALTZBURG. Yes. It is a reasonableness standard of review. It defers to the trial judge. But outrageous cases can be taken care of.

It is time I think that we recognize that judges aren't the enemy. There was a sense for a while that somehow Congress was here and judges were there. And, actually, it turns out everybody agrees

with what you said, everybody I talked to when I chaired the Kennedy Commission. I went to Texas and talked to prosecutors there. The State prosecutors there said the same thing: People who commit serious crimes should do serious time. But what we learned is not everybody needs to be locked up.

Mr. POE. People shouldn't go to jail for having a red fish that is two inches too long?

Mr. SALTZBURG. That is correct. Or for putting the mailing label on a UPS or Fed Ex tag not knowing that Alaska didn't have ground transportation. I didn't know that either. I am glad I wasn't filling out a form.

Mr. EVERTSON. But it is connected to the U.S.

Mr. SALTZBURG. That I knew.

Mr. POE. Well, I am nearly out of time. But I do want to thank you all for being here. I would hope that this Committee would come up with a solution on how we can take these 4,450 crimes and look at them and maybe reevaluate what we ought to do to folks that violate all these dastardly deeds, and maybe civil penalties ought to certainly be something we require and maybe defer to State court. Because under our theory, the way this country is set up, States are supposed to prosecute really the outlaws and Federal courts are supposed to do other things. Maybe we can get back to that.

Thank you, Mr. Chairman.

Mr. SCOTT. Thank you.

Are there any other questions?

I want to thank our witnesses for their testimony today. This has been very helpful. We may have written questions for the witnesses. If you would respond to those as quickly as possible so that your responses will be made part of the record.

Without objection, the hearing record will remain open for 1 week for additional materials.

Without objection, we will enter into the record a written statement by John Wesley Hall, President, National Association of Criminal Defense Lawyers.

[The prepared statement of Mr. Hall follows:]

PREPARED STATEMENT OF JOHN WESLEY HALL, PRESIDENT,  
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS



Written Statement of  
John Wesley Hall, President  
National Association of Criminal Defense Lawyers

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

Re: "Over-Criminalization of Conduct/Over-Federalization of Criminal Law"

July 22, 2009

## I. Introduction

As the American Bar Association's Task Force on the Federalization of Crime observed in 1998, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes." As of 2003, there were over 4,000 offenses that carried criminal penalties in the United States Code.<sup>1</sup> By 2008, that number had increased to over 4,450.<sup>2</sup> 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.<sup>3</sup> Enforcement of this monstrous criminal code has resulted in a backlogged judiciary, overflowing prisons, and the incarceration of innocent individuals who plead guilty not because they actually are, but because exercising their constitutional right to a trial is all too risky. Enforcement of this inefficient and ineffective scheme is, of course, at tremendous taxpayer expense.

In its current state, our criminal justice system all too frequently prosecutes crimes and imposes sentences without ample justification. Criminal prosecution and punishment constitute the greatest power that government routinely uses against its own citizens. As Harvard Professor Herbert Wechsler famously put it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."<sup>4</sup> It is a truism that any governmental power that is not subject to effective 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 unprincipled and unnecessary criminalization, it is abusing our government's greatest power.

The injury inflicted by a single misguided act of overcriminalization is not limited to an individual defendant, but rather it damages our entire criminal justice system and society as a whole. We cannot continue the race exponentially to expand the body of criminal law. For all these reasons, we welcome this hearing and urge the committee to pursue in earnest the sensible and necessary reform of the federal criminal code.

## II. Overcriminalization is an Abuse of Legislative Authority and Exceedingly Harmful

Although the harm caused by overcriminalization is frequently amplified by the executive and judicial branches, it generally originates in the legislative process. While it can take many forms, overcriminalization most frequently occurs through (i) the enactment of criminal statutes that often lack a meaningful *mens rea* requirement, (ii) the imposition of vicarious liability for the acts of others

<sup>1</sup> 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](http://www.fed-soc.org/doclib/20070404_crimreportfinal.pdf).

<sup>2</sup> 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.efn>.

<sup>3</sup> 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).

<sup>4</sup> Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1098 (1952).

with insufficient evidence of personal awareness or neglect, (iii) the expansion of criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies, (iv) the creation of mandatory minimum sentences that frequently bear no relation to the wrongfulness or harm of the underlying crime, (v) the federalization of crimes traditionally reserved for state jurisdiction, and (vi) the adoption of duplicative and overlapping statutes.

#### A. The Absence of Meaningful *Mens Rea* Requirements

Criminal offenses lacking meaningful culpable state-of-mind (or *mens rea*) requirements inevitably lead to unjust prosecutions, convictions, and punishments. With rare exception, the government should not be allowed to wield its power against a defendant without having to prove that he acted with a wrongful intent. Absent a meaningful *mens rea* requirement, a defendant's other legal and constitutional rights cannot protect him or her from unjust punishment for making honest mistakes or engaging in conduct that he had every reason to believe was legal. The presence of a strong *mens rea* 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 *mens rea* requirement, a number of newly enacted criminal offenses frequently contain only a weak *mens rea* requirement, if they have one at all. Most new crimes only require general intent, i.e. "knowing" conduct, which federal courts usually interpret to mean conduct done consciously. The defendant need not have known that he 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 that is not inherently wrongful, such as certain paperwork violations, the "knowingly" *mens rea* 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 defendant to have any notice of the law or the wrongful nature of his 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.<sup>5</sup> This type of criminalization occurs alongside the enactment of criminal laws that, on their face, contain no *mens rea* requirements. Despite every intention to follow the law, even the most cautious defendant can be found guilty under such laws.

#### B. Criminal Punishment for the Conduct of Others

Similarly, through the imposition of vicarious liability for the acts of others, defendants 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 conduct<sup>6</sup> and landowners can

<sup>5</sup> 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.* (2000). 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.

<sup>6</sup> See *United States v. Hanousek*, 176 F.3d 1116, 1120-23 (9<sup>th</sup> 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).

be convicted for moving sand onto their property without a federal permit.<sup>7</sup> Corporate criminal liability employs the doctrine of *respondet 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.<sup>8</sup> 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.

#### C. The Criminalization of Business and Economic Activity

Because the lack of meaningful *mens rea* provisions together with the application of vicarious criminal liability allow for criminal punishment absent blameworthiness, the expansion of the criminal code into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies is particularly problematic. This expansion has turned aggressive business behavior and questionable judgment calls into prison sentences. In addition, this form of criminalization upstages the work of the regulatory agencies.

Civil and regulatory agencies have diverse tools at their disposal to prevent misconduct, order compliance, and impose monetary penalties to compensate injured parties or disgorge unlawful profits. But before regulators have the opportunity to declare what conduct is unlawful or use any of these tools, defendants are being hauled into criminal court. 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 and job losses.

#### D. 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 thirty years can serve to deter a defendant from intentionally violating the law, such a sentence can have no deterrent effect where the defendant had no intention to commit a wrong or had every reason to believe his conduct was lawful. Rather, the combination of such high sentences with broadly written criminal offenses that lack meaningful *mens rea* provisions often results in the incarceration of innocent people. Why would anyone risk going to trial when the potential punishment is ten or twenty years in jail but the plea offer is fifteen months? A genuine lack of blameworthiness is no match for this risk.

Further, mandatory minimum sentences bear little to no relation to the wrongfulness or harmfulness 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 grossly disproportionate to the virtually non-

<sup>7</sup> See *United States v. Rapanos*, 376 F.3d 629, 632-33, 640-44 (6<sup>th</sup> Cir. 2004) (affirming defendant's conviction under the Clean Water Act due to classification of his property as federally protected "wetlands").

<sup>8</sup> 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 (9<sup>th</sup> 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").

existent blameworthiness of the defendant.<sup>9</sup> Mandatory minimums remove discretion from judges, who are best suited to assess a particular defendant's culpability because they are the party closest to the facts and circumstances of the particular matter, and instead, concentrate too much discretion in the hands of the charging prosecutors. For example, 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 and weak or no *mens rea* provisions – 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.<sup>10</sup> 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 ten years.<sup>11</sup> Due to the failure of Congress to include a *mens rea* provision in this statute, a defendant 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 *mens rea* requirements. In order to be convicted of the crime of attempted illegal reentry, punishable by up to twenty years in prison,<sup>12</sup> the defendant 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.<sup>13</sup> Therefore, a defendant's guilt and possible punishment of twenty years depends on the location of his conduct and not the conduct itself. Such variances, removed entirely from the defendant'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.

#### E. 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 explained:

Over the last decade, Congress has contributed significantly to the rising caseload by continuing to federalize crimes already covered by state

<sup>9</sup> See *United States v. Yirkovsky*, 259 F.3d 704, 707 n.4 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2001) (Arnold, J., dissenting from denial of rehearing en banc) (suggesting “that on its face the sentence is grossly disproportionate to the offense for which it was imposed”).

<sup>10</sup> 18 U.S.C. § 924(c)(1)(A) (2000).

<sup>11</sup> *Dean v. United States*, 129 S.Ct. 1849 (2009).

<sup>12</sup> 8 U.S.C. § 1326(a)-(b) (2000).

<sup>13</sup> The Ninth and Eighth Circuits require evidence of specific intent. See *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1190 (9<sup>th</sup> Cir. 2000); see also *United States v. Kenyon*, 481 F.3d 1054, 1069 (8<sup>th</sup> 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 (1<sup>st</sup> Cir. 1995); *United States v. Rodriguez*, 416 F.3d 123, 125 (2<sup>nd</sup> Cir. 2005); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5<sup>th</sup> Cir. 2004); and *United States v. Peralt-Reyes*, 131 F.3d 956, 957 (11<sup>th</sup> Cir. 1997).

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.<sup>14</sup>

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 boasts of 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 conduct or intent, but rather on the authority that prosecutes him. Two defendants, 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 defendant and to leave the other for the state to prosecute.<sup>15</sup> Perhaps the best example of this abuse is the federalization of purely intrastate drug offenses, particularly low-level crack cocaine offenses.

#### F. The Abysmal State of the Federal Criminal Code

Finally, the utter disarray of the federal criminal code is both a cause and symptom of the overcriminalization problem. Take, for example, the many criminal provisions in Section Two of the recently enacted Fraud Enforcement Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617. Virtually all of the criminal provisions prohibit conduct that was already prohibited under the federal criminal code.<sup>16</sup> At the hearing to consider this particular piece of legislation, federal law enforcement witnesses made it clear that existing federal law is more than adequate to punish any actual criminal conduct associated with the current financial crisis.<sup>17</sup> Yet, it was passed and signed into law. This is certainly not a unique example. This type of redundancy is commonplace in the federal legislative process.

<sup>14</sup> 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).

<sup>15</sup> See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 Am. U. L. Rev. 747, 764 (2005).

<sup>16</sup> Letter from the Nat'l Ass'n of Criminal Def. Lawyers and the Heritage Found., to the Honorable Patrick Leahy and the Honorable Arlen Specter, (Feb. 11, 2009), available at <http://www.nacdl.org/public.nsf/freeform/Testimony?OpenDocument>.

<sup>17</sup> *The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing on S. 386 Before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. (Feb. 11, 2009).

### III. Possible Legislative and Policy Reforms

Aside from its fundamental inconsistency with our justice system, the abuse of overcriminalization exacts a heavy burden on innocent defendants, the federal judiciary, the federal prisons, and taxpayers. The massive federal criminal code may require significant reform; however, there are several reforms that can be implemented immediately to prevent the situation from getting further out of control and to reduce significantly the negative effects of overcriminalization.

**To ensure that only those with sufficient culpability are convicted and punished, we recommend that Congress enact two new federal statutes to address the frequently lacking *mens rea* requirements in federal criminal offenses.** First, Congress should enact a federal statute that would apply a default *mens rea* requirement to criminal statutes that lack any such requirement. Second, Congress should enact a federal statute that would mandate that any introductory or “blanket” *mens rea* requirement be applied to all material elements of the offense. These two reforms will ensure that innocent, law-abiding citizens are protected from unjust conviction under criminal offenses with inadequate *mens rea* provisions. Further, these reforms will require Congress to enact criminal offenses with weak or no *mens rea* requirements *consciously* by setting out its intent in clear legislative language. With these two simple legislative enactments, Congress will take the first step towards preventing disparate treatment, unjustified punishment, and the conviction of law-abiding citizens. In addition, Congress should be skeptical of Department of Justice efforts to water down offense elements – a practice that has exacerbated the negative impact of the harm of minimum intent requirement.

**To guarantee that the punishment is proportionate with the blameworthiness of the individual defendant and the harm caused by the defendant’s conduct, we recommend the repeal of all mandatory minimum sentences.** The repeal of mandatory minimum sentences will remove the shackles from judges who are frequently forced to sentence defendants without regard for their intent, conduct, and culpability. While a full repeal of mandatory minimums will not ensure that the punishment always fits the crime, it will increase the likelihood of such. At a minimum, we urge this body against any effort to make the federal sentencing guidelines more rigid or to further limit the discretion of individual judges. The power to sentence properly belongs to the judge, and not the prosecutor who brings the charges. Increasing judicial discretion at sentencing will keep that power in the right hands. Further, repealing mandatory minimums and providing judges with the ability to craft defendant-specific sentences may have the positive effect of decreasing the number of innocent individuals who plead guilty rather than risk going to trial.

**To prevent the further expansion of the federal criminal code, we recommend that Congress strengthen its rules and procedures to require that the Judiciary Committee of each chamber receive sequential referral over every Congressional bill that adds or modifies criminal offenses and penalties.** This amendment should not be limited to those bills related to Title 18, but rather it should cover any bill that contains any type of criminal offense or penalty regardless of its particular location in the federal code. The House and Senate Judiciary Committees are uniquely positioned to take on the responsibility of ensuring that all new criminal offenses are necessary and not duplicative. Further, these committees have specialized knowledge on fundamental criminal law principles such as *mens rea*, vicarious liability, sentencing and federalism, to name a few. Funneling all new criminalization through the Judiciary Committees, which are limited in time and resources, will facilitate the prioritization of criminalization and reduce the proliferation of unnecessary federal criminal offenses.

**IV. Conclusion**

The federal judiciary is backlogged, the federal prisons are overflowing, and the number of innocent, law-abiding individuals locked behind bars is growing. In these tough economic times especially, the cost of enforcing the federal criminal code constitutes reason alone for serious reflection, though the most important reason has always been and remains that we should have a rational and fair criminal justice administration.

Overcriminalization causes harm to every member of our society. This costly abuse must come to a halt now and be replaced by serious and genuine reforms. For all these reasons, we welcome this hearing, we urge the committee to make the most of this window of opportunity, and we recommend the committee enact legislation embodying the aforementioned reforms.

\* \* \*

The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

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Mr. SCOTT. Without objection, the hearing is adjourned.  
[Whereupon, at 6:08 p.m., the Subcommittee was adjourned.]



## A P P E N D I X

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### MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON CRIME, TERRORISM, AND HOMELAND SECURITY

Mr. Chairman, I ask for leave to extend my remarks for the record. Mr. Chairman, I salute your leadership in convening this important hearing to address the issue of Over-Criminalization of Conduct/Over-federalization of Criminal Law. I would like to thank our distinguished witnesses, the Honorable Richard Thornburg, former Attorney General, Prof. Steve Salzburg, George Washington Univ. Law School, Tim Lynch—CATO Institute, Prof. James A. Strazzella, Temple University School of Law, Ms. Kathy Norris, and Krister Evertson.

As a former trial state court judge, I like most jurists disfavor pre-set and static sentencing formulas set by the federal government rather than relying upon state legislators and state judges. Most members of the bench view federal sentences and many federal criminal statutes as being redundant and devices that bar judges from employing hers or his discretion during the sentencing phase of trial. Indeed, such formulas shift the responsibility for selecting the penalty for a certain crime from the judge—an objective legal mind that spends hours listening to testimony and examining the facts and law of a particular case—to legislators who create these rigid guidelines far in advance of a particular criminal incident.

As of 2003 there were over 4,000 offenses that carried criminal penalties in the United States code. Unfortunately, some of these punish conduct that is not typically considered to be criminal. This is because an increasing number of statutes require that the culpable party have only general intent, i.e. that he or she acted “knowing” of the facts of the underlying conduct but not necessarily with intent to break the law, with knowledge that he or she was breaking the law, or even with knowledge that he or she was doing anything wrongful. This becomes especially important and relevant as Congress criminalizes more and more conduct that involves regulatory violations and highly technical misconduct.

From the start of the year 2000 through the end of 2007, 452 additional crimes were created, for a total of at least 4,450 federal crimes. This increase of 452 over the seven year period between 2000 and 2007 averages 56.5 crimes per year—roughly the same rate at which Congress created new crimes in the 1980s and 1990s. In fact, in a 1998 report, the ABA’s Task Force on the Federalization of Criminal Law reported that more than 40% of the federal criminal law provisions enacted since the Civil War had been enacted since 1970.

And while I have no fondness for federal criminal sentences, and redundant federal statutes, I have an even greater disdain for criminal activity itself particularly that committed against the poor, women, children, and other vulnerable populations. Thus, I believe that a balance must be struck. A balance that seeks to protect the public wellbeing while expanding our judicial system by restoring the judiciary’s power to fix penalties based upon the unique circumstance of particular cases.

Mr. Chairman, as you know, many of the sentencing laws in the federal criminal code have led to unprecedented rates of incarceration over a half century. The federal prison population has quadrupled since the Sentencing Reform Act of 1984, and now totals over 200,000 inmates. More than half of all federal inmates are serving sentences for drug offenses. In 2007, almost thirty-five percent of all federal convictions were for drug offenses, and 65% of these offenders received mandatory minimum sentences. Many of these offenders had only low-level involvement in drug activity. For example, 66% of the federal crack cocaine offenders in 2005 had only low-level involvement in drug activity.

The United States now incarcerates far more people than any other country in the world, with more than 700 incarcerated for every 100,000 in the population, or one in every 54 adult males ages 18 and older. There are more people in the prisons of America than there are residents in states of Alaska, North Dakota, and Wyoming combined. Over one million people have been warehoused for nonviolent, often petty crimes. The European Union, with a population of 370 million, has one-sixth the number of incarcerated persons as we do, and that includes violent and non-violent offenders. This is one third the number of prisoners which America, a country with 70 million fewer people, incarcerates for nonviolent offenses.

Our federal prison system is struggling to keep up with this growth. At the end of last year, the Bureau of Prisons was operating at 36% over capacity. High-security penitentiaries were operating at 46% over capacity. This ever-increasing rate of incarceration comes with a high price tag. Federal correction costs have soared in the last 25 years, increasing 925% between 1982 and 2007 to over \$5.4 billion. This growth in incarceration also imposes indirect costs on communities. Researchers estimate that at least 1.5 million children have a parent in prison, and the majority of these children are under ten years old. Researchers have also shown that children of prisoners have increased risks of poverty and other deprivations, abuse, foster care placement, difficulties in school with both academic and social failures, as well as increased risks of ending up in the juvenile and criminal justice systems.

A close examination of this matter reveals that the hardest hit by federal criminal statutes have been African Americans and Hispanics, who make up a large segment of the 18th Congressional district that I represent. In addition to the disparate impact upon ethnic minorities, federal criminal sentences also yield irrational sentencing results.

I introduced two important remedies, starting with H.R. 265, the Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009. This bill was intended to eliminate the unjust and unequal federal crack/cocaine sentencing disparity in America. I sought to achieve this end by amending the Controlled Substances Act and the Controlled Substances Import and Export Act to increase the amount of a controlled substance or mixture containing a cocaine base (i.e., crack cocaine) required for the imposition of mandatory minimum prison terms for crack cocaine trafficking.

Mr. Chair, after working with you and our friends in the Republican leadership, I'm happy that you've incorporated the principals of my bill in new legislation that we hope to mark up today. I salute you and look forward to working with you to ensure "our bill" is passed and signed into law.

In addition, I've introduced H.R. 61, the "Federal Prison Bureau Nonviolent Offender Relief Act of 2009" also known as a Good Time Bill. My bill provides for the early release of non-violent offenders who have attained the age of at least 45 years of age, have never been convicted of a violent crime, have never escaped or attempted to escape from incarceration, have not engaged in any violation, involving violent conduct, of institutional disciplinary regulations, and have completed at least half of their sentence.

H.R. 61 seeks to ensure that in affording offenders a second chance to turn around their lives and contribute to society, ex-offenders are not too old to take advantage of a second chance to redeem themselves. A secondary benefit of H.R. 61 is that it would relieve some of the strain on federal, state, and local government budgets by reducing considerably government expenditures on warehousing prisoners.

Mr. Chairman, I firmly believe that the disparate impact of federal criminal sentences on African American is not only unjust, but it also leaves a lasting stain on the fabric of the American judicial system. These laws have been shown to compromise the basic fairness and integrity of the federal criminal judicial system. For example, the U.S. Sentencing Commission found that mandatory minimum sentencing "appears to be related to the race of the defendant, where Whites are more likely than non-whites to be sentenced below the applicable mandatory minimum." The facts reveal that White offenders were less likely to receive the mandatory minimum sentence than Black or Hispanic offenders. The African American and Hispanic communities are well aware of this disparity, and as such these populations have grown distrustful of our system of checks and balances.

Mr. Chairman, Judge Gohmert, fellow colleagues, I salute us for holding this hearing to take a comprehensive examination of our federal criminal statutes. I look forward to hearing from our witnesses and I yield back the balance of my time.

Re: July 22, 2009 Subcommittee Hearing  
Strazzella

to: Veronica Eligan  
from: Jim Strazzella 8-10-09



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Earlier, I responded to the open-record invitation by sending the following,

**Professor Strazzella. In response to Chairman Scott's question, I might add this.**

Whatever else may be said about the stories told by the citizen witnesses at this hearing, their testimony emphasizes another often-overlooked consequence of legislating a crime: Such legislation empowers executive agencies to investigate and inquire about citizen conduct, to search and seize, to arrest and charge citizens, sometimes sensibly, sometimes not. This empowerment also needs to be carefully considered when Congressionally making conduct a federal crime.

( But I now see from the transcript that the question is actually attributed to Representative Lee — asked at Draft Tr. p 65, line 1473 (with comments concluded at p 67, line 1511). So, I would correct my above additional comment to read:

**Professor Strazzella. In response to Representative Lee's question: I might add this.**

Whatever else may be said about the stories told by the citizen witnesses at this hearing, their testimony emphasizes another often-overlooked consequence of legislating a crime: Such legislation empowers executive agencies to investigate and inquire about citizen conduct, to search and seize, to arrest and charge citizens, sometimes sensibly, sometimes not. This empowerment also needs to be carefully considered when Congressionally making conduct a federal crime.

Thanks,  
Jim  
8/10/09





JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE  
OF THE UNITED STATES  
*Presiding*

JAMES C. DUFF  
*Secretary*

July 30, 2009

Honorable Robert C. Scott  
Chairman  
Subcommittee on Crime, Terrorism,  
and Homeland Security  
Committee on the Judiciary  
United States House of Representatives  
Washington, DC 20515

Dear Mr. Chairman:

The Judicial Conference of the United States strongly opposes the federalization of crimes traditionally prosecuted by the states because it unduly drains limited federal resources that should be reserved for offenses truly warranting federal prosecution. This is of particular concern in light of the fact that the federal criminal code includes more than an estimated 4,400 statutes, and has grown at a rate of approximately 500 new offenses per year for the past 25 years. Today, the federal code encompasses such crimes as carjacking and failure to pay child support.

Such a dual system, in which many crimes are punishable by both state and federal law, can result in wasted resources and inefficiencies. The Judicial Conference believes that the negative effects of inappropriate federalization greatly impact upon the federal courts' ability to dispose of crimes that *do* arise from appropriately-defined federal questions involving national interests, and impede the ability to fulfill civil responsibilities in a timely manner. In his 1999 Year-End Report on the Federal Judiciary, Chief Justice Rehnquist quoted the American Bar Association's bipartisan Task Force on Federalization of Criminal Law, warning against "the long-range damage to real crime control and to the nation's structure caused by inappropriate federalization."

The Judicial Conference's opposition to the federalization of traditional state crime is both consistent and long-standing. See, e.g., JCUS-MAR 82, pp. 38-39; JCUS-SEP 90, p. 70; JCUS-SEP 91, p. 45; JCUS-SEP 92, p. 57; JCUS-MAR 93, p. 13; and JCUS-SEP 97, p. 65.

In particular, the Judicial Conference has recommended that Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Criminal and civil jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters. JCUS-SEP 95, p. 40.

