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

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

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

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I. Introduction

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

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

II. Criminal Intent Requirements Are Fundamental to Constitutional Due Process

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

One such fundamental principle is embodied in the doctrine of fair notice, which is a critical component of the Constitution's due process protection. The fair notice doctrine requires that, in order for a person to be punished criminally, the offense with which she is charged must provide adequate notice that the conduct in which she engaged was prohibited. In the words of the Supreme Court: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or

forbids."[1] Due process therefore demands that a criminal law give "fair warning of the conduct that it makes a crime."[2]

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

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

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

[1] *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).
[2] *Id.* at 350.
[3] *Morissette v. United States*, 342 U.S. 246, 250 (1952).
[4] Brief of the National Association of Criminal Defense Lawyers *et al.* as *Amici Curiae* in Support of Petitioner at 18-22, *Shelton v. Sec'y Dept. of Corrections*, 802 F.Supp.2d 1289 (M.D. Fla. Jan. 28, 2011) (No. 6:07-cv-839-Orl-35KRS) (detailing the history and origins of the *mens rea* or guilty mind requirement in criminal law).

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

In addition, an adequate criminal intent requirement serves the critical function of protecting those who are reasonably mistaken about or unaware of the law. As one travels along the continuum from pure inherently wrongful conduct, such as murder, towards merely prohibited conduct, such as bringing sand onto one's property without a permit, the fair notice provided by the conduct itself diminishes to the point of vanishing. It is an obvious injustice to punish an individual for conduct that is not inherently wrongful if she did not know, and had no reasonable expectation to know, that her conduct was prohibited by law. Requiring proof of a guilty mind, not just a guilty act, is an essential component of a just system of criminal law.

Accordingly, when society, through its elected representatives, specifies the particular conduct and mental state that constitute a crime, "it makes a critical moral judgment about the wrongfulness of such conduct, the resulting harm caused or threatened to others, and the culpability of the perpetrators."[5] Therefore, a proper and adequate criminal intent requirement should reflect the differences in culpability that result when individuals with different mental states engage in the same prohibited conduct. This point is well illustrated by the differing criminal intent requirements that apply to homicide, or the killing of a human being. Even with the same bad act—a killing—different levels of criminal intent define different offenses, which carry different punishments. These distinctions not only help to assign appropriate levels of punishment, but also to protect those who committed prohibited conduct accidentally or inadvertently.

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

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

Whether the offense is relatively straightforward like homicide or a more complicated regulatory prohibition, careful consideration must always be given to the fundamental principles of culpability and fair notice when defining the guilty mind and guilty act that constitute the crime. Furthermore, strict liability should only be employed in the criminal law after weighty deliberation. As the