Honorable Robert C. Scott  
Page 2

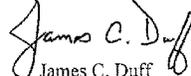
In determining which offenses warrant federal prosecution, the Judicial Conference has recommended that Congress should be encouraged to allocate criminal jurisdiction to the federal courts only in relation to the following five types of offenses:

- The proscribed activity constitutes an offense against the federal government itself or against its agents, or against interests unquestionably associated with a national government; or the Congress has evinced a clear preference for uniform federal control over this activity.
- The proscribed activity involves substantial multistate or international aspects.
- The proscribed activity, even if focused within a single state, involves a complex commercial or institutional enterprise most effectively prosecuted by use of federal resources or expertise. When the states have obtained sufficient resources and expertise to adequately control this type of crime, this criterion should be reconsidered.
- The proscribed activity involves serious, high-level or widespread state or local government corruption, thereby tending to undermine public confidence in the effectiveness of the local prosecutors and judicial systems to deal with the matter.
- The proscribed activity, because it raises highly sensitive issues in the local community, is perceived as being more objectively prosecuted within the federal system.

The Judicial Conference strongly opposes further legislation that will continue the trend to federalize traditional state crime. It further urges Congress to review existing federal criminal statutes with the goal of eliminating provisions no longer serving an essential federal purpose, to revise the federal criminal code so that it fulfills the spirit of the limited jurisdiction intended for federal questions involving crimes, and to utilize "sunset" provisions to ensure periodic reevaluation of the purpose and need for any new federal offenses that may be created. JCUS-SEP 95, p. 40.

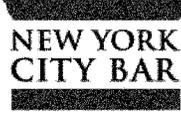
Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

  
James C. Duff  
Secretary

Identical letter sent to: Honorable Louie Gohmert

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NEW YORK  
CITY BAR

July 22, 2009

Hon. John Conyers  
Chairman  
House Judiciary Committee  
2624 Rayburn, House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Hon. Patrick Leahy  
Chairman  
Senate Judiciary Committee  
433 Russell, Senate Office Building  
U.S. Senate  
Washington, D.C. 20510

Hon. Robert Scott  
Chairman  
House Judiciary Subcommittee on Crime,  
Terrorism, and Homeland Security  
1201 Longworth, House Office Building  
U.S. House of Representatives  
Washington, D.C. 20515

Hon. Benjamin Cardin  
Chairman  
Senate Judiciary Subcommittee on Terrorism  
and Homeland Security  
509 Hart, Senate Office Building  
U.S. Senate  
Washington, D.C. 20510

Hon. Janet Napolitano  
Secretary  
U.S. Department of Homeland Security  
Washington, D.C. 20528

Hon. Tom Vilsack  
Secretary  
U.S. Department of Agriculture  
1400 Independence Ave., S.W.  
Washington, D.C. 20250

Hon. Eric Holder  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, D.C. 20530

**Re: The Animal Enterprise Terrorism Act, 18 U.S.C. § 43**

Dear Senator Leahy, Representative Conyers, Representative Scott, Senator Cardin, Secretary Napolitano, Secretary Vilsack, and Attorney General Holder:

On behalf of the Legal Issues Pertaining to Animals Committee and the Civil Rights Committee of the New York City Bar Association, we write to urge the repeal of the Animal Enterprise Terrorism Act (“AETA”), 18 U.S.C. § 43, because the statute’s overbreadth and vagueness infringe upon protected First Amendment activity. We also urge the dismissal of the pending indictments under AETA<sup>1</sup> and request that the Attorney General forebear from seeking any further prosecutions under the statute.

<sup>1</sup> Indictment of William Viehl and Alex Hall, *United States v. Viehl*, No. 2:09-cr-00119 (D.C. Utah Mar. 4, 2009), available at <http://www.usdoj.gov/usao/ut/press/indictments/Viehl%20et%20al%20indictment.pdf>; Indictment of Joseph Buddenberg, Maryam Khajavi, Nathan Pope, and Adriana Stumpo, *United States v. Buddenberg*, No. 5:09-

AETA makes it a federal crime to use interstate commerce “for the purpose of damaging or interfering with the operations of an animal enterprise” by “intentionally damag[ing] or caus[ing] the loss of any real or personal property” connected to an animal enterprise; by “intentionally plac[ing] a person in reasonable fear” of death or serious bodily injury by “threats, acts of vandalism, property damage, criminal trespass, harassment, or intimidation;” or by “conspir[ing] or attempt[ing] to do so.” 18 U.S.C. § 43(a)(1-2).

AETA raises serious constitutional problems because, in targeting actions that cause only economic harm, AETA reaches protected First Amendment activity including protest and picketing. We have no doubt that a properly-drafted statute could constitutionally prohibit physical property damage or serious threats of death or bodily injury. But AETA’s expansive definition of damages threatens to criminalize public speech activities, which often have the coincidental or secondary effect of causing the disfavored business profit or reputation losses. On a plain reading of the statute, demonstrators picketing in front of a local pet store could be prosecuted if the store lost sales or business goodwill as a result. AETA also sets a broad range of possible criminal penalties for its violation, including fines and imprisonment ranging from less than one year to a life term. 18 U.S.C. § 43(b). Given its broad scope, the statute’s criminalization of protected speech activities is particularly troubling.

AETA infringes on protected First Amendment actions like pamphleteering, peaceful protest, and demonstrations by animal rights and other groups. The pending indictment in *United States v. Buddenberg*, discussed in detail below, illustrates how AETA’s expansive scope enables prosecution of animal rights demonstrators for protesting animal testing and conducting Internet searches. The *Buddenberg* indictment also reveals how misapplying the label of terrorism to a statute may mask its serious infringement of constitutional rights. We urge the repeal of AETA and the dismissal of the pending indictments for the following reasons: (1) the statute is an overly broad content-based speech restriction; (2) the statute’s vague language fails to notify individuals of permitted and prohibited conduct, chilling their abilities to speak and protest freely; and (3) the statute’s savings clause does not remedy its constitutional defects. We discuss each of these points in detail below.

### (1) AETA is an Overly Broad Content-Based Speech Restriction

AETA cannot pass strict scrutiny under the First Amendment because it defines offenses based on the content of the penalized speech and is not narrowly tailored. The pending indictment in *Buddenberg*<sup>2</sup> demonstrates the statute’s broad reach, encompassing protected speech activities like demonstrations opposing animal testing and protest-related research on the Internet. Moreover, the *Buddenberg* indictment shows AETA’s misapplication of “terrorism” to animal rights protest activity. These defendants were charged with violating AETA for allegedly protesting outside of the homes of animal researchers associated with the University of California. AETA’s expansive definition of “animal enterprise” includes not only research institutions and animal processing facilities, but pet stores, zoos, and any business that sells animal products. AETA’s inclusion of economic damage within its scope makes the statute unconstitutionally overbroad. By imposing criminal penalties for causing economic loss, AETA reaches protest activity that results in lost profits, use of property, or business opportunities. Therefore, AETA’s language is over-inclusive in

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er-00263 (N.D. Cal. Mar. 12, 2009), available at [http://www.greenistheword.com/blog/wp-content/images/aeta4\\_indictment.pdf](http://www.greenistheword.com/blog/wp-content/images/aeta4_indictment.pdf).

<sup>2</sup> This letter focuses on the indictment in *Buddenberg* because the criminal complaint in that case provides substantial detail regarding the facts of the case. In contrast, no criminal complaint was filed in *United States v. Viehl*, and the underlying facts are not detailed in the indictment. The indictment in *Viehl* merely indicates that the defendants were indicted for “intentionally damag[ing] and caus[ing] the loss of . . . property” of two mink farms in August and October of 2008. Indictment of William Viehl and Alex Hall at 1-2.

its definition of enterprises and criminal actions targeting them. For these reasons, AETA is overly broad in violation of the First Amendment.

AETA is a content-based restriction on speech because it targets speech by animal rights activists. “Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal citation, quotation marks, and emphasis omitted). In a statement supporting AETA’s passage, the Department of Justice described the statute as enabling prosecution of “animal rights extremists.”<sup>3</sup> As a content-based restriction on speech, AETA must serve a compelling state interest and be narrowly tailored to survive a court’s strict scrutiny under the First Amendment. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992). Content-based restrictions are presumptively invalid because such discrimination “raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.” *Id.* at 382, 387 (internal citation omitted). AETA fails strict scrutiny because it is not narrowly tailored and its overly broad language encompasses protected First Amendment speech.

The pending indictment in *Buddenberg* illustrates AETA’s wide application to traditionally protected forms of political speech. A statute violates the First Amendment where its overly broad reach is “substantial . . . judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Criminal statutes, like AETA, “must be scrutinized with particular care; those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application.” *City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (internal citations omitted). The *Buddenberg* defendants were indicted under Section (a)(2)(B) of AETA, which prohibits using interstate commerce “for the purpose of damaging or interfering with the operations of an animal enterprise” by “intentionally plac[ing] a person in reasonable fear” of death or bodily injury. The defendants staged several animal rights demonstrations at the homes of University of California researchers.<sup>4</sup> During these demonstrations, the defendants chanted animal “liberation” slogans and chalked anti-animal testing messages on the public sidewalks. The defendants also used an Internet terminal at a Kinko’s shop to gather information about the biomedical researchers, and they made fliers with animal rights slogans to distribute at a local cafe. In the conspiracy count, the indictment lists two of the protests at researchers’ homes, along with the defendants’ “use[ ] [of] the Internet to find information” on the researchers, as “overt acts” “in furtherance of the conspiracy.”<sup>5</sup> In the count charging the defendants with a violation of Section (a)(2)(B), the indictment does not specify any particular acts, but includes the time period covering the protests.<sup>6</sup> The *Buddenberg* indictment shows AETA’s overbroad application, covering protected First Amendment speech like political demonstrations and Internet research activity.

The *Buddenberg* indictment also serves as a cautionary example of the danger that “anti-terrorism” statutes pose to free speech, especially when the terrorism label is misapplied. The word “terrorism” appears only in AETA’s title, but legislative history reveals that the bill was intended to prohibit allegedly “extremist” protest activity. A Department of Justice statement supporting enactment of AETA refers to “animal rights extremists,” their “terror tactics,” and their separation from

<sup>3</sup> *Hearing on H.R. 4239 Before the Subcommittee on Crime, Terrorism, and Homeland Security*, 109th Cong. 3 (2006) (statement of Brett J. McIntosh, Deputy Assistant Att’y Gen.).

<sup>4</sup> The details set out above are taken from the Affidavit of FBI Agent Lisa Shaffer in Support of a Criminal Complaint, *United States v. Buddenberg* (N.D. Cal. Feb. 19, 2009).

<sup>5</sup> *Buddenberg* Indictment at 2.

<sup>6</sup> All of the described protests were non-violent, with the exception of a minor altercation with a researcher in February 2008. However, this incident is not listed in either count of the defendants’ indictment.

“mainstream activities that should be part of the public discourse.”<sup>7</sup> The preamble to the enrolled bill states that AETA’s purpose is “[t]o provide the Department of Justice the necessary authority to apprehend, prosecute, and convict individuals committing animal enterprise terror.”<sup>8</sup> Appending the label of terrorism to AETA’s title was apparently intended to buttress the statute from opponents who were concerned about its encroachment on protected First Amendment activity. However, designating speech as “terrorism” does not permit its suppression. “[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. . . . Any variation from the majority’s opinion may inspire fear.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969). The *Buddenberg* defendants’ opposition to animal testing may have represented an unpopular perspective, but it did not constitute a threat of terrorism. AETA’s breadth allows prosecution of a variety of protected First Amendment activity, and the “terrorism” label in its title only serves as a distraction from the statute’s unconstitutionality.

AETA’s definition of “animal enterprise” also violates the First Amendment’s requirement that a content-based restriction on speech be narrowly tailored. AETA defines “animal enterprise” so broadly that it encompasses a vast number of firms and organizations, some of which only incidentally implicate animal rights issues. Section (d)(1)(A) states that “animal enterprise” means a “commercial or academic” organization that “uses or sells animals or animal products for profit, food or fiber production, agriculture, education, research, or testing.” Including all enterprises that “use[ ] or sell[ ]” animal products gives the statute nearly limitless application. AETA covers businesses as diverse as a “zoo, aquarium, animal shelter, pet store, breeder, furrier, circus, or rodeo, or . . . any fair . . . intended to advance agricultural arts and sciences.” 18 U.S.C. § 43(d)(1)(B-C). As applied to these “animal enterprises,” Section (a)(1) includes broad language prohibiting “damage” and “interference” with these organizations’ operations. AETA’s expansive definition of “animal enterprise” violates the First Amendment’s requirement that the statute be narrowly tailored.

Section (a)(2)(A) of AETA, which criminalizes acts causing economic damage, also fails strict scrutiny. This section prohibits any act, with the purpose of “damaging or interfering” with an animal enterprise, that “intentionally damages or causes the loss” of property either belonging to an animal enterprise or to a person connected with an animal enterprise. AETA’s scope reaches beyond that of its predecessor, the Animal Enterprise Protection Act, which criminalized “physical disruption” of a covered entity.<sup>9</sup> In congressional hearings on AETA, the Department of Justice supported the new statute’s expanded coverage of activities on the ground that it would “avoid the narrowness of ‘physical disruption’ by focusing instead on economic damage and disruption . . . .”<sup>10</sup> However, by criminalizing intentional damage under such a broad definition, AETA sweeps up speech long protected by the First Amendment. Many protest activities have as secondary goals alerting customers to the company’s business activities, damaging the company’s goodwill in the business community, discouraging sales and decreasing future profits, or causing the company to invest in increased security measures. All of these harms cause a loss to intangible property within the scope of Section (a)(2)(A). Protesting outside a company and picketing at a retail outlet have long been recognized as protected speech under the First Amendment even when the goal is “to advise customers and prospective customers of the relationship existing between the employer and its employees . . . induc[ing] such customers not to patronize the employer.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (internal citation omitted). Upholding the boycott as protected speech, the *Claiborne* Court noted that the protestors “certainly foresaw— and directly

<sup>7</sup> Statement of Brett J. McIntosh at 2, 4.

<sup>8</sup> S. 3880, 109th Cong. (2006) (enacted).

<sup>9</sup> Statement of Brett J. McIntosh at 4 (stating that AETA would correct for AEPA’s insufficient coverage).

<sup>10</sup> *Id.*

intended—that the merchants [subject to the boycott] would sustain economic injury as a result of their campaign.” *Id.* at 914. Section (a)(1)(A), on its face, could be used to prosecute individuals for carrying anti-fur signs outside a furrier if the protestors intended to shame potential customers out of making purchases.<sup>11</sup> Such “[b]road prophylactic rules in the area of free expression are suspect.” *NAACP v. Button*, 371 U.S. 415, 438 (1963). The Supreme Court has plainly stated that it does not “assume that, in . . . subsequent enforcement [of a potentially problematic statute], ambiguities will be resolved in favor of adequate protection of First Amendment rights. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” *Id.* (internal citations omitted). The breadth of AETA’s language has the potential to prohibit legitimate First Amendment speech like whistleblowing and picketing based on the targeted business’s economic losses from the protest. Sections (a)(1) and (a)(2)(A) lack adequate specification to limit their scope within constitutional boundaries.

### **(2) AETA’s Vague Language Fails to Provide Notice and Chills First Amendment Activity**

A statute may violate due process if its language is too vague. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Supreme Court has identified three means by which a statute may be “void for vagueness”: (1) the statute fails to give proper notice of what conduct is permissible and what conduct is prohibited; (2) the statute allows for arbitrary or discriminatory enforcement by government officials; or (3) the statute has chilling effects on First Amendment protected activity. *Id.* at 108-109. AETA fails to notify citizens of the line between permissive and non-permissive conduct, grants too much discretion in enforcement to government officials, and thus chills protected speech.

A law is void on its face if it is so vague that “men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). In addition, “If the line . . . between the permitted and prohibited [speech] activities . . . is an ambiguous one, [a court] will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression.” *Button*, 371 U.S. at 432. AETA’s breadth and its inclusion of acts that cause only economic damage are confusing and fail to provide sufficient limits on its scope. While the statute defines an offense as one with “the purpose of damaging or interfering with . . . an animal enterprise,” it does not state whether this purpose must be *because* the animal enterprise is such an organization. For example, it is unclear whether labor organizers protesting working conditions at a grocery store (which falls within the definition of “animal enterprise” because it sells “animal products”) may be committing an offense under AETA even if they are unconcerned with the store as an animal enterprise. While Section (d)(3)(B) includes an exception for certain “lawful economic disruption,” this exception does not clarify the scope of the statute and indeed further confuses the reader. Section (d)(3)(B) exempts from the definition of economic damages “lawful economic disruption (including a lawful boycott) that results from lawful public, governmental, or business reaction to the disclosure of information about an animal enterprise.” 18 U.S.C. § 43(d)(3)(B) (emphasis added). The statute does not explain the intended distinction between the economic damages that are prohibited under the statute and the economic disruption that is lawful. Despite the importance of differentiating between actions that cause “disruptions” and those that cause “damages,” Section (d)(3)(B) offers no clarification except for its parenthetical reference to a “lawful boycott.” The vagueness in several key statutory terms leaves an average person confused about

<sup>11</sup> The exemption for “lawful economic disruption” under Section (d)(3)(B) and the savings clause in Section (e)(1) are discussed *infra* in points 2-3.

permissible and prohibited activity under AETA and may lead to discriminatory enforcement by government officials because of the lack of guidance that the statute offers.

AETA's vague terms will also cause individuals to "steer far wider of the unlawful zone [of activity] than if the boundaries of the forbidden area were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (internal citation omitted). AETA's lack of specification of purpose under Section (a) may prevent individuals contemplating protest of an animal enterprise from engaging in those actions for fear of prosecution under AETA, even if their complaints have nothing to do with the company's treatment of or policies regarding animals. Under AETA's expansive definition of "animal enterprise," a wide range of speech activity at research universities, businesses selling animal products, and agricultural firms may be hampered. The wording of Section (d)(3)(B)'s exception may also chill protected speech. Section (d)(3)(B) exempts from penalty "lawful economic disruption . . . that results from lawful public . . . reaction to the disclosure of information about an animal enterprise." Because penalties under the statute are premised in part on the amount of economic damage an offense causes, the Section (d)(3)(B) exception is highly important to individuals charged under the statute. But a person who wishes to protest a visiting circus's immoral treatment of animals may be unable to determine ex ante whether any lost profits resulting from his actions will qualify as an exempted "disruption" or penalized "damages," and may decide to remain silent. AETA's limitation of the exemption to the "reaction" to information about an animal enterprise may also fail to capture some protected speech. Likewise, Section (a)'s overly broad language characterizing an offense may appear to reach so widely that individuals check their own speech rather than risk violating the vague, insufficiently defined terms of the statute. "The objectionable quality of vagueness and overbreadth [is in] . . . the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 432-33. AETA's vague and broad language threatens to chill protected First Amendment speech in violation of the Constitution.

### (3) AETA's Savings Clause Fails to Remedy the Constitutional Defects

Section (c) states, "Nothing in this section shall be construed (1) to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution." 18 U.S.C. § 43(c)(1). However, the presence of a savings clause alone does not necessarily save a statute from unconstitutionality. The Supreme Court has suggested that such generally worded savings clauses may themselves be impermissibly vague. See *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 575-76 (1987) (rejecting city's limiting construction of ordinance as vague and "murky," and thus striking down city ordinance that made airport "a virtual 'First Amendment Free Zone'" as "substantially overbroad"). District courts have struck down similar ordinances despite their savings clauses, on the grounds that the clauses were "inherently vague and unenforceable, and hence unconstitutional." *Rubin v. City of Santa Monica*, 823 F. Supp. 709, 712 n.6 (C.D. Cal. 1993);<sup>12</sup> see also *Nat'l People's Action v. City of Blue Island*, 594 F. Supp. 72, 80 (N.D. Ill. 1984) (including a savings clause in attempt to cure overbreadth of statute made it "unconstitutionally vague" since diversity of First Amendment law gave individuals insufficient notice of ordinance's coverage). AETA's savings clause offers an example of protected conduct ("peaceful picketing"), but its parenthetical reference provides insufficient guidance for a person faced with a highly fact specific question of whether a certain activity falls within AETA's scope. See *Nat'l People's Action*, 594 F. Supp. at 79 (citing Lawrence Tribe, *American Constitutional Law*, § 12-26 at 716 (1978)) ("To construe a statute by reference to such a fact-

<sup>12</sup> The ordinance struck down in *Rubin* required permits for park use except for meetings "organized for the purpose of conveying a . . . message protected by . . . the First Amendment." *Rubin*, 823 F. Supp. at 712 n.5.

oriented standard is to inject an excessive element of vagueness into the law because the standard itself takes shape only as courts proceed on a retrospective, case-by-case basis . . ."). Therefore, at best, AETA's savings clause provides insufficient guidance to a citizen and, at worst, is itself unconstitutionally vague.

We urge the repeal of AETA and the dismissal of the pending indictments because the statute's broad sweep criminalizes protected First Amendment activity. As discussed above, not only is AETA an overly broad content-based restriction on speech addressing animal rights, its vague language fails to notify individuals of permissive and prohibited behavior, chilling protected forms of protest under the First Amendment. AETA's saving clause fails to remedy either of these constitutional defects. The *Buddenberg* indictment demonstrates both AETA's far-ranging application and the danger of misapplying the label of terrorism to a statute that criminalizes protected speech.

The Legal Issues Pertaining to Animals Committee and the Civil Rights Committee of the New York City Bar Association welcome the opportunity to work with you on the vitally important interests discussed in this letter. Please contact us if you have questions about our recommendations or would like more information. You may reach the Legal Issues Pertaining to Animals Committee by contacting Jane Hoffman, Committee Chair, at [jehoffman@earthlink.net](mailto:jehoffman@earthlink.net). You may reach the Civil Rights Committee by contacting Peter Barbur, Committee Chair, at [pbarbur@cravath.com](mailto:pbarbur@cravath.com).

Thank you very much for your attention and concern.

Respectfully,

The Committee on Legal Issues Pertaining to Animals  
The Committee on Civil Rights

## **The Unlikely Orchid Smuggler: A Case Study in Overcriminalization**

*Andrew M. Grossman*

George Norris, a retiree, had turned his orchid hobby into a part-time business run from the greenhouse in back of his home. He would import orchids from abroad—Argentina, Brazil, Peru—and resell them at plant shows and to local enthusiasts. He never made more than a few thousand dollars a year from his orchid business, but it kept him engaged and provided a little extra money—an especially important thing as his wife, Kathy, neared retirement from her job managing a local mediation clinic.

Their life would take a turn for the worse on the bright fall morning of October 28, 2003, when federal agents, clad in protective Kevlar and bearing guns, raided his home, seizing his belongings and setting the gears in motion for a federal prosecution and jail time.

### **The Raid**

Around 10:00 am, three pick-up trucks turned off a shady cul-de-sac in Spring, Texas, far in Houston's northern suburbs, and into the driveway of Norris's single-story home. Six agents emerged, clad in dark body armor and bearing sidearms. Two circled around to the rear of the house, where there is a small yard and a ramshackle greenhouse. One, Special Agent Jeff Odom of the U.S. Fish and Wildlife Service, approached the door and knocked; his companions held back, watching Odom for the signal.

Norris, who had seen the officers arrive and surround his house, answered the knock at the door with trepidation. Odom was matter-of-fact. Within 10 seconds, he had identified himself, stated that he was executing a search warrant, and waved in the rest of the entry team for a sweep of the premises. Norris was ordered to sit at his kitchen table and to remain there until told otherwise. One agent was stationed in the kitchen with him.

As Norris looked on, the agents ransacked his home. They pulled out drawers and dumped the contents on the floor, emptied file cabinets, rifled through dresser drawers and closets, and pulled books off of their shelves.

When Norris asked one agent why his home was the subject of a warrant, the agent read him his Miranda rights and told him simply that he was not charged with anything at this time or under arrest. Norris asked more questions—What were they searching for? What law did they think had been broken? What were their names and badge numbers?—but the agents refused to answer anything. Finally, they handed over the search warrant, but they would not let Norris get up to retrieve his reading glasses from his office; only an agent could do that.

It was as if he were under arrest, but in his own home.

Attached to the warrant was an excerpt of an e-mail message, from two years earlier, in which a man named Arturo offered to have his mother “smuggle” orchids from Ecuador in a suitcase and send them to Norris from Miami. Norris remembered the

exchange; he had declined the offer and had stated that he could not accept any plants that were not accompanied by legal documentation.

The agents questioned Norris about the orchids in his greenhouse, asking which were nursery-grown and which were collected from the wild. Norris explained that nearly all of them had been artificially propagated; one agent, knowing little about orchids, asked whether this meant they had been grown from seeds.

The agents boxed and carried out to their trucks nearly all of Norris's business records, his computer, his floppy disks and CD-ROMs, and even installation discs. Then they left. Norris surveyed the rooms of his home. In his tiny office, papers, old photographs, and trash were strewn on the floor. Everything was out of place.

His wife arrived home shortly after the agents left. She had panicked when, calling home to talk to her husband, an agent picked up the phone and refused to put him on or answer any questions. It took the two of them hours to clean up the house and try to assess the damage.

### **A Passion Blossoms**

George Norris, now 73 and arthritic, carries his large frame wearily. His gestures are careful, as if held back by pain or fear, and his stride slow and deliberate. And his voice, no doubt once booming, is now softer and tentative. Visibly, he is a man who has been permanently scarred by experience.

Yet his mood and movements become animated when he discusses the birth of his passion for orchids. His first was a gift, twice over: A neighbor had received the blooming plant, straight from the store, for Mother's Day, and she gave it to Norris after the flowers faded. At the time, he had a small lean-to greenhouse and dabbled in horticulture. He put it there and forgot about it. A year later, as he was doing the morning watering, his eyes were drawn to two stunning yellow flowers on stems shooting out of the plant. They were prettier than any other flowers he had ever seen.

He dove into the world of orchids with an unusual passion, reading everything he could find on the subject. One book extolled the diversity of species in Mexico. It was not so far from Houston, and his wife spoke fluent Spanish, so they planned an orchid-hunting trip. In every small town, the locals would point them to unusual plants, often deep in the woods. Norris managed to collect 40 or 50 plants, and their beauty and diversity were stunning. He was hooked.

That was 1977, years before an orchid craze would hit the United States. All of a sudden, Norris found himself part of a small, close-knit community of orchid enthusiasts and explorers committed to finding and collecting the unknown species of Africa and South America. They communicated by newsletters and at regional orchid shows. While man had thoroughly covered and mapped the terrain of the world, the world of orchids was still frontier, with exotic specimens being discovered regularly.

Within a few years, orchids were taking up more and more of Norris's time and attention, and he had become dissatisfied with his work in the construction field. So he quit work and set off to see if he could make a living as a full-time explorer, finding orchids in the wild and introducing them to serious collectors in the U.S.

His new business was not initially a success. It took years to build up a mailing list of customers and credibility in the field. By the mid-1980s, he was beyond the break-even point, and from there, business kept growing. In 2003, revenues topped \$200,000—a huge sum considering that most plants sold for around \$10.

Norris, meanwhile, was gaining prominence. Through word of mouth, and after seeing his orchids in collections, more and more enthusiasts wanted to be on his mailing list, and he began using his catalogue as a platform for his views on orchids, the orchid community, and even politics. Orchid clubs all around the South invited him to deliver talks and slideshows.

Norris made a name for himself as one of the few dealers importing wild and non-hybrid plants. He got commissions from botany departments at several universities that needed non-hybrid plants for their research, from botanical gardens, and from the Bronx Zoo when it needed native orchids to recreate a gorilla habitat. Years later, some of those orchids are still a part of the zoo's Congo Gorilla Forest.

Norris's work took him to Costa Rica, Peru, Ecuador, Colombia, and other countries where exotic species grew wild. On each trip, he tried to meet local collectors and growers, contacts who could lead him to the best plants. Some of these, in later years, would become his chief suppliers.

Rules at the time were lax. In Mexico, Norris explained, "You could collect as many as you wanted" and get permits for them all. And with that paperwork, importing them into the U.S. was a breeze.

As orchids became more popular, however, that would change.

### **"The Regulation Is Out of Hand"**

Passion for the flower is not enough today to succeed in the orchid business. Moving beyond the standard hybrids sold at big-box stores requires either gaining a detailed knowledge of several complicated bodies of law or hiring attorneys. This is a necessity because not only is the law complicated, but the penalties for getting anything wrong are severe: fines, forfeiture, and potentially years in prison.

Trade in orchids is regulated chiefly by the Convention on International Trade in Endangered Species (CITES), an international treaty that has been ratified by about 175 nations. Though initially conceived to protect endangered animals, the subject matter was expanded to include flora as well.

CITES classifies species, and the limitations on their trade, in three appendices.

- Appendix I species are the most in danger of extinction; importing or exporting them from any CITES country is prohibited, except for research purposes.
- The species listed in Appendix II are less endangered and can be traded so long as they are accompanied by permits issued by the exporting country.
- Appendix III species are listed by individual countries and are subject to the permit requirement only when they originate in the listing country.

Determining the listing of a plant is not always an easy task. Some species of orchids are listed in Appendix I, and so cannot be traded, and the remainder are covered by Appendix II. Exporters, however, often have a tough time identifying plants, especially those collected from the wild. The result is rampant mislabeling of orchid species. Usually, this has few consequences, because permitting agencies and customs agents, who tend to focus on animals and invasive species, rarely have the expertise to recognize the often subtle differences between varieties of orchids, especially when they are not in bloom.

Making matters even more complicated, CITES contains a major exception to the tough restrictions of Article I. Article I plants that are artificially propagated are deemed to be covered by Article II and so may be traded. But artificial propagation is not simply a matter of ripping a plant from the wild and breeding it in a nursery. To take advantage of the exception, nurseries must be registered with CITES and obtain a permit from their government to remove a small number of plants from the wild for the purpose of propagation. Then there is the difficulty of distinguishing Article I plants raised in nurseries from those collected from the wild.

Countries that have joined CITES agree to enforce its requirements within their laws. This means establishing agencies to research domestic wildlife and, when appropriate, grant permits. It also requires close monitoring of imports and exports to ensure that no Appendix I species are traded and that shipments of species listed in Appendix II and Appendix III are properly permitted. While the treaty requires countries to “penalize” improper imports and exports, it does not require any specific penalties; that is left up to each country’s lawmakers.

In the United States, CITES is implemented through both the Lacey Act, a 1900 wildlife protection act that was amended in 1981 to protect CITES-listed species, and the Endangered Species Act (ESA). Both, in their original forms, covered only animals; plants were added later and made subject to the same restrictions as animals. Taken together, these laws prohibit trade in any plants in violation of CITES, as well as possession of plants that have been traded in violation of CITES.

More specifically, federal regulations lay out the requirements for importing plants. Every plant must be accompanied by a tag or document identifying its genus and species, its origin, the name and address of its owner, the name and address of its recipient, and a description of any accompanying documentation required for its trade, such as a CITES permit. The importer is required to notify the government upon the arrival of a shipment. After that, the plants are inspected by the Animal and Plant Inspection Service, a division of the U.S. Department of Agriculture, which checks for possible infestations, banned invasive species, and proper documentation. Any red flags can cause a shipment to be turned back at the border.

Violations also carry severe penalties. Under the ESA, “knowing” violations—that is, ones in which the dealer knew the basic facts of the offense, such as what kind of plant was being imported or that the CITES permit did not match the plant, though not the legal status of the plant, such as whether it was legal to import—can be punished by civil fines of up to \$25,000 for each violation, criminal fines of up to \$50,000, and imprisonment. The same conduct can also be punished under the Lacey Act, which

allows civil penalties of up to \$10,000 for each violation, criminal fines of up to \$20,000, and imprisonment of up to five years.

Importers also face possible legal penalties under more general federal statutes, such as those prohibiting false or misleading statements to government officials (imprisonment of up to five years); the mail fraud statute (20 years); the wire fraud statute (20 years); and the conspiracy statute (five years).

The result is that minor offenses, such as incorrect documentation for a few plants, are treated the same as the smuggling of endangered animals and can lead to penalties far more severe than those regularly imposed for violent crimes and dealing drugs. Because this legal risk is so great, many orchid dealers have stopped importing foreign plants—even those that can be traded legally—while others have sharply curtailed their imports.

Perversely, the result of this drop in legal imports has been a blossoming in black-market orchids, illegally imported into the country and commanding large premiums due to their rarity and allure. Meanwhile, those who continue to import plants through the proper channels, even if they do so with great care and top-notch legal advice, know that they could be ruined at any time by so much as a single slipup. As one academic ecologist put it, “The regulation is out of hand.”

Worse than that, it’s ineffective. “Habitat destruction poses much more of a threat to [the] survival” of orchid species than collection and trade do, concludes one survey of the ecology literature. In Singapore, for example, clearance of old-growth forest caused the extinction of 98 percent of orchid species versus 26 percent of other plants. While there are several examples of collection dealing the final blow to a vulnerable species—for example, the Vietnamese Lady Slipper—the vulnerability in each instance was due to development, particularly rain forest clearance.

CITES strictly regulates trade in orchids but does nothing to address this greater threat. Indeed, some argue that CITES has not protected a single species of orchid from extinction.

It may even have pushed a number of species into extinction. Orchid growers frequently complain that the treaty’s restrictions on collection from the wild restrict preservation efforts in the face of habitat destruction. Under CITES, it is illegal to collect wild orchids for artificial propagation without a permit, but obtaining a permit can take months if it can be had at all. By that time, the point may be moot: The habitat has already been destroyed. And when collection is allowed, it is highly regulated and usually limited to just a few plants. If those plants cannot be propagated, there is no second chance; even if another specimen exists, if it was not legally collected, neither are its offspring.

Further, there is evidence that regulation has served to increase wild collection and smuggling of rare species. Trade in *Phragmipediums* surged in advance of their Appendix I listing, leading to the loss of several species. After the listing went into effect, black-market prices rose for many species, increasing incentives for smugglers. Growers, meanwhile, struggled to collect species from the wild legally for propagation. In this way,

CITES benefits poachers while putting hurdles in the path of legitimate, conservation-minded collectors.

The other group that benefits are the large orchid growers of Germany and the Netherlands, which supply the bulk of the world market. The Dutch, in particular, lobbied for the inclusion of Phrags in Article I, despite little evidence that Phrags were more endangered than other orchids, on the grounds that they were difficult to distinguish from plants from the unrelated Paphiopedilum family. The listing stifled growing competition with European growers in the potted-plant market from lower-cost producers in South America. The respite, however, lasted only a few years—the time it took for dealers to cultivate ties with growers in Southeast Asia, whose output multiplied, and push prices down.

The fundamental problem may be that CITES is simply a poor fit for plants. As originally conceived, the treaty was intended to cover only endangered animals; plants were added toward the end of negotiations. The amendment was crude, doing little more than replacing “animals” in every instance with “animals or plants.” An orchid picked from the wild, which could produce a thousand seedlings in short order, is subject to the same regulation as an elephant, a female of which species will produce fewer than 10 offspring in its decades-long lifespan. And by extension, that orchid and elephant are subject to the same means of criminal enforcement in the United States.

The difference, needless to say, is that elephant poaching may lead to that species’ extinction, while picking the orchid will more likely lead to its species’ preservation in the face of widespread habitat destruction. It is truly a perverse result that furthering the ends of CITES and U.S. environmental law carries the same massive penalties as frustrating them.

### **Risky Business**

George Norris was among that group of legal importers, counting on his common sense and understanding of orchids to see him through any legal risks. That would be his downfall.

Over the years, he had built relationships with orchid gatherers and growers around the world, and many became his suppliers. He worked the most with Manuel Arias Silva, who operated several nurseries in Peru and was known for cultivating the toughest species from the wild that few others could persuade to grow.

Norris had met Silva in the late 1980s, when Silva had just started his export business and was looking to build a customer base in the United States. The two hit it off immediately, and in 1988, Norris spent two weeks in Peru with Silva, collecting plants and surveying Silva’s operations.

Their families also grew close. After meeting Silva’s relations, Norris and his wife offered to take in two of Silva’s sons, Juan and Manolo, who were badly scarred about their hands and faces from a fire years earlier, and to arrange plastic surgery for them. Kathy Norris persuaded a local hospital to donate its facilities, and Dr. David Netscher, a prominent surgeon and professor at the Baylor College of Medicine, agreed to do the work for \$1,500 per child, barely enough to cover his expenses.

In 1993 and 1994, first Juan and then Manolo spent six months with the Norrises undergoing surgery, follow-up care, and recuperation. After that experience, the Norrises and the Silvas were in regular contact, by mail and then by e-mail, exchanging family photographs and visiting from time to time.

Norris had other suppliers. One was Raul Xix, a native Mayan in Belize who supported his 11 children and wife through odd jobs: building homes, tapping trees, and collecting orchids from the jungle. Norris had befriended Xix on a trip and encouraged him to try his hand at exporting plants, a potentially more lucrative and dependable source of income.

Xix, Norris soon learned, had no business experience, could barely read and write, and knew little about exotic orchids. He would ship boxes loaded with all manner of flora, some not even orchids and many infested with ants, and though bearing CITES permits from Belize, few plants were correctly identified—not that it ever mattered.

Norris, charmed by Xix and admiring his work ethic, decided that he would be a regular customer and use their interactions to teach Xix the ins and outs of the business. Keeping that commitment was a challenge: Xix's first few shipments were a total loss, and others were turned back at the border because of poor packing and infestations. But slowly, Xix did become more reliable.

One of Norris's most regular suppliers was Antonio Schmidt, an orchid dealer in Brazil. The two had met at orchid shows in the United States, and Norris was impressed with Schmidt's extensive catalogue of plants. Schmidt, unlike most other suppliers, was easy to work with, promptly sending shipments of healthy plants that were well packaged.

Documentation, though, was a problem. Schmidt, like many orchid gatherers and dealers in South America, would obtain his CITES permits well before shipping and, in some cases, obtaining the orchids. As a result, his shipments did not always match what was on the accompanying CITES permits—though he *could* have obtained the proper documentation, since none were Appendix I plants. Several times, Schmidt e-mailed Norris lists stating what he had written on the label and what the plants so labeled actually were. Even with the wrong labels, the plants always sailed through customs and inspections.

Schmidt's case at fooling inspectors was the first thing that came to mind when Silva told Norris in 1998 that his greenhouses were filled with artificially propagated *Phragmipediums*. Phrags, better known as tropical lady slippers, became popular in the early 1990s after all of the species in the family were uplisted to CITES Article I, a move that many in the orchid business attribute to commercial rather than preservationist motives. Demand for the flowers surged and continued to grow over the following decade.

Silva had been breeding the plants for years from plants that had been legally obtained, but because his nursery was not registered to produce the flowers under CITES, he could not export them; and the plants were not worth much in Peru, where they grow wild in abundance. Norris saw the opportunity to help Silva and add some valuable plants to his inventory.

The plan Norris devised was not complicated: Silva would simply substitute Phrags for some of the plants listed on the CITES permit. But Silva was wary, and it took Norris a year to convince him that it was doubtful that any of the inspectors would notice. In the next shipment, Silva included some Phrags, labeled as Maxillarias, another family of orchids. It worked. The plants made it through without a problem.

Norris knew, of course, that he and Silva were breaking the law—just as everyone else who had to deal with CITES on a regular basis did—but he never believed that he was doing anything serious or wrong. He wasn't importing endangered tigers or elephants, but just orchids, and none of those orchids were truly endangered: Most came from Silva's nurseries, and the rest were hardly rare. He and Silva had seen entire hillsides blooming with the same types of Phrags. All of the plants probably could qualify for a permit if Silva went through additional reams of paperwork and waited a few more months, so what was the harm?

From that time on, Silva would include Phrags from his nurseries, as well as some plants collected in and around Peru in his shipments to Norris. Each time, he would send a letter containing a key to identify the flowers. Over time, Silva's nurseries received permits and CITES registration to grow many of the Phrags he had previously shipped under other names, and as that happened, he began labeling them properly in his shipments. But there were always at least a few in each shipment that were mislabeled because he had not yet received the proper permit.

None of these mislabeled flowers, though, attracted any suspicion from authorities or Norris's customers, who had no reason to believe that anything was amiss. It was a flower that he never actually imported that would lead to the investigation and his arrest.

If there is a rock star of the orchid world, it is the *Phragmipedium kovachii*. James Michael Kovach discovered the flower while on an orchid-hunting trip to the Peruvian Andes in 2002 and sneaked it back into the United States without any CITES documentation to have it catalogued by Selby Botanical Gardens' Orchid Identification Center, a leader in identifying and publishing new species. Two Selby staff members, recognizing the importance of the discovery, rushed out a description of the new flower, christening it *kovachii*, after Kovach, and barely beating into print an article by Eric Christensen, a rival researcher who had been working from photos and measurements taken in Peru.

The most striking thing about the *kovachii* is its size. The plants grow thick leaves up to two feet in length. Flower stalks shoot up from the plant, rising two feet or more. But the real stunner is the flower: It is velvety, a rich pink-purple at the tips of its petals, brilliant white in the center. And the size! Some measure more than 10 inches across. The flower is a rare combination of grace and might, a giant unrivalled in its delicacy and elegance. Lee Moore, a well-known collector, dubbed it "the Holy Grail of orchids."

Pictures circulated on orchid mailing lists and discussion reached a fever pitch. "People decided they would become excited beyond all reason," said one orchid dealer. "Everyone wanted it. It was a meteoric plant." According to rumors, black-market specimens had sold for \$25,000 or more.

The orchid fever was only heightened by the legal drama that had engulfed Selby Gardens and Kovach as a result of the find. The Peruvian government caught wind of the frenzy over the flower and, irked that its country had lost out on the honor of identifying the plant, pressed U.S. authorities to investigate for CITES violations. Eventually, criminal charges were brought against Kovach, Selby Gardens, and its chief horticulturalist, Wesley Higgins. All pled guilty, receiving probation and small fines.

Right after he heard about the kovachii, Norris contacted Silva to press for information about the flower, especially when they would be available for sale. With illegal trade in the flower already flourishing, Silva figured that he could get the right permits to collect a few from the wild for artificial propagation. Breeding the flower would not be easy—Phrags have a reputation for being difficult plants, and that is especially true of the rarer ones—but he had succeeded before with other tough plants and had a high-altitude greenhouse that would be perfect for the kovachii. Doing it legally could take a year or two, maybe even three.

Norris was more optimistic and ran with the information in his next catalog, boasting that he would have kovachiis for sale in a year, perhaps less—far sooner than anyone else thought possible. That caught the attention of an orchid researcher who had long believed that the U.S. orchid trade was overrun with illegal plants, threatening the survival of many species in the wild. Enforcement was a joke; there had been only one prosecution to date for dealing in illegal orchids.

He decided to take a closer look at Norris's Spring Orchid Specialties and, with kovachiis not yet on sale, placed an order for four other Phrags and specifically asked Norris to include the CITES permits for the flowers. It was an unusual request. Usually, the Department of Agriculture inspectors took the permits at the border for their records. Except for the few times that shipping brokers made copies, Norris hardly ever received them with plant shipments. Assuming that the request was just a misunderstanding, he shipped the plants with a packing list but no permits.

A day after the orchids were delivered, Norris received another e-mail from the buyer, asking again for the permits. The Department of Agriculture had them, Norris responded, but he would try to get a copy. That, thought Norris, was the end of the matter. The buyer made another order for more Phrags a year later and again asked for the permits. Once again, Norris shipped the flowers without them.

Unknown to Norris, the buyer in these transactions had decided to take action about what he saw as the rampant trade in illegal orchids and had begun to send information to Fish and Wildlife Service agents. Because of the controversy over the kovachii, the Service had finally become interested in orchids. A few prominent prosecutions would serve as a warning to the rest of the tight-knit orchid community.

The informant's two transactions with Norris would serve as the basis for the raid on Norris's home.

### **The Prosecution**

The raid occurred in October 2003, but George Norris was uncertain of his fate for the next five months, receiving no communications from the government. On the advice of friends, he wrote a letter to the Miami-based prosecutor who was probably

overseeing the case, explaining that he had never imported kovachiis—this was at the time that others were being charged for importing the flower—and asking for a meeting to answer any questions. At the very least, he asked, could the government tell him what he was suspected to have done? After a few weeks, his computer was returned, broken, and Norris resumed business as best he could, taking orders and showing off his plants at shows.

Meanwhile, Fish and Wildlife Service Agents were poring over the records retrieved from Norris's home, as well as others obtained from the Department of Agriculture. There was no evidence that Norris had ever obtained or sold a kovachii, but the agents did notice minor discrepancies in the documents. Some of the plants Norris had offered for sale were not listed on any CITES permits. Among those missing were three of the 10 Phrags in the informant's second order. The agents also found Norris's correspondence with Silva and Schmidt, which seemed to confirm their hunch: Norris had been engaged in a criminal conspiracy to skirt CITES and violate U.S. import laws.

Norris's business quickly recovered but suffered a devastating blow when Manuel Arias Silva was arrested in Miami one day before the Miami Orchid Show in March 2004. After that, everyone assumed that Norris would be next. Norris and his wife scrambled to sell Silva's flowers at the show, earning just enough to pay his expenses and get him out of jail. With no one else to step in, they guaranteed Silva's \$25,000 bail and \$175,000 personal surety bond: He was now their responsibility. Rumors raged that Norris would be arrested on the floor of the show.

But it was another week before Norris was indicted. There were seven charges: one count of conspiracy to violate the Endangered Species Act, five counts of violating CITES requirements and the ESA, and one count of making a false statement to a government official, for mislabeling the orchids. Silva faced one additional false-statement charge.

On March 17, 2004, Norris and his wife flew to Miami, where he voluntarily surrendered to the U.S. marshals. The marshals put him in handcuffs and leg shackles and threw him in a holding cell with three other arrestees, one suspected of murder and two suspected of dealing drugs. Norris expected the worst when his cell mates asked him what he was in for. When he told them about his orchids, they burst into laughter. "What do you do with these things, smoke 'em?" asked one of the suspected drug dealers.

The next day, Norris pled not guilty, and a day after that, he was released on bail. The Norrises returned to Spring, Texas, to figure out their next steps. Their business was slowing, their retirement savings were on the line for the Peruvian orchid dealer who was now living in the spare bedroom, and Norris, 67 and in frail health, faced the prospect of living out his days in a federal prison. Still, Norris believed he had not done anything wrong and would win out in the end.

So they made a go of fighting the charges. Norris hired an attorney who, with most of his experience at the state or county level, quickly found himself in over his head with the complexities of international treaties, environmental law, and the intricacies of a federal prosecution.

In April, the attorney accompanied Norris to what turned out to be a proffer meeting, at which defendants are typically offered the opportunity to cooperate with the government in exchange for leniency. Norris had not been told what to expect and did not have anything to say when prosecutors asked what he was willing to admit. They peppered him with names of other orchid dealers, but Norris was not inclined to inform on them—not that he knew enough about their operations, in any case, to offer anything more than speculation.

After that, Norris got a more experienced—and much more expensive—attorney. With bills piling up and the complexity of the case and the resulting difficulty of mounting a defense finally becoming apparent, Norris took the step he had been dreading: changing his plea to guilty. “I hated that, I absolutely hated that,” said Norris. Five years after the fact, the episode still provokes pain, his face blushing and speech becoming softer. “The hardest thing I ever did was stand there and say I was guilty to all these things. I didn’t think I was guilty of any of them.”

While Norris and his wife were focused on his case, Manuel Arias Silva was plotting his own next moves. By mid-May, he had managed to obtain a new passport and exit visa from the Peruvian Consulate. On May 19, soon after they had returned to Texas from a hearing in Miami, Kathy Norris received a call from Juan Silva, in Peru, who was in tears. His father, he explained, had returned home to evade the charges against him in the United States. The Norrises would be on the hook for Silva’s bail and bond—nearly \$200,000.

Based on Norris’s transactions with Silva, as well as those with Schmidt and Xix, the government recommended a prison sentence of 33 to 41 months. Such a lengthy sentence was justified, according to the sentencing memorandum, because of the value of the plants in the improperly documented shipments. Two choices pushed the recommended sentence up.

*First*, the government used Norris’s catalog prices to calculate the value of the plants rather than what he had paid for them.

*Second*, it included all plants in each shipment in its calculations, reasoning that the properly documented plants—by far the bulk of every shipment—were a part of the offense because they were used to shield the others.

On October 6, Norris was sentenced to 17 months in prison, followed by two years of probation. In the eyes of the law, he was now a felon and would be for the rest of his life. The sentencing judge suggested to Norris and his wife that good could come of his conviction and punishment:

Life sometimes presents us with lemons. Sometimes we grow the lemons ourselves. But as long as we are walking on the face of the earth, our responsibility is to take those lemons and use the gifts that God has given us to turn lemons into lemonade.

Norris reported to the federal prison in Forth Worth on January 10, 2005; was released for a year in December 2006 while the Eleventh Circuit Court of Appeals considered a challenge to his sentence; and then returned to prison to serve the remainder of his sentence. He was released on April 27, 2007.

### **The Aftermath**

George Norris has lost his passion for orchids. The yard behind their home is all dirt and grass, nothing more. The greenhouse is abandoned. Broken pots, bags of dirt, plastic bins, and other clutter spill off its shelves and onto the floor. The roof is sagging. A few potted cacti are the only living things inside it, aside from weeds.

A dozen potted plants grace the Norrises' back porch; three or four are even orchids, though none are in bloom. Kathy waters them. "They're the ones I haven't managed to kill yet," she says.

The couple's finances are precarious. Following the flood of 1994, Norris rebuilt most of their home himself, but they had to refinance the house to pay for materials. Kathy had to make those payments and all the others while Norris was in prison, relying on her salary as director of Montgomery County's Dispute Resolution Center, which she runs on a shoestring budget. The same discipline now reigns at home. "I figured out how to live on as little as it's possible to live on and still keep the house," says Kathy.

Neither Norris nor his wife knows how they will face retirement with all of their savings used to pay legal expenses. Silva's bond hangs over their heads as well, and the government has said that it will seek to enforce it. That threat keeps Kathy up at nights. She doesn't know what else they could give up, other than the house, or how they could possibly come up with the \$175,000 still owed.

Norris has already suffered the indignity of his grandchildren knowing that he spent over a year in federal prison and is a convicted criminal. What hurts him now is that he cannot introduce them to the hunting tradition—small game, squirrels, and rabbits—that has been a part of his family, passed from generation to generation. As a felon, he cannot possess a firearm. They sold off and gave away his grandfather's small gun collection, which he had inherited. In poor health and unarmed, Norris fears that he cannot even defend his own family.

But the hardest blow, explains Kathy, has been to their faith in America and its system of criminal justice:

I got raised in a country that wasn't like this. I grew up in a reasonably nice part of Dallas, I came from a family where nobody had been indicted for anything, and so had George. And the government didn't do this stuff to people. It wasn't part of anything I ever got taught in my civics books.

That lack of faith is almost visible in George Norris's frailty and fear. "I hardly drive at all anymore," he explained. "The whole time I'm driving, I'm thinking about not getting a ticket for anything.... I don't sleep like I used to; I still have prison dreams." He pauses for a moment to think and looks down at the floor. In a quiet voice, he says, "It's utterly wrecked our lives."

### **Conclusion**

Probably any dealer in imported plants could have been prosecuted for the charges that were brought against George Norris. His crime, at its core, was a paperwork violation: He had the wrong documents for some of the plants he imported but almost certainly could have obtained the right ones with a bit more time and effort. Neither he

nor other dealers ever suspected that the law would be enforced to the very letter so long as they followed its spirit.

Norris was singled out because he was in the wrong place at the wrong time. As controversy roared over the kovachii and prosecutors were gunning for a high-profile conviction to tamp down sales in truly rare and endangered plants, Norris bragged that he would soon have the extraordinary flower in stock.

To this date, he has never seen one.

Armed with overly broad laws that criminalize a wide range of unobjectionable conduct, prosecutors could look past that fact. Burrowing through Norris's records, they found other grounds for a case. One way or another, they would have their poster child.

This is the risk that all American entrepreneurs face today. Enormously complex and demanding regulations are regularly paired with draconian criminal penalties for even minor deviations from the rules. Minor violations from time to time are all but inevitable, because full compliance would be either impossible or impossibly expensive. Nearly every time, nobody notices or cares, but all it takes is one exception for the hammer of the law to strike.

*—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.*



WASHINGTON EXAMINER  
Opinion

## **Part One: Eco-inventor wins victory in federal court case**

**Examiner Editorial**

**January 22, 2009**

Krister Evertson is in jail in an absurdly convoluted legal saga that began with a misunderstanding of the most basic sort: He didn't know that shipping by "ground" transportation from Alaska still usually entails an airplane flight.

In the early years of the current decade, Evertson was splitting his time between Wasilla, Alaska, where his aging mother lived and where he mined for gold, and Salmon, Idaho, where his sister lived.

In Salmon, Evertson spent \$100,000 of his family's money seeking to create a fuel cell that would use pure sodium, mixed with borax (yes, the detergent ingredient), to create clean energy without polluting the environment.

Pure sodium is a metal that, when in direct contact with a certain amount of water, can explode. But it can be easily bought online when it is packaged correctly, that is, surrounded by an oil solution that protects against water.

Evertson had legally purchased 10 metric tons of sodium from a dealer in China.

But he ran out of money in Idaho before his experiments bore fruit, so he carefully stored all of his materials, machines, and byproduct in stainless steel tanks, with much of the sodium either surrounded by oil and plastic or in its original, legal packaging from China.

He then moved his materials half a mile down the road to the Steel and Ranch Supply Facility, an industrial supply company in Salmon owned by a friend, and paid rent in the form of two sacks of 1,000 pounds each of borax, which his friend could re-sell for a profit.

Evertson said he planned to return once he raised enough money to re-start his experiments. He moved to his mother's house in Wasilla, Alaska, taking a few dozen pounds of sodium with him, and began selling the sodium on E-bay to raise funds to finance a new gold-mining expedition.

Then on May 27, 2004, federal agents in black SUVs and waving assault rifles, appeared out of nowhere, forced Evertson's truck off the road, and arrested him. He was charged for shipping

sodium he had sold on E-Bay by air, which is understandably forbidden as a result of its potential explosiveness.

Evertson knew it was illegal to ship the material by air, which is why he had packaged it according to all available guidelines, and he had even checked the “ground transportation” box on the bill.

What he didn’t know was that in the UPS system, ground transportation from Alaska actually is carried by air. That meant Evertson should have put a special sticker on the package of sodium routing it for special “ground” treatment.

Federal authorities could have treated the incident as a simple civil violation, but instead chose to charge Evertson with a serious criminal offense.

Two years later, an Alaska jury acquitted Evertson of all charges. --- *Quin Hillyer*



**FEDERAL CRIMINAL LAW**

Leese III, Chair  
Chairman  
Obermaier  
Santarelli  
Strazzella, Reporter  
W. Taylor, III  
Van de Kamp

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Smith

**THE FEDERALIZATION OF CRIMINAL LAW**

**James A. Strazzella**  
*Reporter*

*Task Force on the Federalization of Criminal Law*  
*American Bar Association*  
*Criminal Justice Section*

1998



**TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW**

John S. Baker, Jr.	Edwin Meese III, Chair
Sara Sun Beale	James Neal
Susan A. Ehrlich	Jon O. Newman
Reuben Greenberg	Otto G. Obermaier
Howell Heflin	Donald Santarelli
Philip Heymann	James Strazzella, Reporter
Victor S. Johnson III	William W. Taylor, III
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Robert Litt	

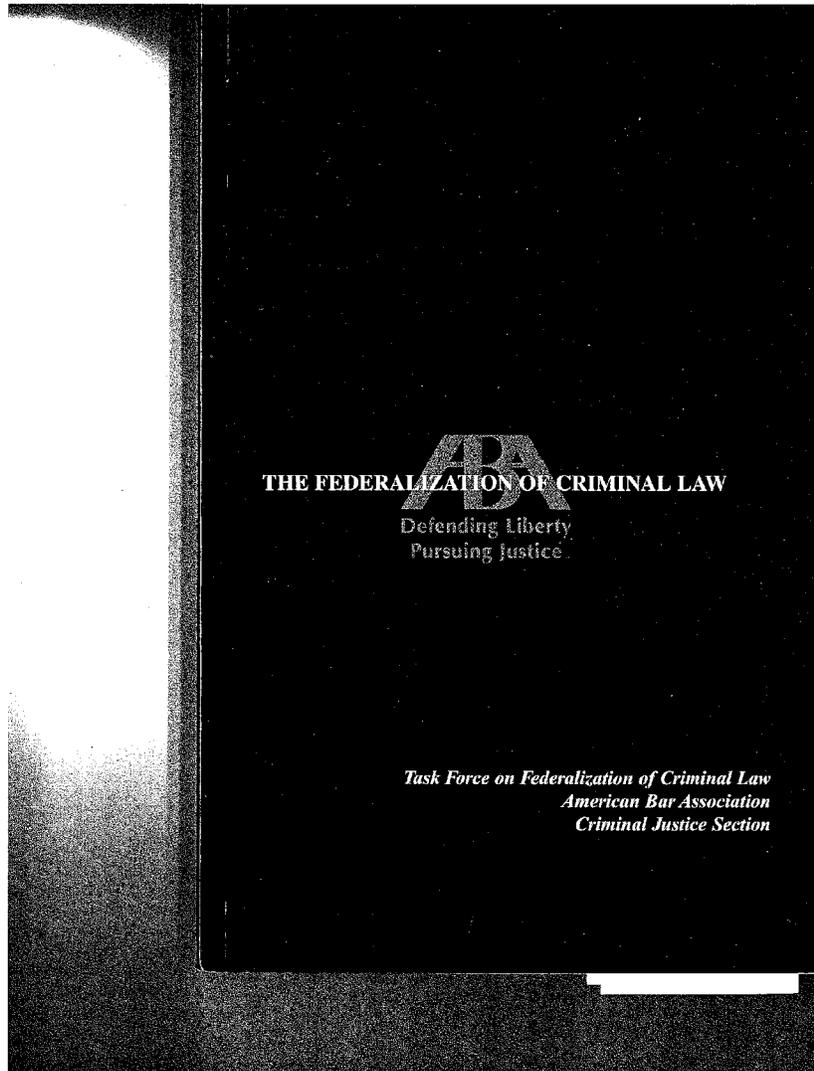
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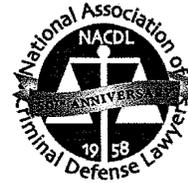
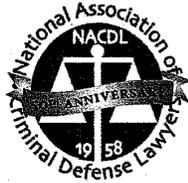
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American Bar Association  
-Criminal Justice Section  
740 15th Street, N.W.  
Washington, DC 20005  
Executive Director: Thomas C. Smith





**SUFFICIENTLY ARMED:**  
**THE FEDERAL TOOLBOX FOR PUNISHING CRIMINALITY IN THE SUBPRIME MARKET**

By **Stephanie A. Martz, Senior Director**  
**Tiffany Joslyn, Research Counsel**

**White Collar Crime Project**  
**National Association of Criminal Defense Lawyers**

It should come as no surprise that the current market crisis has given rise to a fierce outcry for heads to roll and “greedy corporate executives” to be thrown behind bars. Like the “Enron scandal” (shorthand for the many, sudden corporate failures of that time period), and the savings and loan debacle before that, the press and public are looking to the federal government for action and a vindication for the wrongs arguably inflicted by Wall Street on Main Street.<sup>1</sup> In this heated environment, Congress is likely to see itself as compelled to enact new criminal statutes that supposedly would have prevented the crisis.<sup>2</sup> However, Congress has already enacted all of the tools prosecutors need (and far more) to prosecute any criminal activity associated with the subprime market. Congressional action in this arena would be redundant at best.

This paper briefly sets forth the federal criminal statutes that are currently in place and available for prosecutors to use to pursue whatever criminal activity allegedly occurred. The paper begins with a list of the relevant charging statutes that already exist in the United States Code for financial and related crimes.<sup>3</sup> Then, in varying depth, we discuss each statute’s individual coverage, elements, and application. This analysis takes a neutral perspective and explains the current state of the law without advocating for a particular application. Nothing in this paper should be interpreted as advocating for the enforcement of the criminal law in the current circumstances in general, or in any case in particular.

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<sup>1</sup> Eric Lichtblau, David Johnston, and Ron Nixon, *F.B.I. Struggles to Handle Financial Fraud Cases*, *The New York Times* (Oct. 19, 2008), available at <http://www.nytimes.com/2008/10/19/washington/19fbi.html> (last visited Oct. 20, 2008) (“The pressure on the F.B.I. has recently increased with the disclosure of criminal investigations into some of the largest players in the financial collapse . . .”).

<sup>2</sup> See Rachel Brand, *Making It a Federal Case: And Inside View of the Pressure to Federalize Crime*, Heritage Foundation Legal Memo No. 30, August 28, 2008.

<sup>3</sup> However, “[d]ocumenting the precise contours of federal criminal law has proved difficult, because getting an accurate count of federal crimes is not as simple as counting the number of criminal statutes. According to the ABA Report, “[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes.” John S. Baker, *Jurisdictional And Separation Of Powers Strategies To Limit The Expansion Of Federal Crimes*, 54 AM. CRIM. L. REV. 545, 548-49 (2005) (internal citations omitted).

Nevertheless, it is the view of NACDL and numerous criminal-law experts that all too often the rush to use overbroad criminal statutes with loose *mens rea* requirements results in prosecutions that cannot stand – and should not stand – in light of the lack of evidence of what has always been considered *criminal* behavior: behavior that involves a fraud or a high level of deceit, and that can only be deterred through criminal sanction.<sup>4</sup> When a person is prosecuted and convicted, even though he or she acted without the intent to do anything wrong or violate any law, the criminal law loses its moral force. The criminal law is the greatest power government uses against its own citizens and thus should be used only as society's last line of defense for intentional wrongdoing. The civil law and administrative remedies are available to redress inadvertent violations of the law and good-faith mistakes of judgment.

As with previous crises, such as the S&L failures, it is not likely to be the case that criminal activity *caused* the collapse. Rather, any criminal activity will more reasonably be classified as incidental to or a collateral consequence of, the crisis.<sup>5</sup> In making a preliminary assessment of the types of wrongdoing coming to the surface as part of the subprime investigations, Benton Campbell, U.S. Attorney for the Eastern District of New York stated, "The more things change, the more they stay the same."<sup>6</sup> As part of any investigation into the crisis, prosecutors will have to focus on separating bad business decisions from possible criminal conduct.<sup>7</sup> Campbell explained that the current "types of criminal activity are fundamentally very familiar" to the criminal conduct his office has seen over the years and that most investigations so far have been finding evidence suggestive of "classic cases of securities fraud."<sup>8</sup>

Classic cases of securities fraud include willful material misrepresentations in violation of Rule 10b-5, intentional overvaluation and misrepresentations to auditors, insider trading, and other forms of self-dealing. Some of the cases currently under investigation involve allegations that investors were deceived about the type of securities in which they were investing, or the risk involved in making investments.<sup>9</sup> The federal criminal statutes used to prosecute these kinds of activities include securities fraud under Titles 15 and 18, mail fraud, wire fraud, bankruptcy fraud, and bank fraud.

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<sup>4</sup> See, e.g., Stephanie A. Martz and Ivan Dominguez, *A Very Brief History of the Criminalization of Everything*, THE CHAMPION, September 2008, at 30 (documenting recent examples of over-zealous prosecutions of financial crimes, based on overly broad criminal offenses such as mail fraud and wire fraud, resulting in acquittals or reversals on appeal).

<sup>5</sup> Abbe David Lowell, *Don't Overstate Crimes*, The National Law Journal (October 24, 2008).

<sup>6</sup> Evan Perez, *Familiar Abuses Seen in Latest Finance Crisis*, The Wall Street Journal (Oct. 4, 2008), available at <http://online.wsj.com/article/SB122307667720003963.html> (last visited Oct. 20, 2008) (internal quotation marks omitted); see also Linda Sandler and Christopher Scinta, *Lehman Collapse Probed by Three Federal Grand Juries*, Bloomberg.com (Oct. 17, 2008), available at <http://www.bloomberg.com/apps/news?pid=20601087&refer=home&sid=a5oUoIV5pBTk#> (last visited Oct. 20, 2008).

<sup>7</sup> See Carrie Johnson, *Prosecutors Expected To Spare Wall St. Firms*, Washington Post (Oct. 3, 2008), available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/10/02/AR2008100203631.html> (last visited Oct. 20, 2008).

<sup>8</sup> Noeleen G. Walder, *Criminal Prosecutions Predicted to Surge Over Financial Crisis*, New York Law Journal (Oct. 9, 2008), available at <http://www.law.com/jsp/article.jsp?id=1202425138326> (last visited Oct. 20, 2008) (internal quotation marks omitted).

<sup>9</sup> See Walder, *supra* note 5; Perez, *supra* note 3; Johnson, *supra* note 4.

General federal fraud statutes, such as mail and wire fraud, are also available to address any criminality. In fact, these laws reach conduct such as violating technical state regulations and private company policies that the lay person would not think of as “fraud.” Courts’ expansive reading of the mail fraud statute “has made it possible for the federal government to attack a remarkable range of criminal activity even though some of the underlying wrongdoing does not rest comfortably within traditional notions of fraud.”<sup>10</sup> Leading commentators have widely agreed that “[s]cheme to defraud,” the key phrase of the mail fraud and wire fraud statutes, “has long served . . . as a charter of authority for courts to decide, retroactively, what forms of unfair or questionable conduct in commercial, public and even private life should be deemed criminal. In so doing, this phrase has provided more expansive interpretations from prosecutors and judges than probably any other phrase in the federal criminal law.”<sup>11</sup>

In addition, federal investigators and prosecutors will be looking out for the non-substantive crimes of false statements and obstruction that can be prosecuted under Chapters 47 and 73 of the Federal code. As in the Martha Stewart prosecution, these collateral counts, some of which carry long potential sentences, are often brought even when the substantive counts are not indicted at all, are weak, or are dismissed.

On both the state and local level, prosecutors will likely continue to focus their efforts on the retail-level fraud perpetrated by individual brokers, real-estate agents, lenders, buyers, and borrowers.<sup>12</sup> Like the federal government, states have ample legal authority to prosecute fraud. In addition, states – and not the federal government – regulate mortgage brokers and the insurance industry. They are likely to be the locus of the most urgent *civil and administrative* reforms in the wake of the crisis.

The draconian sentences that are available for punishing white collar offenders put the government in an even more powerful position. In fraud cases, the calculation of “loss” under the federal sentencing guidelines is far from nuanced. Because sentencing judges often use a naked, rough figure based on decline in stock value or the “amount” of the fraudulent transactions, sentences can range as high as Bernie Ebbers’ (25 years), Jeffrey Skilling (more than 24 years), Jamie Ois (24 years, later reduced to 6 years), and Timothy Rigas (17 years). These sentences are comparable to those used for punishing the most violent of crimes in state systems. Only recently, after a series of United States Supreme Court decisions that restored much-needed discretion in sentencing to federal judges, have courts begun to consider more nuanced questions such as whether the drop in stock price was also due to global market factors and whether the amount of loss should be reduced based on the victim/investors’ level of sophistication. These are questions that will prove determinative in enforcement decisions that grow out of this particular financial crisis.<sup>13</sup>

In sum, our analysis demonstrates that the government is sufficiently armed to pursue any criminal conduct that may be related to the market crisis. To the extent that criminal law is capable of

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<sup>10</sup> Julie R. O’Sullivan, “Federal White Collar Crime: Cases and Materials,” 483 (2d ed. 2003).

<sup>11</sup> John C. Coffee, Jr. & Charles K. Whitehead, *the Federalization of Fraud: Mail and Wire Fraud Statutes*, in 1 Otto G. Obermaier & Robert G. Morvillo, *White Collar Crime: Business and regulatory offenses* § 9.01 (2002).

<sup>12</sup> *See id.*

<sup>13</sup> Evan Jenness, “Gaining the Upper Hand in Arguing Loss in Securities Fraud Cases,” *The Champion*, September 2008.

detering financial crimes, such laws have already been in place, often resulting in enormous fines and terms of imprisonment that are effectively life sentences. While we acknowledge that the cry for government action may be both loud and forceful, we also note that some are likely to find political advantage in raising or promoting that cry and that any response that is based in criminal enforcement should not lie in an impassioned rush to prosecute executives, nor in the passage of even more federal criminal laws.

**I. List of Relevant Charging Statutes:**

- **Title 18, Chapter 47 – Fraud and False Statement Offenses**
  - 18 U.S.C. § 1001 – False Statements or Entries
  - 18 U.S.C. § 1005 – Bank Entries, Reports and Transactions
  - 18 U.S.C. § 1014 – Loan/Credit applications generally
  - 18 U.S.C. § 1016 – Acknowledgment/Oath
- **Title 18, Chapter 63 – Mail Fraud Offenses**
  - 18 U.S.C. § 1341 – Mail Fraud
  - 18 U.S.C. § 1343 – Wire Fraud
  - 18 U.S.C. § 1344 – Bank Fraud
  - 18 U.S.C. § 1346 – Honest Services Clause
  - 18 U.S.C. § 1348 – Securities Fraud
  - 18 U.S.C. § 1349 – Attempt/Conspiracy to commit Chapter 63 offense
  - 18 U.S.C. § 1350 – Certification of Financial Reports
- **Title 18, Chapter 73 – Obstruction Offenses**
  - 18 U.S.C. § 1505 – Obstruction of Proceedings
  - 18 U.S.C. § 1510 – Obstruction of Criminal Investigations
  - 18 U.S.C. § 1512 – Witness Tampering
  - 18 U.S.C. § 1516 – Obstruction of Federal Audit
  - 18 U.S.C. § 1517 – Obstructing the Examination of a Financial Institution
  - 18 U.S.C. § 1519 – Destruction, Alteration, or Falsification of Records
  - 18 U.S.C. § 1520 – Destruction of Corporate Audit Records
- **Title 15, Chapter 2b – Securities Exchange Offenses**
  - 15 U.S.C. § 78j – Manipulative and deceptive devices
  - 15 U.S.C. § 78ff – Willful violations; false and misleading statements
- **Other Relevant Criminal Statutes**
  - 18 U.S.C. § 371 – Conspiracy
- **Related SEC Regulations**
  - 17 C.F.R. § 240.10b-5 – Use of Manipulative and Deceptive Devices
  - 17 C.F.R. § 240.10b-5-1 – Insider Trading
  - 17 C.F.R. § 240.10b-5-2 – Duty in misappropriation insider trading cases
  - 17 C.F.R. § 240.12b – Registration and Reporting
  - 17 C.F.R. § 240.12b-2 – Maintenance of records; preparation of reports
  - 17 C.F.R. § 240.13a – Issuers’ reports securities registered pursuant to §12

## II. Explanations of Charging Statutes

Statutes such as mail, wire, and securities fraud and many of the obstruction of justice-related statutes are already exceedingly broad in their reach. What follows is a description of the often broad interpretation currently given to these statutes. Some key conclusions emerge:

1. Federal “fraud” offenses often do not, in fact, criminalize what we often think of as “fraudulent” behavior. Rather, under the law of some circuits, a defendant can face a possible 20-year sentence for having merely breached a fiduciary duty – thereby criminalizing bad business judgment.
2. The new criminal sanctions ushered in by Sarbanes-Oxley make it exceptionally easy to attach similarly long sentences to the execution of anything other than entirely routine, long-standing policies for destroying or retaining documents. In addition, the Department of Justice has increasingly used lying-to-the-government theories to indict corporate employees for misstatements made to *private* counsel, which are *then* turned over to the government. This is a significant (but yet unlitigated) tool in DOJ’s toolbox.
3. The “willfully” requirement in criminal federal securities law has been interpreted by some courts as requiring mere proof that the defendant was acting knowingly, rather than by accident or mistake, and that the defendant’s conduct violated civil securities provisions. This could easily lead to the indictments of “low-hanging employees” – managers whose public statements, *in retrospect*, were inaccurate depictions of the health of securities that few understood.
4. These statutes, in conjunction with the federal conspiracy statute (which requires only circumstantial evidence of an agreement and one overt act by one individual in the conspiracy), have been used to indict individuals who were only peripherally involved in the activity. In addition, the willful blindness jury instruction – which allows a jury to convict an executive for failing to detect wrongdoing – can be used to prosecute higher-ups who knew nothing of any criminality. In the hands of a prosecutor who is exercising less than measured discretion, this leverage can be used against the culpable and the non-culpable alike.

In sum, current law already vests a tremendous amount of discretion with the executive branch to prosecute those who truly committed bad acts with criminal intent – and even those who did not.

### ➤ Title 18, Chapter 47 – Fraud and False Statement Offenses

#### - False Statements or Entries (18 U.S.C. 1001)

- Elements:
  - (1) knowingly and willfully making false statements, representations, writings, or entries; and
  - (2) those statements are made in a matter within the jurisdiction of a federal agency; but
  - (3) the scienter requirement only applies to the first element, not the second jurisdictional element. *See United States v. Yermian*, 468 U.S. 63, 69 (1984).
- Materiality: “[C]onviction under this provision requires that the statements be ‘material’ to the Government inquiry . . . [and] ‘materiality’ is an element of the offense that the

Government must prove.”<sup>14</sup> However, courts have held that materiality is deemed satisfied even if the government was not actually influenced by or did not rely upon or believe the false statements.<sup>15</sup>

- **Bank Entries, reports and transactions (18 U.S.C. 1005)**

This statute prohibits individuals from making “false entr[ies] in any book, report, or statement of [a] bank, company, branch, agency, or organization with intent to injure or defraud such [institution].” Further, it punishes those who participate or share, either directly or indirectly, in any money or benefits of a transaction with the financial institution, when one does so with the intent to defraud the United States government or that institution. Similar to the previous statutes, this could be used to indict any behavior involving the false reporting by corporate officials. The statute’s language explicitly delineates what types of institutions are within its reach.

- **Loan/Credit applications generally (18 U.S.C. § 1014)**

This excessive broadness of this statute to cover even innocent mistakes is due to the fact that it criminalizes *any* false statements or overvaluations made in conjunction with any loan or credit application. The Supreme Court has held that materiality is not an element of this offense and thus the government need not prove such. *United States v. Wells*, 519 U.S. 482, 484 (1997). The statute’s language explicitly delineates what types of institutions are within its reach.

As part of a 2007 Press Release, the FBI listed 18 U.S.C. § 1014 as one of nine “applicable Federal criminal statutes which may be charged in connection with mortgage fraud.”<sup>16</sup> The government has used this statute to prosecute retail-level mortgage fraud committed by individuals such as buyers, borrowers, lenders, and agents.

- **Acknowledgment/Oath (18 U.S.C. § 1016)**

This statute punishes an individual who “knowingly makes any false acknowledgment, certificate, or statement concerning the appearance before him or the taking of an oath or affirmation by any person . . . .” This statute could be used, in conjunction with 18 U.S.C. § 1014, to prosecute individuals who falsely certified loans and mortgages.

<sup>14</sup> *United States v. Gaudin*, 515 U.S. 506, 509 (1995); see *United States v. Johnson*, 520 U.S. 461, 465 (1997) (restating the holding of *Gaudin* that materiality is an element of 18 U.S.C. 1001 that must be submitted to the jury for consideration).

<sup>15</sup> See *United States v. Puente*, 982 F.2d 156, 159 (5<sup>th</sup> Cir. 1993) (“Actual influence or reliance by a government agency is not required. The statement may still be material “even if it is ignored or never read by the agency receiving the statement.”) (internal citations omitted); *United States v. Steele*, 933 F.2d 1313, 1319 (6<sup>th</sup> Cir. 1991) (“It is not necessary to show that the statement actually influenced an agency, but only that it had the capacity to do so”) (internal citations omitted); see also *United States v. Herring*, 916 F.2d 1543, 1547 (11<sup>th</sup> Cir. 1990); *United States v. Land*, 877 F.2d 17, 20 (8<sup>th</sup> Cir. 1989); *United States v. Notarantonio*, 758 F.2d 777, 785 (1<sup>st</sup> Cir. 1985); *United States v. Norris*, 749 F.2d 1116, 1121 (4<sup>th</sup> Cir. 1984).

<sup>16</sup> Federal Bureau of Investigation, *Press Release: FBI Issues Mortgage Fraud Notice In Conjunction With Mortgage Bankers Association* (Mar. 8, 2007), available at <http://www.fbi.gov/pressrel/pressrel07/mortgagefraud030807.htm> and <http://www.fbi.gov/pressrel/pressrel07/mortgagefraudwarning.pdf> (last viewed Oct. 20, 2008).

➤ **Title 18, Chapter 63 – Mail Fraud Offenses**

- **Mail Fraud (18 U.S.C. § 1341)**

Federal mail fraud and wire fraud are two of the broadest criminal statutes in American law. While the elements of the federal mail fraud statute have been subject to a wide range of interpretations and are subject to great debate, we attempt to distill them here.

○ **Elements:**

- (1) a scheme devised or intending to defraud or for obtaining money or property by fraudulent means;
- (2) use or causing the use of the mails (or private courier) in furtherance of the fraudulent scheme; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

There is also a trend to use the breach of fiduciary duty as the underlying act in both public and private sector acts under 18 U.S.C. § 1346, although some courts have rejected this approach.<sup>17</sup>

○ **Related Statutes:**

- 18 U.S.C. § 1346 provides that a “scheme or artifice to defraud” includes schemes or artifices to deprive another of the intangible right of honest services. This statute is often referred to as the “honest services clause” because it has been interpreted in some, although not all, circuits as criminalizing such behavior as failing to abide by a private company’s internal policy, or acting against the company’s interests, even if action may be not criminal if it is in accordance with a company’s policies and interests.
- 18 U.S.C. § 1349 punishes the inchoate offenses of attempt and conspiracy and be coupled with all of the Chapter 63 offenses.<sup>18</sup>

- **Wire Fraud (18 U.S.C. § 1343)**

Along with mail fraud, federal wire fraud is one of the broadest criminal offenses in American criminal law.

○ **Elements:**

- (1) a scheme devised or intending to defraud or for obtaining money or property by fraudulent means;

<sup>17</sup> See Joshua A. Kobrin, *Betraying Honest Services: Theories Of Trust And Betrayal Applied To The Mail Fraud Statute And § 1346*, 61 N.Y.U. ANN. SURV. AM. L. 779, 816-17, n. 1190 (2006) (“[T]he Fifth Circuit has defined the deprivation of honest services as a failure to perform a duty owed under state law [and] . . . the Third Circuit has not decided whether an underlying state violation is always necessary . . .”).

<sup>18</sup> The following offenses, as discussed in this piece, are codified under Chapter 63: 18 U.S.C. §§ 1341, 1343-44, 1346, 1348-50.

- (2) transmission by means of wire, radio, or television communication in furtherance of the fraudulent scheme; and
- (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

- Related Statutes: Same as Mail Fraud 18 U.S.C. § 1341

#### **Bank Fraud (18 U.S.C. 1344)**

Bank Fraud is very similar to mail and wire fraud, but the focus is on a defendant’s execution of a fraud upon a financial institution.

- Statute Prohibits: The knowing execution, or attempt to execute, “a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the moneys, . . . or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.”

- Elements:
  - (1) a scheme devised for intending to defraud or for obtaining money or property by fraudulent means;
  - (2) perpetrated against a financial institution as defined by 18 U.S.C. § 20; and
  - (3) materiality – under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.”

- Related Statutes:
  - 18 U.S.C. § 20 defines the term “financial institution.” Under this statute, “financial institution” includes, among other entities, insured depository institutions, insured credit unions, Federal home loan banks, small business investment companies, deposit institution holding companies, Federal Reserve banks and member banks.
  - 18 U.S.C. §§ 1346 and 1349, as discussed under Mail Fraud 18 U.S.C. § 1341
  - Any of the certification or reporting statutes outlines below, such as 18 U.S.C. §§ 1005, 1350, or 15 U.S.C. § 78m, because a failure to accurately report transactions, funds, etc., could be considered a fraud on the financial institution.

#### **Securities Fraud (18 U.S.C. 1348)**

- Elements:
  - (1) a scheme devised to or intending to defraud or for obtaining money or property by fraudulent means;
  - (2) in connection with any security or the purchase or sale of any security as defined by the statute; and
  - (3) materiality -- under the Supreme Court holding in *Neder v. United States*, 527 U.S. 1, 25 (1999), the “materiality of falsehood is an element of federal mail fraud, wire fraud, and bank fraud statutes.” This holding logically extends to the additional crime of securities fraud.

- o Related Statutes: Same as those discussed under Mail Fraud – 18 U.S.C. § 1341 and Bank Fraud – 18 U.S.C. 1344.

- **Attempt/Conspiracy (18 U.S.C. 1349)**

This statute establishes the inchoate offenses of attempt and conspiracy with regard to any offense listed under Chapter 63 (Mail Fraud Offenses). It provides that “[a]ny person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

- **Certification of Financial Reports (18 U.S.C. 1350)**

This statute, enacted by the Sarbanes-Oxley Act of 2002 (SarboX), (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), sets forth the requirements for periodic financial reporting and makes the failure of corporate officers – specifically the CEO and CFO – to certify financial reports, or to do so in the manner proscribed by the statute, a criminal offense.

- o Elements:
  - (1) certification of periodic financial statement or report that does not comport with all the requirements set forth in §§ 13(a) or 15(d) of the Securities Exchange Act of 1934 – 15 U.S.C. §§ 78m(a) and 78o(d); and
  - (2) the person signing the certification “had reason to know, or should have suspected, due to the presence of glaring accounting irregularities or other ‘red flags’ that the financial statements contained material misstatements of omissions” (*Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1266).

➤ **Title 18. Chapter 73 – Obstruction Offenses**

- **Definitional Provision (18 U.S.C. § 1515)**

This statute sets forth the definitions of various terms and provisions utilized in the Chapter 73 Obstruction of Justice statutes.

- **Obstruction of Proceedings (18 U.S.C. § 1505)**

This statute covers any pending proceeding before any agency or department of the United States government, as well as any inquiry or investigation by either House of Congress or committee thereof. It specifically provides a criminal penalty for “[w]hoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had . . . .”

- **Obstruction of Criminal Investigations (18 U.S.C. § 1510)**

This statute applies to both criminal investigations and judicial proceedings. First, it punishes the willful use “of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute” to a criminal investigator. Second, it

punishes the disclosure of contents of a subpoena either directly or indirectly, by officers of financial institutions.

**Witness Tampering (18 U.S.C. § 1512)**

This statute punishes against various acts – ranging from physical violence to intentional harassment to corrupt persuasion – done with the intent to prevent, hinder, delay, or influence the production of, testimony of, or appearance of persons and things at judicial proceedings or with respect to criminal investigations. It provides, however, that “an official proceeding need not be pending or about to be instituted at the time of the offense . . . .” 18 U.S.C. § 1512 (f)(1).

The statute also punishes “[w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person with intent to” obstruct, hinder, or delay investigations, proceedings, and/or production of evidence or “the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . .” 18 U.S.C. § 1512 (b).

This statute also covers acts by individuals alone or in connection with physical evidence, by punishing “[w]hoever corruptly alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.” 18 U.S.C. § 1512 (c).

Both 18 U.S.C. § 1512 (b) and (c) have been used to indict corporate employees who allegedly make untrue statements to private lawyers conducting internal investigations. The theory is that these employees expected (to varying degrees) that these statements would then be turned over to the government.<sup>19</sup>

**Obstruction of Federal Audit (18 U.S.C. § 1516)**

Punishes “[w]hoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties . . . .”

**Obstructing the Examination of a Financial Institution (18 U.S.C. § 1517)**

Punishes “[w]hoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an agency of the United States . . . .”

The term financial institution is defined by 18 U.S.C. § 20. Under this statute, “financial institution” includes, among other entities, insured depository institutions, insured credit unions, Federal home loan banks, small business investment companies, deposit institution holding companies, Federal Reserve banks and members banks.

<sup>19</sup> Stephanie Martz, *The Ring Case*, White Collar Crime Prof Blog (Oct. 13, 2008), available at [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2008/10/heres-an-evergr.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2008/10/heres-an-evergr.html) (last visited Oct. 20, 2008).

- **Destruction, Alteration, or Falsification of Records (18 U.S.C. § 1519)**

This statute, also enacted by the Sarbanes-Oxley Act of 2002 (SarboX), (Pub.L. 107-204, 116 Stat. 745, enacted July 30, 2002), punishes “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . .”

This “statute is drafted in broader terms than prior existing law” and is sometimes referred to as the “anti-shredding provision” of SarboX.<sup>20</sup> “Furthermore, the provision does not limit liability to those actors who are facing a ‘pending proceeding’ nor does it link the ‘intent to obstruct’ element to an official proceeding. Although the actor must form an ‘intent to impede, obstruct or influence’ a federal investigation or administrative action, the statute includes the ‘in relation to or contemplation of’ language – which is unique to the federal obstruction statutes – to modify the mental state sufficient for conviction.”<sup>21</sup>

- **Destruction of Corporate Audit Records (18 U.S.C. § 1520)**

Promulgates requirements for retention of audit records and establishes criminal penalties for violation of any rules or regulations enacted by the SEC, related to record retention, under this statute.

➤ **Title 15, Chapter 2b – Securities Exchanges**

- **Manipulative and deceptive devices (15 U.S.C. § 78j)**

This statute, under Chapter 2b dealing with the Securities Exchange, is the primary statute used to punish securities fraud and violations. Generally there are four types of fraud that can be a basis for a violation under this section: (1) SEC Regulation Rule 10b-5 material omissions and misrepresentations, (2) insider trading, (3) parking, and (4) broker-dealer fraud. Because this statute is essentially read hand-in-hand with Rule 10b-5, 17 C.F.R. § 240.10b-5, it can be used to punish any manipulative behavior or misrepresentations made in connection with securities. Also, this statute can be used broadly to punish both general conduct and specific regulations violations.

- **Willful violations; false and misleading statements (15 U.S.C. § 78ff)**

This is the primary statute under Chapter 2b used to elevate civil regulations to criminal violations when there is evidence of willfulness. As such, it penalizes willful regulatory violations, a willful or knowing failure to file appropriate documents or reports, and willfully or knowingly making misleading statements. When relied upon for an indictment, this statute is often used in conjunction with one or more SEC Regulations.

<sup>20</sup> Dana E. Hill, *Anticipatory Obstruction Of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 89 CORNELL L. REV. 1519, 1521 (2004).

<sup>21</sup> *Id.* at 1522 (internal citations omitted).

➤ **Other Relevant Criminal Statutes**

**Conspiracy (18 U.S.C. § 371)**

This is the basic criminal offense of conspiracy in the United States criminal code that penalizes any conspiracy to commit any offense or to defraud the United States. It requires proof of an agreement, which can be proven through circumstantial evidence; willing participation by the defendant; and an overt act committed by any one member of the conspiracy.

➤ **Related SEC Regulations and those Commonly Used in Charging Documents**

As discussed above, Title 15, Chapter 2b, makes it a criminal offense to violate any of the Securities Exchange Commission Regulations. These regulations are incredibly voluminous, but there are a handful that commonly appear in criminal indictments. Individuals are often simultaneously charged with violating one of these regulations under 15 U.S.C. § 78j and ff.

- 17 C.F.R. § 240.10b-5 – Employment of Manipulative and Deceptive Devices
- 17 C.F.R. § 240.10b-5-1 – Insider Trading
- 17 C.F.R. § 240.10b5-2 – Duties of trust/confidence in misappropriation insider trading cases
- 17 C.F.R. § 240.12b – Registration and Reporting
- 17 C.F.R. § 240.12b-2 – Maintenance of records and preparation of required reports
- 17 C.F.R. § 240.13a – Reports of issuers of securities registered pursuant to section 12

## Bankrupt Justice: The Costly Abuses of Overcriminalization and Need for Reform

### WHAT IS OVERCRIMINALIZATION?

In its current state, our criminal justice system frequently prosecutes “crimes” and imposes sentences without a rational justification. Currently, there are at least 4,450 criminal offenses just in the *federal* criminal code, many of which are vaguely defined and difficult to connect to notions of wrongdoing. In addition, it has been estimated that criminal charges could be brought for the violation of as many as 300,000 different federal regulations. The result: wasteful prosecutions that go nowhere, innocent people caught in heartbreaking tales of conviction, imprisonment for persons who made mistakes but had no criminal intent, and sentences that are far greater than the “crime.” The tragedy for some citizens, and incipient tragedy for the rest of us, is that our liberties are at the mercy of the laws of probability and prosecutors’ idiosyncrasies. Unbridled lawmaking and enforcement that isn’t tethered to this Nation’s founding principles does not well serve its citizens or America’s future.

### WHY IS OVERCRIMINALIZATION A PROBLEM?

Overcriminalization threatens our Democracy and burdens America’s economic growth and future.

- Creating laws that do not inherently provoke a sense of wrongdoing, that are so complex and numerous, and that are scattered around the Code, makes every law-abiding American vulnerable to losing his liberty even when he does not know that he has violated a law. Our criminal laws have become a trap for the unwary and unfairly punish innocent mistakes.
- Companies disappear and people lose jobs when companies face wrongful prosecution even when the company is ultimately found to be innocent, e.g., (now defunct) international accounting firm Arthur Andersen.
- Taxpayers’ money is diverted to a criminal justice system characterized by ineffectiveness and waste in the form of court proceedings that must be repeated or dismissed because of vague laws.
- Overcriminalization has resulted in increased incarceration where society would be better served by exacting a civil penalty—as was the case before Congress began its out-of-control creation of new crimes.
- A criminal justice system that isn’t working damages America by discouraging business creation and jobs within and outside of our country. Job-makers rightly consider vague and burdensome criminal laws as a threat to the lifeblood of a company and choose locations in other countries. The current environment inhibits lawful business risk-taking and stifles creativity and innovation.

### WHAT CAN BE DONE TO FIX THE PROBLEMS?

- Congress must fully consider the adequacy of existing laws and rules before creating new ones.
- Criminal laws should be carefully written to provide notice of prohibited conduct and to avoid punishing innocent mistakes.
- Before enacting new *federal* criminal laws, Congress must consider whether a significant *federal* interest is at issue and determine that a state or local remedy would be inadequate to address the situation.
- Sentencing should fully account for the needs of justice as well as the societal costs and benefits of incarceration. “One size fits all” sentences that over-punish minor transgressions should be avoided.

The mess in our criminal justice system has caused a bi-partisan outcry among a large and growing contingent of organizations and opinion leaders for Congress to pay attention to the foundations of our Nation and responsibly pass laws that adhere to our traditions of liberty. The House Judiciary’s Subcommittee on Crime, Terrorism and Homeland Security (Chairman Scott, D-Va.) will hold a hearing titled “Over-Criminalization of Conduct and Over-Federalization of Criminal Law” on Wednesday, July 22, 2009 at 3 p.m. in Room 2237 of the Rayburn Building. We ask that you consider attending the hearing on these issues and support our effort to sensibly reform federal criminal law.

## Doing Violence to the Law: The Over-federalization of Crime

The rapid expansion of federal criminal law, beyond almost all prudential and constitutional limits, may not be the first thing to leap to mind when one thinks of key problems with American criminal law. But the existence now of over 4,450 federal criminal offenses<sup>1</sup> is itself a problem that implicates the foundations of the criminal law. The number of federal offenses is too great for Americans to be familiar with all of the conduct that is criminal, and many of the offenses themselves are deeply flawed, omitting essential substantive elements necessary to protect the innocent. As a result of these flaws, the federal criminal code fails to serve what may be its most important function, which is not to expose and punish the relatively few persons who consciously choose to engage in criminal conduct, but to inform citizens of the law's requirements, thereby equipping them to avoid the conduct deemed worthy of society's most severe penalty and moral censure.<sup>2</sup>

The explosion of the federal criminal law—both in the number of offenses and their overall scope—demands that legal reformers revisit basic assumptions about what criminal law is and how best to rein in its actual and potential abuses. Over the last forty to fifty years, government at all levels has succeeded in convincing Americans that the criminal law is whatever legislators define it to be. Ill-conceived new criminal offenses occasionally raise an eyebrow or two, but Americans generally accept their legitimacy. The result is that Americans have come to rely, consciously or not, on the good graces of prosecutors and the laws of probability to shield them from prosecution. When lightning does strike and an otherwise law-abiding citizen is charged and convicted for conduct that is not traditionally criminal or necessarily even wrongful, most Americans convince themselves that the accused must have done *something* to warrant the prosecutor's attention. Yet while Americans remain incredulous that improper criminal laws could be used to convict someone who had no intention of doing anything wrongful, the reality is otherwise.

### I. Substantive Protections

"An unjust law is a code that is out of harmony with the moral law," wrote Martin Luther King, Jr., who had no little experience with unjust law.<sup>3</sup> Many federal criminal

offenses fall far short of this standard because they do not require an inherently wrongful act, or even an act that is extraordinarily dangerous. In the days when average citizens were illiterate, they could still know and abide by the criminal law. At that point, most criminal offenses addressed conduct that was inherently wrongful—*malum in se*—such as murder, rape, and robbery. That is no longer the case. Most of today's federal offenses criminalize conduct that is wrong only because it is prohibited—*malum prohibitum*.

Worse, many of these prohibitions are actually contrary to reason and experience, giving average Americans little notice of the content of the law. For example, few would imagine that it is a federal crime for a person to violate the terms of service of an online social networking site by registering with a fake name, as a recent federal indictment in Los Angeles alleges.<sup>4</sup> Indeed, many Americans might instead expect this behavior to be protected, for it promotes privacy and anonymity and, by extension, the personal safety of vulnerable users. Another example: Unauthorized use of the 4-H organization's logo is a federal crime.<sup>5</sup> There are undoubtedly reasons that these laws are on the books, but they are not reasons that average law-abiding Americans would be likely to anticipate when trying to conform their conduct to the law's requirements.

Exacerbating the criminalization of an ever-increasing array of behavior that is not inherently wrongful is the crumbling of traditional protections in the law for those lacking wrongful intent. Historically, a criminal conviction required that a person both

1. committed an inherently wrongful act that constituted a serious threat to public order, and
2. did so with a guilty mind or criminal intent, that is, *mens rea*.

These two substantive components were essential for conviction in almost all criminal cases from the time of the American founding through the first decades of the 20th century.

But over the past few decades in particular, Congress has routinely enacted criminal laws that lack *mens rea* requirements or that include *mens rea* requirements that



**BRIAN W.  
WALSH**

Center for Legal  
and Judicial  
Studies  
The Heritage  
Foundation

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are so watered down as to provide little or no protection to the innocent. As a result, honest men and women increasingly find themselves facing criminal convictions and prison time. This happens even when their "crimes" are inadvertent violations that occur in the course of otherwise lawful, and even beneficial, conduct.

Despite increasing attention to this problem in recent years, the trend is for fewer and weaker *mens rea* requirements. In a recent study, Professor John Baker found that seventeen of the ninety-one federal criminal offenses enacted between 2000 and 2007 lacked any *mens rea* requirement whatsoever.<sup>6</sup> The Heritage Foundation and the National Association of Criminal Defense Lawyers will soon publish the results of their joint research into the *mens rea* provisions in bills introduced in the 109th Congress.<sup>7</sup> Preliminary findings reveal that the majority of those offenses lack a *mens rea* requirement sufficient to protect from federal conviction anyone who engaged in the specified conduct but did so without criminal intent.<sup>8</sup>

Many lawyers seem to accept uncritically the idea that any act made criminal by a legislature is, by that fact alone, an *actus reus*. But to accept that definition is to obliterate the meaning of *actus reus*, for the term would be a mere synonym for "act that has been made criminal." The problem may be best illustrated using some of the "criminal" laws made and enforced by totalitarian regimes. For example, in some communist countries it was deemed a "criminal" act for relatives of politically or religiously persecuted persons to discuss their relative's persecution, even in private and even with other family members. In some regimes, any type of unauthorized communication with a foreigner was deemed a "crime." Regardless of any elaborate (or convoluted) logic and rhetoric that may be used to justify criminalizing such conduct, it is evident that there is no *actus reus* in these so-called crimes.

Similarly, but to a lesser extreme, when Congress makes it a federal crime to violate any foreign nation's laws or regulations governing fish and wildlife—as it has done in the Lacey Act<sup>9</sup>—many violations will be "crimes" that include no *actus reus*. Some of those foreign regulations may do nothing more than protect the foreign nation's local business interests. For example, the fishing regulations of a small Central American nation might require fishermen to package their catch in cardboard, perhaps only in order to stimulate business for a domestic cardboard manufacturer. If a fisherman then packs his catch taken in that nation's waters in plastic rather than cardboard and imports into the United States—in violation of the express terms of no federal or state law of the United States—is there a real *actus reus*?<sup>10</sup> Answering yes leads to the absurd conclusion that Congress could, with a single sentence in a single legislative act, make it a crime to violate any and every law of every nation on earth—and that every such offense thereby includes a meaningful *actus reus*. Such may be positive law, but they are not "crimes" in the truest sense of the word; they are merely

legislatively created offenses that are unworthy of any free nation's criminal law.

The size of the federal criminal law compounds these problems and undermines other protections. The Principle of Legality, for example, holds that "conduct is not criminal unless forbidden by law [that] gives advance warning that such conduct is criminal."<sup>11</sup> The sheer number and disorganization of federal criminal statutes ensures that no one could ever know all of the conduct that has been criminalized. Those who have tried merely to count all federal offenses—including both Professor Baker and the Justice Department itself—have been able to provide only good estimates. The task proves impossible because offenses are scattered throughout the tens of thousands of pages of the United States Code (not to mention the nearly 150,000 pages of the Code of Federal Regulations).<sup>12</sup> If criminal-law experts and the Justice Department itself cannot even count them, average Americans have no chance of knowing what they must do to avoid violating federal criminal law.

## II. The Threat to Liberty

The power to punish criminally—including the deprivation of one's personal liberty and even one's life—is the greatest power that government regularly exercises with respect to its own citizens. As Professor Herbert Wechsler famously characterized it, criminal law "governs the strongest force that we permit official agencies to bring to bear on individuals."<sup>13</sup> Perhaps the central question that the Framers of the Constitution and the Bill of Rights debated, and to which they gave painstaking consideration, was how best to protect individuals from the unfettered power of government. They were well acquainted with abuses of the criminal law and criminal process and so endeavored to place in our founding documents significant safeguards against unjust criminal prosecution, conviction, and punishment.

In fact, they understood so well the nature of criminal law and the natural tendency of government to abuse it, that two centuries later, the most important procedural protections against unjust criminal punishment are derived directly or indirectly from the Constitution itself, specifically the Fourth, Fifth, Sixth, and Eighth Amendments.

But despite these protections, the wholesale expansion of federal criminal law—both as to the number of offenses and the subject matter they cover—is a major threat to Americans' civil liberties. Each time Congress crafts a criminal law covering a new subject matter, it effectively expands the power of the federal government. And the types of crimes that Congress now often creates—lacking a true *actus reus* or a meaningful *mens rea* requirement—can effectively circumvent the Bill of Rights' procedural protections.

Of similar concern, criminal offenses that exceed the limits of Congress's limited, enumerated power are breaches of one of the primary structural limitations that

constitutional federalism imposes on the federal government. After countenancing for decades Congress's almost unlimited criminalization of conduct that is inherently local in nature (as long as, that is, the Constitution's Commerce Clause was invoked to justify the assertion of congressional authority) the Supreme Court rediscovered constitutional limits in *United States v. Lopez*<sup>14</sup> and *United States v. Morrison*.<sup>15</sup> In both of these cases, the Court explained that such limits on federal commerce power are consistent with and flow from the fact that Congress is a body of limited, enumerated powers.<sup>16</sup>

The federal offense of carjacking is a quintessential example of Congress's overreaching assertions of federal criminal jurisdiction. The federal carjacking offense is currently defined as taking a motor vehicle "from the person or presence of another by force and violence or by intimidation."<sup>17</sup> The federal jurisdictional "hook" for this carjacking offense is that the vehicle must have been "transported, shipped, or received in interstate or foreign commerce," but how many vehicles have not? Actual commissions of carjackings take place almost uniformly within a single locale of a single state,<sup>18</sup> yet federal criminal law now purports to authorize federal prosecutors to be the ones to charge and prosecute local carjackings. Such breaches of constitutional federalism are not mere breaches of technical and theoretical niceties, for the power to criminalize is the power to coerce and control. The purpose of constitutional federalism is akin to the purpose of limited government itself: to guard against accumulation of power by a single sovereign—i.e., the federal government—as a "double security . . . on the rights of the people."<sup>19</sup> Thus, if there were no limits on Congress's power to criminalize, there would be no limits on the power of the federal government to coerce and control Americans.

### III. Prospects for Reform

The "overcriminalization" problem is so widespread and pervasive that it is tempting to think that reform is futile. But there is reason to hope that Congress may change its ways. The over-federalization of crime is not a partisan issue, and both major parties stand to benefit from fighting over-federalization once the public is better educated about the problem and its implications. With regard to the criminal law, Democrats generally recognize that the power to make laws and decisions about the enforcement of those laws should reside as closely as possible to those who will be most affected. Washington should in most cases not be dictating which members of the community should be locked up and for what conduct. Many Republicans tend to view constitutional federalism as a check on the unwarranted and potentially dangerous accumulation of power by a central government. Once they understand the mechanics and implications of the over-federalization of crime, Americans who support either party are likely to understand over-federalization as a grave threat to their rights and liberties.

Although most members of Congress remain prone to viewing their being "tough on crime" at the federal level as a hedge against unemployment, that tide is turning. Influential Senators and Representatives of both parties are beginning to recognize the real-world effects of the over-federalization of crime on individuals and communities in their home states and districts. Certainly nothing requires Congress to legislate to the full extent allowed by the Supreme Court's Commerce Clause jurisprudence. Some members of Congress thus have begun to work to change the political environment and block bills that would expand the reach of federal criminal law beyond prudential or constitutional limits. These leaders include Representatives John Conyers (D-MI), Louie Gohmert (R-TX), and Bobby Scott (D-VA) as well as Senators Jeff Sessions (R-AL) and Sam Brownback (R-KS). The projects of all those who advocate for the reform of federal criminal law would be advanced by reaching across real and perceived political boundaries to shape a coalition working to ensure that all new criminal offenses adhere to the fundamental principles of sound criminal law.

In the long run, no one benefits when the federal government indiscriminately criminalizes conduct without regard to prudential and constitutional limitations. Perversely, overcriminalization undermines the rule of law over time, even as it chips away at liberty. Narrow special interests that pressure Congress to add criminal offenses that are not warranted by constitutional norms or prudence play a dangerous game with our freedoms. No one, Democrat, Republican, or otherwise, should countenance it.

### Notes

- <sup>1</sup> John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26, June 16, 2008, at 1.
- <sup>2</sup> Although some treat enforcement of the law as if it were the only means of reducing crime, this ignores the role of moral censure and individual conscience and assumes that most Americans would violate the law without compunction if they could get away with it. But others argue persuasively that conscience, upon being conditioned by appropriate moral education, reduces more crime than is deterred by punishment. See, e.g., JOHN Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME & HUMAN NATURE* 494-95 (1985).
- <sup>3</sup> Martin Luther King, Jr., *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR. 293 (James Melvin Washington ed., 1986).
- <sup>4</sup> See *United States v. Lori Drew*, Case No. CR-08-0582 GW (C.D. Cal. May 15, 2008) (indictment), available at <http://online.wsj.com/public/resources/documents/Drew.pdf>.
- <sup>5</sup> See 18 U.S.C. § 707.
- <sup>6</sup> John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION LEGAL MEMORANDUM No. 26, June 16, 2008, at 7.
- <sup>7</sup> The research is limited to nonviolent criminal offenses that do not involve drugs or firearms.
- <sup>8</sup> Report on Overcriminalization in the 109th Congress, THE HERITAGE FOUNDATION & NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (2008) (forthcoming).
- <sup>9</sup> 16 U.S.C. § 3371 et seq.

- <sup>10</sup> This is no academic question. Although the reasons behind the Honduran regulation requiring cardboard packaging are unclear, U.S. federal prosecutors charged Honduran lobster fisherman David McNab and three Americans with whom he did business with alleged violations of the Lacey Act based in significant part on McNab's having packed his catch in clear plastic. McNab and two of his three fellow business associates are finishing eight-year federal prison terms despite the fact that the Honduran government certified to the U.S. Department of Justice, and also informed the federal court of appeals in an amicus brief, that the regulations in question were not in force at the time of McNab's alleged violations. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003); Tony Mauro, *Lawyers See Risk over Lobster Case*, LEGAL TIMES, Feb. 18, 2004, available at <http://www.law.com/jsp/article.jsp?ci=1076428337070>.
- <sup>11</sup> WAYNE R. LAFAYE, CRIMINAL LAW 11 (4th ed. 2003).
- <sup>12</sup> CURT WAYNE CHURCH, COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2007 13 (2007), available at <http://cei.org/pdf/5018.pdf>.
- <sup>13</sup> See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952).

- <sup>14</sup> 514 U.S. 549 (1995).
- <sup>15</sup> 529 U.S. 598 (2000).

- <sup>16</sup> Some commentators have called into question the viability of *Lopez* and *Morrison* after the Supreme Court held in *Gonzales v. Raich* 545 U.S. 1, 32-33 (2005) that the federal Controlled Substances Act (CSA) preempted California's so-called medical marijuana law. But the *Raich* majority expressly distinguished its two earlier precedents, repeatedly emphasizing that the statutory scheme at issue in *Raich* (which includes the CSA as well as the Comprehensive Drug Abuse Prevention and Control Act, of which the CSA is a part) is highly comprehensive and regulates actual commerce, specifically commerce in controlled substances. *Id.* at 13, 23-28.
- <sup>17</sup> 18 U.S.C. § 2119.
- <sup>18</sup> The wanton, fatal 1992 carjacking Congress used as justification for asserting federal criminal jurisdiction over almost all carjackings took place wholly within suburban Maryland. See Graciela Sevilla, *Basu's Slayer Sentenced to Life without Parole*, WASHINGTON POST, Aug. 19, 1993, at B1.
- <sup>19</sup> THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).



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## ***MENS REA* REQUIREMENT: A CRITICAL CASUALTY OF OVERCRIMINALIZATION**

by  
 Professor John Hasnas

Lawyers love Latin. Perhaps that is why they use the term *mens rea* to describe the simple concept that one should not be subject to punishment unless one has acted in a blameworthy way. Traditionally, the criminal law required a showing of *mens rea* (which is Latin for a guilty mind) for one to be convicted of an offense. One had to knowingly or at least recklessly act in a morally blameworthy way to be subject to criminal punishment.

If you ask a non-lawyer to identify a principle of law, he or she is likely to respond with "Ignorance of the law is no excuse." For much of our history, this would have been a perfectly sensible response. Traditionally, the purpose of the criminal law was the punishment of those who wrongfully caused harm to others, not the regulation of interpersonal affairs. One does not need notice of what the law requires to know that one should not intentionally harm one's fellow citizen. The *mens rea* requirement of the criminal law embodies the fundamental principle that punishment requires personal fault.

However, this principle also renders the criminal law a very poor mechanism for economic regulation. Regulation is not concerned with punishing wrongdoing, but with ordering human interaction so as to improve social welfare. To achieve this end, regulation must prohibit not merely conduct that is wrongful in itself (in lawyers' Latin, *malum in se*), but any conduct that would thwart the overall regulatory scheme even when it is not wrongful in itself (*malum prohibitum*). When such regulatory offenses are embodied within the criminal law, the assumption that everyone is on notice of what the law requires—that ignorance of the law is no excuse—does not hold. Citizens may violate *malum prohibitum* laws without personal fault—without a guilty mind. To the extent that the *mens rea* requirement prohibits punishment in such cases, it undermines the efficacy of the regulatory scheme—something that suggests that regulation is best enforced administratively through civil sanctions.

Unfortunately, at an ever-accelerating rate over the course of the 20<sup>th</sup> and 21<sup>st</sup> centuries, federal and state governments have elected to employ the criminal law as a means of achieving regulatory ends. To do so, they have created a myriad of criminal offenses known as "public welfare offenses" that would be virtually unenforceable if the government had to prove that they were committed intentionally. As a result, Congress and

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John Hasnas is an associate professor of business at the McDonough School of Business at Georgetown University in Washington, DC, where he teaches courses in ethics and law. He has been visiting at the Georgetown Law Center in the fall of 2008 and will be visiting at Duke University School of Law in the spring of 2009. His book *Trapped: When Acting Ethically Is Against the Law* is available from the Cato Institute.

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the state legislatures did away with the *mens rea* requirement for such offenses, allowing citizens to be convicted of a crime even if their violation was merely inadvertent or was entirely innocent. Further, under what is called the “responsible corporate officer doctrine”, supervisors may be punished for the inadvertent or innocent violations of their subordinates. And, even in cases in which Congress and the state legislatures retained the requirement that the defendant act intentionally in committing a *malum prohibitum* regulatory offense, the principle that ignorance of the law is no excuse meant that criminal conviction required no showing that the defendant knew that his or her conduct was wrongful.

This means that citizens can be subjected to sometimes minor, but sometimes significant, punishment in the absence of any personal fault. Indeed, citizens have been imprisoned for conduct such as depositing landfill on their own property and importing lobsters in improper containers. It is telling that the Environmental Protection Agency has its own armed enforcement agents.

In addition to creating offenses that explicitly dispense with *mens rea*, Congress has further eroded the *mens rea* requirement through the creation of offenses, such as the federal fraud and money laundering offenses, that are so broad and vaguely-defined that citizens can never be sure when they have violated the law. For example, fraud traditionally required that one deprive another of his or her property by making a misrepresentation of material fact that the victim relied on in parting with the property. The federal fraud offenses, in contrast, criminalize not fraud, but the scheme or artifice to defraud – something that does not require an actual misrepresentation of fact or that the victim relied on the defendant’s statements or suffered any loss. These offenses criminalize virtually any conduct that involves deception or non-disclosure, and has been described by U.S. Court of Appeals for the Second Circuit as having a “virtually limitless” reach. Citizens have been prosecuted for claiming that the houses they were selling were good investments, for referring patients to perfectly adequate hospital facilities without revealing to the patients that they receive a referral fee for doing so, and, in Ken Lay’s case, for telling Enron employees that he was purchasing Enron stock, which was true, without revealing that he was also making forced sales of Enron stock in response to margin calls.

Although the charge against her was ultimately dismissed for lack of evidence, Martha Stewart was indicted and prosecuted for securities fraud. Her offense consisted of publicly declaring her innocence of insider trading, which in the opinion of prosecutors was a false statement designed to prop up the price of Martha Stewart Living Omnimedia stock. Regardless of what one thinks about Martha Stewart, how many people would know that doing an interview with Barbara Walters and asserting one’s innocence could constitute a federal offense?

By passing statutes that criminalize innocent or merely negligent behavior or that are so broadly defined that citizens cannot be sure when they are violating the law, the federal and state governments have significantly eroded the traditional *mens rea* requirement for criminal conviction. This is a development to be much regretted. There are many things a liberal government may do to improve social welfare. Government may properly ask individual citizens to make significant sacrifices for the common good. However, there are also many things a liberal government may not do. Visiting the opprobrium and stigma of criminal punishment on those who have not behaved in a blameworthy way is among them. Such official scapegoating is inconsistent with a liberal legal regime. A just legal system does not permit punishment without fault. Hence, justice demands the reinvigoration and preservation of the *mens rea* requirement for criminal punishment.



Washington Legal Foundation  
Advocate for freedom and justice  
2009 Massachusetts Ave., NW  
Washington, DC 20036  
202.586.6302

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## APPEALS COURT ORDERS NEW TRIAL IN ABUSIVE CRIMINAL PROSECUTION

*(United States v. San Diego Gas & Electric Co.)*

The U.S. Court of Appeals for the Ninth Circuit in San Francisco this week upheld a district court ruling that granted a new criminal trial to San Diego Gas & Electric Company, an employee, and a contractor, each of whom was convicted of technical violations of the Clean Air Act (CAA) for removing a multi-layered wrap around pipes that contained a small amount of asbestos.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *United States v. San Diego Gas & Electric Co.*, urging that a new trial be granted. WLF argued that the government abused its prosecutorial discretion by arbitrarily resorting to a felony criminal prosecution for this alleged technical infraction, when there were more suitable alternative administrative and civil remedies available. WLF filed its brief on behalf of itself and the National Association of Criminal Defense Attorneys.

The CAA regulations at issue apply to the removal of pipe wrapping when the material at issue contains more than 1% asbestos and the material is "friable" (that is, capable of being crumbled to powder by hand pressure). The district court ordered a new trial because it had serious doubts about the accuracy of government tests that purported to demonstrate that the 1% threshold had been met. The appeals court affirmed, agreeing with WLF that the district court did not abuse its discretion in determining that evidence of asbestos content was highly prejudicial and resulted in "a miscarriage of justice." WLF argued that the government had not tested representative samples and had failed to conduct the testing properly.

WLF also argued that the government had erred in treating this case as a criminal matter in the first case, given the highly technical nature of the defendants' alleged regulatory violation. WLF noted that there was no evidence that even a single asbestos fiber was released into the air or soil as a result of the defendants' activities. Indeed, test results affirmatively showed there was no such release, WLF argued.

WLF cited both EPA and Department of Justice guidelines that instruct employees

to use non-criminal remedies in minor cases, particular where, as here, there existed a good-faith dispute as to whether the pipe wrap even met the 1 % jurisdictional standard.

"This is an outrageous example of overcriminalization of legitimate business activity," said WLF Chief Counsel Richard Samp in response to the Ninth Circuit's decision. "One can only wonder why the Department of Justice would want to send hard-working employees to prison and punish the shareholders and customers of the company where no environmental harm occurred. Although the government is free under the appeals court decision to seek a new criminal trial, we call on the Justice Department to take a fresh look at whether continued pursuit of criminal charges is warranted," Samp said.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to combatting the overcriminalization of regulatory offenses allegedly committed by members of the business community, and to reining in excessive litigation. WLF's brief was drafted with the *pro bono* assistance of Michael L. Kichline and Adam T. Moore of Dechert LLP in Philadelphia.

\* \* \*

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).



## **The Unlikely Orchid Smuggler: A Case Study in Overcriminalization**

*Andrew M. Grossman*

George Norris, an elderly retiree, had turned his orchid hobby into a part-time business run from the greenhouse in back of his home. He would import orchids from abroad—South Africa, Brazil, Peru—and resell them at plant shows and to local enthusiasts. He never made more than a few thousand dollars a year from his orchid business, but it kept him engaged and provided a little extra money—an especially important thing as his wife, Kathy, neared retirement from her job managing a local mediation clinic.

Their life would take a turn for the worse on the bright fall morning of October 28, 2003, when federal agents, clad in protective Kevlar and bearing guns, raided his home, seizing his belongings and setting the gears in motion for a federal prosecution and jail time.

### **The Raid**

Around 10:00 am, three pick-up trucks turned off a shady cul-de-sac in Spring, Texas, far in Houston's northern suburbs, and into the driveway of Norris's single-story home. Six agents emerged, clad in dark body armor and bearing sidearms. Two circled around to the rear of the house, where there is a small yard and a ramshackle greenhouse. One, Special Agent Jeff Odom of the U.S. Fish and Wildlife Service, approached the door and knocked; his companions held back, watching Odom for the signal.

Norris, who had seen the officers arrive and surround his house, answered the knock at the door with trepidation. Odom was matter-of-fact. Within 10 seconds, he had identified himself, stated that he was executing a search warrant, and waved in the rest of the entry team for a sweep of the premises. Norris was ordered to sit at his kitchen table and to remain there until told otherwise. One agent was stationed in the kitchen with him.

As Norris looked on, the agents ransacked his home. They pulled out drawers and dumped the contents on the floor, emptied file cabinets, rifled through dresser drawers and closets, and pulled books off of their shelves.

When Norris asked one agent why his home was the subject of a warrant, the agent read him his Miranda rights and told him simply that he was not charged with anything at this time or under arrest. Norris asked more questions—What were they searching for? What law did they think had been broken? What were their names and badge numbers?—but the agents refused to answer anything. Finally, they handed over the search warrant, but they would not let Norris get up to retrieve his reading glasses from his office; only an agent could do that.

It was as if he were under arrest, but in his own home.

Attached to the warrant was an excerpt of an e-mail message, from two years earlier, in which a man named Arturo offered to have his mother “smuggle” orchids from Ecuador in a suitcase and send them to Norris from Miami. Norris remembered the exchange; he had declined the offer and had stated that he could not accept any plants that were not accompanied by legal documentation.

The agents questioned Norris about the orchids in his greenhouse, asking which were nursery-grown and which were collected from the wild. Norris explained that nearly all of them had been artificially propagated; one agent, knowing little about orchids, asked whether this meant they had been grown from seeds.

The agents boxed and carried out to their trucks nearly all of Norris’s business records, his computer, his floppy disks and CD-ROMs, and even installation discs, and left him a receipt for the 37 boxes that they took. Then they left. Norris surveyed the rooms of his home. In his tiny office, papers, old photographs, and trash were strewn on the floor. Everything was out of place.

His wife arrived home shortly after the agents left. She had panicked when, calling home to talk to her husband, an agent picked up the phone and refused to put him on or answer any questions. It took the two of them hours to clean up the house and try to assess the damage.

### **A Passion Blossoms**

George Norris, now 71 and arthritic, carries his large frame wearily. His gestures are careful, as if held back by pain or fear, and his stride slow and deliberate. And his voice, once booming, is now softer and tentative. Visibly, he is a man who has been permanently scarred by experience.

Yet his mood and movements become animated when he discusses the birth of his passion for orchids. His first was a gift, twice over: A neighbor had received the blooming plant, straight from the store, for Mother’s Day, and she gave it to Norris after the flowers faded. At the time, he had a small lean-to greenhouse and dabbled in horticulture. He put it there and forgot about it. A year later, as he was doing the morning watering, his eyes were drawn to two stunning yellow flowers on stems shooting out of the plant. They were prettier than any other flowers he had ever seen.

He dove into the world of orchids with an unusual passion, reading everything he could find on the subject. One book extolled the diversity of species in Mexico. It was not so far from Houston, and his wife spoke fluent Spanish, so they planned an orchid-hunting trip. In every small town, the locals would point them to unusual plants, often

deep in the woods. Norris managed to collect 40 or 50 plants, and their beauty and diversity were stunning. He was hooked.

That was 1977, years before an orchid craze would hit the United States. All of a sudden, Norris found himself part of a small, close-knit community of orchid enthusiasts and explorers committed to finding and collecting the unknown species of Asia, Africa, and South America. They communicated by newsletters and at regional orchid shows. While man had thoroughly covered and mapped the terrain of the world, the world of orchids was still frontier, with exotic specimens being discovered regularly.

Within a few years, orchids were taking up more and more of Norris's time and attention, and he had become dissatisfied with his work in the construction field. So he quit work and set off to see if he could make a living as a full-time explorer, finding orchids in the wild and introducing them to serious collectors in the U.S.

His new business was not initially a success. It took years to build up a mailing list of customers and credibility in the field. By the mid-1980s, he was beyond the break-even point, and from there, business kept growing. In 2003, revenues topped \$200,000—a huge sum considering that most plants sold for less than \$15.

Norris, meanwhile, was gaining prominence. Through word of mouth, and after seeing his orchids in collections, more and more enthusiasts wanted to be on his mailing list, and he began using his catalogue as a platform for his views on orchids, the orchid community, and even politics. Orchid clubs all around the South invited him to deliver talks and slideshows.

Norris made a name for himself as one of the few dealers importing non-hybrid plants, known as “species” orchids. He got commissions from botany departments at several universities that needed non-hybrid plants for their research, from botanical gardens, and from the Bronx Zoo when it needed native orchids to recreate a gorilla habitat. Years later, some of those orchids are still a part of the zoo's Congo Gorilla Forest.

Norris's work took him to Costa Rica, Peru, Ecuador, Mexico, and other countries where exotic species grew wild. On each trip, he tried to meet local collectors and growers, contacts who could lead him to the best plants. Some of these, in later years, would become his chief suppliers.

Rules at the time were lax. In Mexico, Norris explained, “You could collect as many as you wanted” and get permits for them all. And with that paperwork, importing them into the U.S. was a breeze.

As orchids became more popular, however, that would change.

### **“The Regulation Is Out of Hand”**

Passion for the flower is not enough today to succeed in the orchid business. Moving beyond the standard hybrids sold at big-box stores requires either gaining a detailed knowledge of several complicated bodies of law or hiring attorneys. This is a necessity because not only is the law complicated, but the penalties for getting anything wrong are severe: fines, forfeiture, and potentially years in prison.

Trade in orchids is regulated chiefly by the Convention on International Trade in Endangered Species (CITES), an international treaty that has been ratified by about 175 nations. Though initially conceived to protect endangered animals, the subject matter was expanded to include flora as well.

CITES classifies species, and the limitations on their trade, in three appendices.

- Appendix I species are the most in danger of extinction; importing or exporting them from any CITES country is prohibited, except for research purposes.
- The species listed in Appendix II are less endangered and can be traded so long as they are accompanied by permits issued by the exporting country.
- Appendix III species are listed by individual countries and are subject to the permit requirement only when they originate in the listing country.

Determining the listing of a plant is not always an easy task. Some species of orchids are listed in Appendix I, and so cannot be traded, and Appendix II covers the remainder. Exporters, however, often have a tough time identifying plants, especially those collected from the wild. The result is rampant mislabeling of orchid species. Usually, this has few consequences, because permitting agencies and customs agents, who tend to focus on animals and invasive species, rarely have the expertise to recognize the often subtle differences between varieties of orchids, especially when they are not in bloom.

Making matters even more complicated, CITES contains a major exception to the tough restrictions of Article I. Article I plants that are artificially propagated are deemed to be covered by Article II and so may be traded. But artificial propagation is not simply a matter of ripping a plant from the wild and breeding it in a nursery. To take advantage of the exception, nurseries must be registered with CITES and obtain a permit from their government to remove a small number of plants from the wild for the purpose of propagation. Then there is the difficulty—and often impossibility—of distinguishing Article I plants raised in nurseries from those collected from the wild.

Countries that have joined CITES agree to enforce its requirements within their laws. This means establishing agencies to research domestic wildlife and, when appropriate, grant permits. It also requires close monitoring of imports and exports to ensure that no Appendix I species are traded and that shipments of species listed in Appendix II and Appendix III are properly permitted. While the treaty requires countries to “penalize” improper imports and exports, it does not require any specific penalties; that is left up to each country’s lawmakers.

In the United States, CITES is implemented through both the Lacey Act, a 1900 wildlife protection act that was amended in 1981 to protect CITES-listed species, and the Endangered Species Act (ESA). Both, in their original forms, covered only animals; plants were added later and made subject to the same restrictions as animals. Taken together, these laws prohibit trade in any plants in violation of CITES, as well as possession of plants that have been traded in violation of CITES.

More specifically, federal regulations lay out the requirements for importing plants. Every plant must be accompanied by a tag or document identifying its genus and

species, its origin, the name and address of its owner, the name and address of its recipient, and a description of any accompanying documentation required for its trade, such as a CITES permit. The importer is required to notify the government upon the arrival of a shipment. After that, the plants are inspected by the Animal and Plant Inspection Service, a division of the U.S. Department of Agriculture, which checks for possible infestations, banned invasive species, and proper documentation. Any red flags can cause a shipment to be turned back at the port of entry.

Violations also carry severe penalties. Under the ESA, “knowing” violations—that is, ones in which the dealer knew the basic facts of the offense, such as what kind of plant was being imported or that the CITES permit did not match the plant, though not the legal status of the plant, such as whether it was legal to import—can be punished by civil fines of up to \$25,000 for each violation, criminal fines of up to \$50,000, and imprisonment. The same conduct can also be punished under the Lacey Act, which allows civil penalties of up to \$10,000 for each violation, criminal fines of up to \$20,000, and imprisonment of up to five years.

Importers also face possible legal penalties under more general federal statutes, such as those prohibiting false or misleading statements to government officials (imprisonment of up to five years); the mail fraud statute (20 years); the wire fraud statute (20 years); and the conspiracy statute (five years).

The result is that minor offenses, such as incorrect documentation for a few plants, are treated the same as the smuggling of endangered animals and can lead to penalties far more severe than those regularly imposed for violent crimes and dealing drugs. Because this legal risk is so great, many orchid dealers have stopped importing foreign plants—even those that can be traded legally—while others have sharply curtailed their imports.

Perversely, the result of this drop in legal imports has been a blossoming in black-market orchids, illegally imported into the country and commanding large premiums due to their rarity and allure. Meanwhile, those who continue to import plants through the proper channels, even if they do so with great care and top-notch legal advice, know that they could be ruined at any time by so much as a single slipup. As one academic ecologist put it, “The regulation is out of hand.”

Worse than that, it’s ineffective. “Habitat destruction poses much more of a threat to [the] survival” of orchid species than collection and trade do, concludes a recent survey of the ecology literature. In Singapore, for example, clearance of old-growth forest caused the extinction of 98 percent of orchid species versus 26 percent of other plants. While there are several examples of collection dealing the final blow to a vulnerable species—for example, the Vietnamese Lady Slipper—the vulnerability in each instance was due to development, particularly rain forest clearance.

CITES strictly regulates trade in orchids but does nothing to address this greater threat. Indeed, some argue that CITES has not protected a single species of orchid from extinction.

It may even have pushed a number of species into extinction. Orchid growers frequently complain that the treaty’s restrictions on collection from the wild restrict

preservation efforts in the face of habitat destruction. Under CITES, it is illegal to collect wild orchids for artificial propagation without a permit, but obtaining a permit can take months if it can be had at all. By that time, the point may be moot: The habitat has already been destroyed. And when collection is allowed, it is highly regulated and usually limited to just a few plants. If those plants cannot be propagated, there is no second chance; even if another specimen exists, if it was not legally collected, neither are its offspring.

Further, there is evidence that regulation has served to increase wild collection and smuggling of rare species. Trade in *Phragmipediums* surged in advance of their Appendix I listing, leading to the loss of several species. After the listing went into effect, black-market prices rose for many species, increasing incentives for smugglers. Growers, meanwhile, struggled to collect species from the wild legally for propagation. In this way, CITES benefits poachers while putting hurdles in the path of legitimate, conservation-minded collectors.

The other group that benefits are the large orchid growers of Germany and the Netherlands, which supply the bulk of the world market. The Dutch, in particular, lobbied for the inclusion of Phrags in Article I, despite little evidence that Phrags were more endangered than other orchids, on the grounds that they were difficult to distinguish from plants from the unrelated *Paphiopedilum* family. The listing stifled growing competition with European growers in the potted-plant market from lower-cost producers in South America. The respite, however, lasted only a few years—the time it took for dealers to cultivate ties with growers in Southeast Asia, whose output multiplied, and push prices down.

The fundamental problem may be that CITES is simply a poor fit for plants. As originally conceived, the treaty was intended to cover only endangered animals; plants were added toward the end of negotiations. The amendment was crude, doing little more than replacing “animals” in every instance with “animals or plants.” An orchid picked from the wild, which could produce a thousand seedlings in short order, is subject to the same regulation as an elephant, a female of which species will produce fewer than 10 offspring in its decades-long lifespan. And by extension, that orchid and elephant are subject to the same means of criminal enforcement in the United States.

The difference, needless to say, is that elephant poaching may lead to that species’ extinction, while picking the orchid will more likely lead to its species’ preservation in the face of widespread habitat destruction. It is truly a perverse result that furthering the ends of CITES and U.S. environmental law carries the same massive penalties as frustrating them.

### **Risky Business**

George Norris was among that group of legal importers, counting on his common sense and understanding of orchids to see him through any legal risks. That would be his downfall.

Over the years, he had built relationships with orchid gatherers and growers around the world, and many became his suppliers. He worked the most with Manuel

Arias Silva, who operated several nurseries in Peru and was known for cultivating the toughest species from the wild that few others could persuade to grow.

Norris had met Silva in the late 1980s, when Silva had just started his export business and was looking to build a customer base in the United States. The two hit it off immediately, and in 1988, Norris spent two weeks in Peru with Silva, collecting plants and surveying Silva's operations.

Their families also grew close. After meeting Silva's relations, Norris and his wife offered to take in two of Silva's sons, Juan Alberto and Manolo, who were badly scarred about their hands and faces from a fire years earlier, and to arrange plastic surgery for them. Kathy Norris persuaded a local hospital to donate its facilities, and Dr. David Netscher, a prominent surgeon and professor at the Baylor College of Medicine, agreed to do the work for \$1,500 per child, barely enough to cover his expenses.

In 1993 and 1994, first Manolo and then Juan Alberto spent six months with the Norrises undergoing surgery, follow-up care, and recuperation. After that experience, the Norrises and the Silvas were in regular contact, exchanging family photographs and visiting from time to time.

Norris had other suppliers. One was Raul Xix, a native Maya in Belize who supported his 11 children and wife through odd jobs: building homes, tapping chicle trees, and collecting orchids from the jungle. Norris had befriended Xix on a trip and encouraged him to try his hand at exporting plants, a potentially more lucrative and dependable source of income.

Xix, Norris soon learned, had no business experience, could barely read and write, and knew little about exotic orchids. He would ship boxes loaded with all manner of flora, some not even orchids and many infested with ants, and though bearing CITES permits from Belize, few plants were correctly identified—not that it ever mattered.

Norris, charmed by Xix and admiring his work ethic, decided that he would be a regular customer and use their interactions to teach Xix the ins and outs of the business. Keeping that commitment was a challenge: Xix's first few shipments were a total loss, and others were turned back at the port of entry because of poor packing and infestations. But slowly, Xix did become more reliable.

One of Norris's most occasional suppliers was Antonio Schmidt, an orchid dealer in Brazil. The two had met at orchid shows in the United States, and Norris was impressed with Schmidt's extensive catalogue of plants. Schmidt, unlike most other suppliers, was easy to work with, promptly sending shipments of healthy plants that were well packaged.

Documentation, though, was a problem. Schmidt, like many orchid gatherers and dealers in South America, would obtain his CITES permits well before shipping and, in some cases, obtaining the orchids. As a result, his shipments did not always match what was on the accompanying CITES permits—though he *could* have obtained the proper documentation, since none were Appendix I plants. Several times, Schmidt e-mailed Norris lists stating what he had written on the label and what the plants so labeled actually were. Even with the wrong labels, the plants always sailed through customs and inspections.

Schmidt's ease at fooling inspectors was the first thing that came to mind when Silva told Norris in 1998 that his greenhouses were filled with artificially propagated *Phragmipediums*. Phrags, better known as tropical lady slippers, became popular in the early 1990s after all of the species in the family were uplisted to CITES Article I, a move that many in the orchid business attribute to commercial rather than preservationist motives. Demand for the flowers surged and continued to grow over the following decade.

Silva had been breeding the plants for years from plants that had been legally obtained, but because his nursery was not registered to produce the flowers under CITES, he could not export them; and the plants were not worth much in Peru, where they grow wild in abundance. Norris saw the opportunity to help Silva and add some valuable plants to his inventory.

The plan Norris devised was not complicated: Silva would simply substitute Phrags for some of the plants listed on the CITES permit. In the next shipment, Silva included some Phrags, labeled as *Maxillarias*, another family of orchids. It worked. The plants made it through without a problem.

Norris knew, of course, that he and Silva were bending the law—just as everyone else who had to deal with CITES on a regular basis did—but he never believed that he was doing anything serious or wrong. He wasn't importing endangered tigers or elephants, but just orchids, and none of those orchids were truly endangered: Most came from Silva's nurseries, and the rest were hardly rare. He and Silva had seen entire hillsides blooming with the same types of Phrags. All of the plants probably could qualify for a permit if Silva went through additional reams of paperwork and waited a few more months, so what was the harm?

From that time on, Silva would include Phrags from his nurseries, as well as some plants collected in and around Peru in his shipments to Norris. Each time, he would send a letter containing a key to identify the flowers. Over time, Silva's nurseries received permits and CITES registration to grow many of the Phrags he had previously shipped under other names, and as that happened, he began labeling them properly in his shipments. But there were always at least a few in each shipment that were mislabeled because he had not yet received the proper permit.

None of these mislabeled flowers, though, attracted any suspicion from authorities or Norris's customers, who had no reason to believe that anything was amiss. It was a flower that he never actually imported that would lead to the investigation and his arrest.

If there is a rock star of the orchid world, it is the *Phragmipedium kovachii*. James Michael Kovach discovered the flower while on an orchid-hunting trip to the Peruvian Andes in 2002 and sneaked it back into the United States without any CITES documentation to have it catalogued by Selby Botanical Gardens' Orchid Identification Center, a leader in identifying and publishing new species. Two Selby staff members, recognizing the importance of the discovery, rushed out a description of the new flower, christening it *kovachii*, after Kovach, and barely beating into print an article by Eric Christensen, a rival researcher who had been working from photos and measurements taken in Peru.

The most striking thing about the kovachii is its size. The plants grow thick leaves up to two feet in length. Flower stalks shoot up from the plant, rising two feet or more. But the real stunner is the flower: It is velvety, a rich pink-purple at the tips of its petals, brilliant white in the center. And the size! Some measure more than 10 inches across. The flower is a rare combination of grace and might, a giant unrivalled in its delicacy and elegance. Lee Moore, a well-known collector, dubbed it “the Holy Grail of orchids.”

Pictures circulated on orchid mailing lists and discussion reached a fever pitch. “People decided they would become excited beyond all reason,” said one orchid dealer. “Everyone wanted it. It was a meteoric plant.” According to rumors, black-market specimens had sold for \$25,000 or more.

The orchid fever was only heightened by the legal drama that had engulfed Selby Gardens and Kovach as a result of the find. The Peruvian government caught wind of the frenzy over the flower and, irked that its country had lost out on the honor of identifying the plant, pressed U.S. authorities to investigate for CITES violations. Eventually, criminal charges were brought against Kovach, Selby Gardens, and its chief horticulturalist, Wesley Higgins. All pled guilty, receiving probation and small fines.

Right after he heard about the kovachii, Norris contacted Silva to press for information about the flower, especially when they would be available for sale. With illegal trade in the flower already flourishing, Silva figured that he could get the right permits to collect a few from the wild for artificial propagation. Breeding the flower would not be easy—Phrags have a reputation for being difficult plants, and that is especially true of the rarer ones—but he had succeeded before with other tough plants and had a high-altitude greenhouse that would be perfect for the kovachii. Doing it legally could take a year or two, maybe even three.

Norris was more optimistic and ran with the information in his next catalog, boasting that he would have legal kovachiis for sale in a year, perhaps less—far sooner than anyone else thought possible. That caught the attention of an orchid researcher who had long believed that the U.S. orchid trade was overrun with illegal plants, threatening the survival of many species in the wild. Enforcement was a joke; there had been only one prosecution to date for dealing in illegal orchids. He decided to take a closer look at Norris’s Spring Orchid Specialties and brought Norris to the attention of the U.S. Fish and Wildlife Service.

Around that time, a new customer placed an order for four Phrags and specifically asked Norris to include the CITES permits for the flowers. It was an unusual request. Usually, the Department of Agriculture inspectors took the permits at the port of entry for their records. Except for the few times that shipping brokers made copies, Norris hardly ever received them with plant shipments. Assuming that the request was just a misunderstanding, he shipped the plants with a packing list but no permits.

Several days after the orchids were delivered, Norris received another e-mail from the buyer, asking again for the permits. The Department of Agriculture had them, Norris responded, but he would try to get a copy. That, thought Norris, was the end of the matter. The buyer made another order for more Phrags a year later and again asked for the permits. Once again, Norris shipped the flowers without them.

Unknown to Norris, the buyer in these transactions was working with Fish and Wildlife Service agents. Because of the controversy over the kovachii, the Service had finally become interested in orchids. A few prominent prosecutions would serve as a warning to the rest of the tight-knit orchid community.

That informant's two transactions with Norris would serve as the basis for the raid on Norris's home.

### **The Prosecution**

The raid occurred in October 2003, but George Norris was uncertain of his fate for the next five months, receiving no communications from the government. On the advice of friends, he wrote a letter to the Miami-based prosecutor who was probably overseeing the case, explaining that he had never imported kovachiis—this was at the time that others were being charged for importing the flower—and asking for a meeting to answer any questions. At the very least, he asked, could the government tell him what he was suspected to have done? After a few weeks, his computer was returned, broken, and Norris resumed business as best he could, taking orders and showing off his plants at shows.

Meanwhile, Fish and Wildlife Service Agents were poring over the records retrieved from Norris's home, as well as others obtained from the Department of Agriculture. There was no evidence that Norris had ever obtained or sold a kovachii, but the agents did notice minor discrepancies in the documents. Some of the plants Norris had offered for sale were not listed on any CITES permits. Among those missing were three of the 10 Phrags in the informant's second order. The agents also found Norris's correspondence with Silva, Schmidt, and Xix, which seemed to confirm their hunch: Norris had been engaged in a criminal conspiracy to skirt CITES and violate U.S. import laws.

Norris's business slowly recovered but suffered a devastating blow when Manuel Arias Silva was arrested in Miami one day before the Miami Orchid Show in March 2004. After that, everyone assumed that Norris would be next. Norris and his wife scrambled to sell Silva's flowers (mostly Phrags, by now properly permitted) at the show, earning just enough to pay his expenses and get him out of jail. With no one else to step in, they guaranteed Silva's \$25,000 bail and \$175,000 personal surety bond: He was now their responsibility. Rumors raged that Norris would be arrested on the floor of the show.

But it was another week before Norris was indicted. There were seven charges: one count of conspiracy to violate the Endangered Species Act, five counts of violating CITES requirements and the ESA, and one count of making a false statement to a government official, for mislabeling the orchids. Silva faced one additional false-statement charge.

On March 17, 2004, Norris and his wife flew to Miami, where he voluntarily surrendered to the U.S. marshals. The marshals put him in handcuffs and leg shackles and threw him in a holding cell with three other arrestees, one suspected of murder and two suspected of dealing drugs. Norris expected the worst when his cell mates asked him what he was in for. When he told them about his orchids, they burst into laughter. "What do you do with these things, smoke 'em?" asked one of the suspected drug dealers.

The next day, Norris pled not guilty, and a day after that, he was released on bail. The Norrises returned to Spring, Texas, to figure out their next steps. Their business was destroyed, their retirement savings and home were on the line for the Peruvian orchid dealer who was now living in the spare bedroom, and Norris, 67 and in frail health, faced the prospect of living out his days in a federal prison. Still, Norris believed he had not done anything wrong and would win out in the end.

So they made a go of fighting the charges. Norris hired an attorney who, with most of his experience at the state or county level, quickly found himself in over his head with the complexities of international treaties, environmental law, and the intricacies of a federal prosecution.

In April, the attorney accompanied Norris to what turned out to be a proffer meeting, at which defendants are typically offered the opportunity to cooperate with the government in exchange for leniency. Norris had not been told what to expect and did not have anything to say when prosecutors asked what he was willing to admit. They peppered him with names of other orchid dealers, but Norris was not inclined to inform on them—not that he knew enough about their operations, in any case, to offer anything more than speculation.

After that, Norris got a more experienced—and much more expensive—attorney. With bills piling up and the complexity of the case and the resulting difficulty of mounting a defense finally becoming apparent, Norris took the step he had been dreading: changing his plea to guilty. “I hated that, I absolutely hated that,” said Norris. Five years after the fact, the episode still provokes pain, his face blushing and speech becoming softer. “The hardest thing I ever did was stand there and say I was guilty to all these things. I didn’t think I was guilty of any of them.”

While Norris and his wife were focused on his case, Manuel Arias Silva was plotting his own next moves. By mid-May, he had managed to obtain a new passport and exit visa from the Peruvian Consulate. On May 19, soon after they had returned to Texas from a hearing in Miami, Kathy Norris received a call from Juan Silva, in Peru, who was in tears. His father, he explained, had returned home to evade the charges against him in the United States. The Norrises would be on the hook for Silva’s bail and bond—nearly \$200,000.

Based on Norris’s transactions with Silva, as well as those with Schmidt and Xix, the government recommended a prison sentence of 33 to 41 months. Such a lengthy sentence was justified, according to the sentencing memorandum, because of the value of the plants in the improperly documented shipments. Two choices pushed the recommended sentence up.

*First*, the government used Norris’s catalog prices to calculate the value of the plants rather than what he had paid for them.

*Second*, it included all plants in each shipment in its calculations, reasoning that the properly documented plants—by far the bulk of every shipment—were a part of the offense because they were supposedly used to shield the others.

On October 6, Norris was sentenced to 17 months in prison, followed by two years of probation. In the eyes of the law, he was now a felon and would be for the rest of

his life. The sentencing judge suggested to Norris and his wife that good could come of his conviction and punishment:

Life sometimes presents us with lemons. Sometimes we grow the lemons ourselves. But as long as we are walking on the face of the earth, our responsibility is to take those lemons and use the gifts that God has given us to turn lemons into lemonade.

Norris reported to the federal prison in Forth Worth on January 10, 2005; was released for a year in December 2006 while the Eleventh Circuit Court of Appeals considered a challenge to his sentence; and then returned to prison to serve the remainder of his sentence. Prison officials, angered by Norris's temporary reprieve, threw him in solitary confinement, where he spent 71 days in total. He was released on April 27, 2007.

### **The Aftermath**

George Norris has lost his passion for orchids. The yard behind their home is all dirt and grass, nothing more. The greenhouse is abandoned. Broken pots, bags of dirt, plastic bins, and other clutter spill off its shelves and onto the floor. The roof is sagging. A few potted cacti are the only living things inside it, aside from weeds.

A dozen potted plants grace the Norrises' back porch; three or four are even orchids, though none are in bloom. Kathy waters them. "They're the ones I haven't managed to kill yet," she says.

The couple's finances are precarious. Following the flood of 1994, Norris rebuilt most of their home himself, but they had to refinance the house to pay for materials. Kathy had to make those payments and all the others while Norris was in prison, relying on her salary as director of Montgomery County's Dispute Resolution Center, which she ran on a shoestring budget. The same discipline now reigns at home. "I figured out how to live on as little as it's possible to live on and still keep the house," says Kathy.

Neither Norris nor his wife knows how they will face retirement with all of their savings used to pay legal expenses. Silva's bond hangs over their heads as well, and the government has said that it will seek to enforce it. That threat keeps Kathy up at nights. She doesn't know what else they could give up, other than the house, or how they could possibly come up with the \$175,000 still owed.

Norris has already suffered the indignity of his grandchildren knowing that he spent over a year in federal prison and is a convicted criminal. What hurts him now is that he cannot introduce them to the hunting tradition—small game, squirrels, and rabbits—that has been a part of his family, passed from generation to generation. As a felon, he cannot possess a firearm. They sold off and gave away his grandfather's small gun collection, which he had inherited. In poor health and unarmed, Norris fears that he cannot even defend his own family.

But the hardest blow, explains Kathy, has been to their faith in America and its system of criminal justice:

I got raised in a country that wasn't like this. I grew up in a reasonably nice part of Dallas, I came from a family where nobody had been indicted for anything, and

so had George. And the government didn't do this stuff to people. It wasn't part of anything I ever got taught in my civics books.

That lack of faith is almost visible in George Norris's frailty and fear. "I hardly drive at all anymore," he explained. "The whole time I'm driving, I'm thinking about not getting a ticket for anything.... I don't sleep like I used to; I still have prison dreams." He pauses for a moment to think and looks down at the floor. In a quiet voice, he says, "It's utterly wrecked our lives."

### **Conclusion**

Probably any dealer in imported plants could have been prosecuted for the charges that were brought against George Norris. His crime, at its core, was a paperwork violation: He had the wrong documents for some of the plants he imported but almost certainly could have obtained the right ones with a bit more time and effort. Neither he nor other dealers ever suspected that the law would be enforced to the very letter so long as they followed its spirit.

Norris was singled out because he was in the wrong place at the wrong time. As controversy roared over the kovachii and prosecutors were gunning for a high-profile conviction to tamp down sales in truly rare and endangered plants, Norris bragged that he would soon have the extraordinary flower in stock.

To this date, he has never seen one.

Armed with overly broad laws that criminalize a wide range of unobjectionable conduct, prosecutors could look past that fact. Burrowing through Norris's records, they found other grounds for a case. One way or another, they would have their poster child.

This is the risk that all American entrepreneurs face today. Enormously complex and demanding regulations are regularly paired with draconian criminal penalties for even minor deviations from the rules. Minor violations from time to time are all but inevitable, because full compliance would be either impossible or impossibly expensive. Nearly every time, nobody notices or cares, but all it takes is one exception for the hammer of the law to strike.

*—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.*

## **Examiner Special Report: How one good man's intentions took him from a fuel cell to a jell cell**

**By: Quin Hillver**  
**Associate Editorial Page Editor**  
**January 22, 2009**

Critics who contend federal prosecutors too often go far beyond common sense and the law in enforcing bureaucratic gobbledegook, especially on environmental matters, could list as Example One the strange case of Krister Evertson, aka federal prisoner number 15003-006.

Evertson is spending 21 months in the Sheridan, Oregon, federal prison for an environmental "crime" in which no environmental harm occurred and during the commissioning of which he was trying to find a way to help the environment.

Evertson had no history of legal problems, and a long history of charitable service – especially in teaching sign language to deaf young people, a talent he learned while coping with a severe stutter that partially lingers to this day. He is described in federal court documents as a "good-natured, kind, gentle person."

Now 54, Evertson has been a science wiz since grade school, and won the Kailua Intermediate School science fair in Hawaii for research into making bio-chemical fuel cells using coconut juice.

Ever since then, he has dreamed of developing an inexpensive, mass-use fuel cell that could be used to generate power without polluting the air. His enthusiasm for the project is such that Evertson will gladly talk at length, providing scientific explanations, with citations, of why his cell will work to produce "clean energy" if only a few kinks can be worked out.

And it seems nobody doubts his basic science, only the practicality of making it available for widespread use by the general public.

Yet Evertson was convicted after being charged by federal prosecutors for allegedly violating obscure regulations of the Environmental Protection Agency by "abandoning" semi-hazardous waste that actually had been meticulously saved, sealed and stored with a friend.

"This is how we reward innovators in America?" asked senior legal policy analyst Andrew Grossman of the Heritage Foundation, his inflection turning the statement into a question. "They wind up in jail?.... This isn't the way regulation is supposed to work."

Among Grossman's assignments at the conservative Washington think tank is working with former Attorney General Edwin A Meese on the foundation's Over-criminalization Project.

The project was initiated by Meese, who heads Heritage's Center for Legal and Judicial Studies, to oppose the growing trend in government and the legal community in which trivial conduct is punished as a crime.

Evertson's story has become a favorite illustration in Meese's efforts. It is a tale that must be told in two parts, both of which ended in court rooms, which you will find [here](#) and [here](#). And go [here](#) for additional background on groups from across the political spectrum in the legal community who are uniting to do something about over-criminalization.

*Quin Hillyer is associated editorial page editor of The Washington Examiner.*



# Legal Memorandum

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## Revisiting the Explosive Growth of Federal Crimes

*John S. Baker, Jr.*

Measuring the growth in the number of activities considered federal crimes is challenging. Ideally, one compares counts of federal crimes taken at different times and employing consistent criteria to determine what constitutes a federal crime. Obtaining comparable data, however, is almost impossible. Nonetheless, a careful survey of laws enacted by Congress does permit reasonable estimation of the number of federal criminal offenses.

This report follows from other attempts to count the number of federal criminal offenses or to measure their growth. The most complete count of federal crimes, done by the U.S. Department of Justice (DOJ) in the early 1980s, put the number at 3,000. A 1998 report by a task force of the American Bar Association relied on the DOJ figure and other data to measure the growth of federal criminal law but did not itself actually provide a count of federal crimes.<sup>1</sup> In a 2004 Federalist Society monograph building on the DOJ and ABA reports, I counted new federal crimes enacted following the point at which the ABA report finished its data collection at the close of 1996. That report estimates that there were 4,000 federal crimes at the start of 2000.<sup>2</sup> This report updates that total through 2007, finding 452 additional crimes created since 2000, for a total of at least 4,450 federal crimes.<sup>3</sup>

The growth of federal crimes continues unabated. The increase of 452 over the eight-year period between 2000 and 2007 averages 56.5 crimes per year—roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the

### Talking Points

- Congress has enacted 452 new crimes over the eight-year period between 2000 and 2007—a rate of about 57 new crimes per year—for a total of 4,450 federal crimes in the U.S. Code.
- This growth rate is basically unchanged from the rates that prevailed during the 1980s and 1990s, despite that the growth of the federal criminal law has come under increasing scrutiny in recent years.
- Election politics may be driving the growth of the federal criminal law. The data show that Congress creates more criminal offenses in election years.
- Troublingly, many new crimes lack a *mens rea* requirement, a traditional element that protects those who did not intend to commit wrongful acts from prosecution and conviction.
- The trend of “overcriminalization” continues unabated as Congress subjects more and more activities to criminal sanction and weakens the role of *mens rea*. In the process, the criminal law’s power as a system of moral education and socialization is diminished.

This paper, in its entirety, can be found at  
[www.heritage.org/Research/LegalIssues/lm26.cfm](http://www.heritage.org/Research/LegalIssues/lm26.cfm)

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past twenty-five years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade. That pace is not steady from year to year, however; the data indicate that Congress creates more criminal offenses in election years.

This study reviews the crimes newly enacted by Congress in order to: (1) update the number of federal crimes; (2) measure whether Congress continues to pass federal criminal laws at the same pace found by the ABA report; and (3) determine whether the new crimes contain a *mens rea* requirement, a key protection of the common law that protects those who did not intend to commit wrongful acts from unwarranted prosecution and conviction.

### Previous Studies

Counting the number of federal crimes might seem to be a rather straightforward matter: Simply count all the statutes that Congress has designated as crimes. After all, unlike state law, federal law has never had a common law of crimes. Locating purely common-law crimes requires consulting judicial opinions, and even then, determining what is and is not a common-law crime is problematic.<sup>4</sup> Given that federal courts lack common-law jurisdiction over crimes, all federal crimes must be stat-

utory.<sup>5</sup> So it would seem that counting statutes should be an easy task.

Making an accurate count is not as simple as counting the number of criminal statutes, however. As the American Bar Association's Task Force on the Federalization of Crime stated, "So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."<sup>6</sup> Not only is the number of statutes large, but the statutes are scattered and complex.<sup>7</sup> The situation presents a two-fold challenge: (1) determining what statutes count as crimes and (2) determining whether, as to the different provisions within a section or subsection, there is more than a single crime, and if so, how many.

The first difficulty is that federal law contains no general definition of the term "crime." Title 18 of the U.S. Code is designated "Crimes and Criminal Procedure," but it is not a comprehensive criminal code. Title 18 is simply a collection of statutes. It does not provide a definition of crime. Until repealed in 1984, however, Section 1 of Title 18 began by classifying offenses into felonies and misdemeanors, with a sub-class of misdemeanors denominated "petty offenses." Later amendments re-introduced classifications elsewhere in Title 18.<sup>8</sup> The repeal and later amendments, however, were tied to the creation of the United States Sentencing

1. TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW (1998) [hereinafter ABA REPORT].
2. JOHN BAKER, FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION (2004) [hereinafter FEDERALIST SOCIETY REPORT].
3. See app.
4. See WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 2.1(e) (2003).
5. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).
6. ABA REPORT, *supra* note 1, at 9.
7. The ABA report explained:  
[A]n exact count of the present "number" of federal crimes contained in the statutes (let alone those contained in administrative regulations) is difficult to achieve and the count subject to varying interpretations. In part, the reason is not only that the criminal provisions are now so numerous and their location in the books so scattered, but also that federal criminal statutes are often complex. One statutory section can comprehend a variety of actions, potentially multiplying the number of federal "crimes" that could be enumerated. . . . Depending on how all this subdivisible and dispersed law is counted, the true number of federal crimes multiplies.  
*Id.* at 93.
8. See 18 U.S.C. § 3581 (classification of felonies, misdemeanor and infraction in terms of sentencing); 18 U.S.C. § 3156(3) (definition of "felony" for purposes of release and detention).

Commission, and this new focus on sentencing has done nothing to solve—and probably has exacerbated—the problem of determining just what should be counted as “crimes.” That issue is particularly pertinent for offenses not listed in Title 18. Title 18 does contain many, but not all, of the federal crimes. Other offenses carrying criminal penalties are distributed throughout the other 49 titles of the U.S. Code.<sup>9</sup> These scattered criminal provisions are usually regulatory or tort-like, sometimes making them difficult to identify.

The second problem is that, whether it is codified in Title 18 or some other title, one statute does not necessarily equal one crime. Often, a single statute contains several crimes. Determining the number of crimes contained within a single statute is a matter of judgment. Different people may make different judgments about the number of crimes contained in each statute, depending on the criteria they employ. In the absence of a definition of crime, it is incumbent upon the compiler to explain the criteria employed in making the count. Not intending to re-invent the criteria, I have looked to previous attempts to count the number of federal crimes.

The most comprehensive effort to count the number of federal crimes was undertaken by the Office of Legal Policy (OLP) of the U.S. Department of Justice in early 1983 in connection with efforts to pass a comprehensive federal criminal code. Ronald Gainer, who oversaw the study, later published an article entitled “Report to the Attorney General on Federal Criminal Code Reform.”<sup>10</sup> The DOJ’s count involved a review by hand of every page of the U.S. Code, and it put the number at “approximately 3,000 federal crimes,” a figure which has been much cited since.<sup>11</sup> That number includes all federal offenses in the U.S.

Code carrying a criminal penalty enacted through early 1983.

In a 1998 article, “Federal Criminal Code Reform: Past and Future,” Gainer cited the figure of “approximately 3,300 *separate provisions* that carry criminal sanctions for their violation.”<sup>12</sup> This number was based on a count done by the Buffalo Criminal Law Center “employing somewhat different measures” than the DOJ survey.<sup>13</sup> This survey apparently considered only “separate provisions” as constituting crimes, while the methodology used in the DOJ count often found more than one crime in a single provision.

In 1998, the American Bar Association’s Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese and containing this author as a member, issued a report entitled “The Federalization of Criminal Law.” This report was concerned with the growth in federal criminal law and thus faced the problem of identifying the number of federal crimes enacted over periods of time. The Task Force decided, however, not to “undertake a section by section review of every printed federal statutory section,” which would have been too “massive” an undertaking for the Task Force’s “limited purpose.”<sup>14</sup> The ABA report did conclude that the 3,000 number was “surely outdated by the large number of new federal crimes enacted in the 16 or so years since its estimation.”<sup>15</sup> The ABA report did not attempt a comprehensive count like DOJ, but it did provide a good measure of the growth of federal criminal law, which demonstrated that the number of federal crimes as of the end of 1996 greatly exceeded 3,000.

Although the ABA Report did not actually count the number of crimes, it drew the following dramatic conclusion from the available data:

9. There are 50 titles, but Title 34 currently contains no un-repealed statutes.

10. Ronald Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99 (1989).

11. *Id.* at 110.

12. Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 55 n.8 (1998) (emphasis added).

13. *Id.*

14. ABA REPORT, *supra* note 1, at 92.

15. *Id.* at 94.

The Task Force's research reveals a startling fact about the explosive growth of federal criminal law: *More than 40% of the federal provisions enacted since the Civil War have been enacted since 1970.*<sup>16</sup>

But the ABA report's approach actually *underestimates* the increase in the number of federal crimes. According to Gainer, the DOJ effort to count crimes discovered that any attempt to count using computer searches would consistently undercount crimes. This is why the DOJ did a complete hand count of federal crimes, which meant reading through the many thousands of pages of the U.S. Code. The ABA report, for its purposes, instead conducted a Westlaw search of the statutes "us[ing] the key words 'fine' and 'imprison' (including any variations of those words such as 'imprisonment')." <sup>17</sup> As explained below, this strategy likely missed many crimes.

### Methodology

This current report and the accompanying count were developed against the background of the DOJ and the ABA Task Force reports. Like the ABA Task Force, my researchers and I could not review thousands of pages of statutes in order to complete a count as comprehensive as the DOJ's, nor even review all the new crimes enacted since the DOJ completed its count in 1983. The ABA report did not actually include a count, and even the comprehensive count by the DOJ report gave the number in terms of an estimate. In part, that was due to the fact that the DOJ count employed debatable criteria about how many crimes are contained in a particular statute. Nevertheless, our count adhered to the criteria used in the DOJ count. For the current count, we reviewed legislation from the beginning of 2000 through the end of 2007.

Building on the data in the 1998 ABA report, which run through 1996, my previous report for the Federalist Society estimated that the U.S. Code contained 4,000 crimes as of the beginning of 2000.<sup>18</sup> For the present report, we conducted a comprehensive search of statutory provisions enacted from the beginning of 2000 through 2007. Like the DOJ and ABA reports, this and my previous report consider only statutes, not regulations. As the ABA report notes, if regulations were included, that would have added, as of the end of 1996, an additional 10,000 or so crimes.<sup>19</sup> Another report from the early 1990s, however, estimated that "there are over 300,000 federal regulations that may be enforced criminally."<sup>20</sup>

For purposes of continuity, this report, like my previous one, relied on Westlaw searches using the same terms as the ABA report. For this report, however, we went beyond the terms used by the ABA report and found more crimes in amendments to existing laws that did not contain those search terms. Just searching the database of statutes passed each year using the terms "fine!" and "imprison!"—the ABA Report approach—does not yield a comprehensive list of crimes because it does not capture statutory amendments that do not contain either of those terms. For example, an amendment to an existing law might revise the statute by adding an additional subsection. This subsection, due to its placement in the existing statute, might create a new crime, although it does not include either "fine!" or "imprison!." Therefore, after using the search terms "fine!" and "imprison!," the search proceeded to the "Historical Notes" field for each of the years from 2000 through 2007. This produced several hundred hits for each year (the highest being about 690 in a single year), which yielded a number of crimes

16. *Id.* at 7 (emphasis in the original); see also *id.* at n.9 ("[M]ore than a quarter of the federal criminal provisions enacted since the Civil War have been enacted within the sixteen year period since 1980").

17. ABA REPORT, *supra* note 1, at app. C, 91, n.1.

18. The Federalist Society Report looked at crimes enacted through 2003, but only drew conclusions about the number of crimes as of the beginning of 2000. See FEDERALIST SOCIETY REPORT, *supra* note 2, at 8.

19. See ABA REPORT, *supra* note 1, at 10.

20. John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. Rev. 193, 216 (1991).

which were not captured just using the ABA search terms.

In this report, we employed the DOJ report's methodology for counting the number of new crimes contained within a single statute. Under the DOJ approach, statutes containing more than one act corresponding to a common-law crime were determined to have as many crimes as there were common-law crimes in the statute.<sup>21</sup> On the other hand, the DOJ counted a statute as containing only one crime, even though it contained multiple acts, if those acts did not constitute common-law crimes.

Specifically, the criteria employed in this report to distinguish whether the new statutory language did or did not create a new crime are as follows:

- Each act stated in terms corresponding to the act element of a traditional or common-law crime (e.g., theft, burglary, fraud) is counted separately as one crime. Thus, multiple crimes may be listed in a single section or subsection.
- Multiple acts unrelated to traditional crimes, when stated in the same section or subsection, are treated as different ways of committing one crime. Also, elaborations on traditional crimes (e.g., theft by fraud, misrepresentation, forgery) are counted as one crime only if listed together in one section or subsection.
- If the same or similar non-traditional crimes are listed in separate sections or sub-sections, each section or subsection is counted as a separate crime. Attempts and conspiracies to commit a crime were counted as distinct crimes.
- The number of crimes listed for each section or subsection indicates only the number of crimes added that year by a statute or amendment, which does not necessarily equal the total number of crimes in those sections or subsections originally enacted in an earlier year.

#### **The Number of Federal Crimes**

My 2004 report stated that "Conservatively speaking, the U.S. Code contains at least 3,500

offenses which carry criminal penalties. More realistically, the number exceeds 4,000." The estimate of over 4,000, as of the beginning of 2000, rested on an evaluation of the information already covered by the counts conducted by DOJ and the ABA and new data for the years 1997 through 1999.

Since the start of 2000, Congress has created at least 452 new crimes. So the total number of federal crimes as of the end of 2007 exceeds 4,450. Ninety-one of the 452 were contained in new laws that created 279 new crimes, and the remaining were contained in amendments to existing laws.<sup>22</sup> The total of 452 new crimes breaks down by year as follows: 65 for 2000; 28 for 2001; 82 for 2002; 51 for 2003; 48 for 2004; 13 for 2005; 145 for 2006; 20 for 2007. The Appendix to this report lists all the federal statutes containing new crimes.

The data suggest a potential electoral motivation behind the growth of the federal criminal law. Except for in 2003, the number of new crimes enacted in election years significantly surpass those in non-election years. While this may be due to the two-year cycle in Congress and the time it takes to pass a bill, work done on legislation in a previous Congress need not be completely duplicated. Bills are, for example, frequently re-introduced at the commencement of the a new Congress.

This study did not perform a statistical analysis of the number of crimes created in various discrete areas of substantive law. My 2004 report, however, concluded that a large percentage of the new crimes came in the environmental area. For the years 2000 through 2007, many of the new crimes were in the following areas:

- National security, i.e., aircraft security; protection of nuclear and other facilities, counterfeit/forged insignia and documents;
- Terrorism and support for terrorists;
- Protection of federal law enforcement;
- Protection of members of the armed forces;
- Protection of children from sexual exploitation; and
- Controls on the Internet.

21. Telephone interview with Ronald Gainer (Dec. 29, 2003).

22. The ABA report does not include a review of amendments. See ABA REPORT, *supra* note 1, at 8 n.10.

Not surprisingly, many of the new crimes were enacted in response to the events of 9/11.

### Interpretation: A Troubling Trend

As practitioners in the field know well, the number of criminal statutes does not tell the whole story. Measuring the rate of growth certainly confirms that Congress continues to enact criminal statutes at a brisk pace. But no matter how many crimes Congress enacts, it remains for federal prosecutors to decide which statutes to invoke when seeking an indictment.

Federal prosecutors have certain favorites, notably mail and wire fraud statutes,<sup>23</sup> which they use even when other statutes might be more applicable. That, of course, does not mean that the addition of little-used crimes is unimportant. The federal government is supposedly a government of limited powers and, therefore, limited jurisdiction. Each new crime expands the jurisdiction of federal law enforcement and federal courts. Regardless of whether a statute is used to indict, it is available to establish the legal basis upon which to show probable cause that a crime has been committed and, therefore, to authorize a search and seizure. The availability of more crimes also affords the prosecutor more discretion and thereby greater leverage against defendants. Increasing the number and variety of charges tends to dissuade defendants from fighting the charges, because they usually can be “clipped” for something.

Moreover, the expansion of federal criminal law continues to occur even without new legislation. Federal prosecutors regularly stretch their theories of existing statutes. For example, federal courts often cooperate with prosecutors by making new laws apply retroactively. What Judge John Noonan wrote in 1984 about bribery and public corruption continues to be generally true, namely that federal prosecutors and federal judges have been effectively creating a common law of crimes through expansive interpretations.<sup>24</sup>

Ultimately, the reason the ABA report and this report track the increase of federal crimes is to provide some measure of the extent to which federal criminal law and its enforcement are over-reaching constitutional limits. The Supreme Court has admonished Congress twice within recent years, when it declared federal statutes unconstitutional, that it lacks a “plenary police power.”<sup>25</sup> The statistical measures in this and the ABA report indicate that those cases have not dissuaded Congress from continuing to pass criminal laws at the same pace.

### Judicial Interpretation of *Mens Rea*

A *mens rea* requirement has long served an important role in protecting those who did not intend to commit wrongful acts from unwarranted prosecution and conviction. *Mens rea* elements, such as specific intent, willful intent, and the knowledge of specific facts constituting the offense, are a part of nearly all common-law crimes. These protections were generally codified into statutes, as state legislatures adopted criminal codes, and the practice was continued in the creation of statutes defining new crimes in addition to those recognized historically by the common law.

If anything, *mens rea* requirements are more important today than in the past. Historically, nearly all crimes concerned acts that were *malum in se*, or wrong in themselves, such as murder, battery, and theft. Today, however, new crimes and petty offenses created by statute almost always concern acts that are *malum prohibitum*, or wrong only because it is prohibited. This category includes petty offenses and crimes like marketing medicines not approved by the FDA and shipping flammable materials without a sticker on the box. For *malum prohibitum* crimes and petty offenses, *mens rea* requirements can serve to protect individuals who have accidentally or unknowingly violated the law or, in some cases, were unaware that a law covered their particular conduct.

For the period 2000 through 2007, the great majority of sections or subsections appeared to

23. 18 U.S.C. §§ 1341, 1343 (mail fraud and wire fraud, respectively).

24. See JOHN NOONAN, BRIBES (1984) at 585–86, 620.

25. United States v. Lopez, 514 U.S. 549, 566 (1995); United States v. Morrison, 529 U.S. 598, 618 (2000).

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.

The Appendix of this report identifies the *mens rea* element or the lack thereof for each of the 237 statutory provisions containing new crimes passed by Congress.

This count concerning *mens rea* is somewhat tentative, for several reasons. For example, whether an offense has a *mens rea* requirement may depend on a judgment about the number of crimes contained in a particular section or subsection. 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.<sup>26</sup> 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 has done in passing a statute—that is, whether it has or has not eliminated a *mens rea* requirement.

The linkage between the *mens rea* issue and meaning of “crime” goes to the heart of the moral foundation of criminal law, as Professor John Coffee has explained:

[T]o define the proper sphere of the criminal law, one must explain how its purposes and

methods differ from those of tort law. Although it is easy to identify distinguishing characteristics of the criminal law—e.g., the greater role of intent in the criminal law, the relative unimportance of actual harm to the victim, the special character of incarceration as a sanction, and the criminal law’s greater reliance on public enforcement—none of these is ultimately decisive.

Rather 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 more than tort law, the criminal law is a system for public communication of values.<sup>27</sup>

When the traditional requirement of *mens rea* is weakened, then, the unique features of the criminal law are undermined, to the great detriment of society. It is troubling that, in a significant proportion of new criminal statutes enacted in recent years, Congress has neglected this crucial component that cuts to the heart of what it means to be “guilty” of a crime.

### Conclusion

As is repeated throughout this report, one’s opinion about what counts as a federal crime drives the count of federal crimes. Simply focusing on the penalty may not be sufficient because one penalty often applies to several acts. While federal law classifies crimes by penalties, federal law does not provide a clear definition of crime that would allow distinctions among separate criminal acts. That makes any count subject to argument. At the very least, however, this report can conclude the following: Based on the growth of federal crime legislation since the count in the early 1980s by the Office of Legal Policy in the Department of Justice, the United States Code today includes at least

26. Previously, the relevant portion of the provision (18 U.S.C. § 1960(b)(1)(A)) read “is intentionally operated”; it now reads “is operated.”

27. Coffee, *supra* note 20, at 193–194 (emphasis added) (citation omitted).

4,450 offenses which carry a criminal penalty, and the rate at which Congress passes new crimes has not waned since at least the 1980s.

#### **Appendix**

The Appendix to this report, which lists and describes the criminal statutory provisions enacted from 2000 through 2007, is available at <http://>

[www.heritage.org/Research/LegalIssues/upload/2008\\_Baker\\_appendix.pdf](http://www.heritage.org/Research/LegalIssues/upload/2008_Baker_appendix.pdf).

*—John S. Baker is Dale E. Bennett Professor of Law at the Louisiana State University Law Center. The author thanks his research assistant, Ms. Beverly Froese, who reviewed the federal statutes and organized the data under his direction.*

WASHINGTON EXAMINER

Opinion

## **Part Two: Woe to the man who beats federal prosecutors**

**Examiner Editorial**

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**January 22, 2009**

When federal agents first interviewed Krister Evertson about his shipping sodium he had sold on E-Bay via UPS, he described his fuel cell experiments back home in Idaho in great detail.

Federal authorities in Alaska sent word to the Environmental Protection Agency (EPA) in Idaho, which promptly dispatched its agents to the industrial supply facility in Salmon where Evertson had stored his fuel cell materials.

The EPA agents treated the materials like a Superfund site. They cut open his steel drums, cleared away a perimeter – and, by their own account, spent some \$430,000 disposing of every bit of Evertson’s painstakingly assembled experiments.

“They never told me; they just went and did it,” Evertson told The Washington Examiner in a telephone interview from his Oregon prison.

“It’s like Chicken Little: They run around like the sky is falling.... It’s like the perfect storm of misunderstanding and unfounded fear and they never asked me about it. I could have told them in one minute exactly what to do with it,” he said.

Despite his acquittal in Alaska, federal authorities filed new charges against Evertson in Idaho for allegedly illegally transporting his materials the half mile from his home to the storage facility and improperly disposing of “hazardous” waste, all based on strained readings of EPA regulations.

Evertson claimed he had stored the materials properly and they were perfectly secure.

“My expert witness said the stainless steel container could safely contain the intermediate process stream indefinitely, that means forever. The stainless steel was 3/8 of an inch thick. I bought it from the Long Beach, California, Naval Yard. It was completely enclosed.... I could have neutralized all of it for \$200,” Evertson said.

Marc Callaghan, a government witness, testified that he tried to speak with Evertson, but claimed that “Mr. Evertson would not speak to me.”

But Callaghan's assertion seems to conflict with the FBI's initial description of Everton as eager to discuss his fuel cell activities. Strangely transcript of Everton's second trial shows the judge did not ask prosecutors for elaboration on Callaghan's assertion.

Never mind that Everton had clearly saved the material for future use rather than abandoning it. Never mind that it would be potentially dangerous only if taken out of the storage materials Everton had so carefully constructed.

And never mind, finally, that, in the words of Everton's appellate brief, none of the materials were "discharged into the air, land or sea," and the government failed to produce any evidence "that the defendant intended this to happen."

Indeed, the brief notes, "the EPA witness, Marc Callaghan, testified that the materials became hazardous waste [only] when the EPA disposed of them."

Even so, on Oct. 22, 2007, the Idaho jury found Everton guilty of the illegal disposal charge. He was sentenced to 21 months in federal prison.

Everton has appealed, claiming the jury was improperly instructed by the trial judge on multiple counts that, if corrected, would have materially changed the jury's understanding, and thus its verdict.

Everton's appeal brief sums up the absurdity of the whole case by quoting from a decision of the U.S. Court of Appeals for the DC Circuit in the year 2000: "To say that when something is saved it is thrown away is an extraordinary distortion of the English language."

Justice Department spokesman Charles Miller said prosecutors would have no comment because the case is on appeal. No hearing date has been set. --- *Quin Hillyer*.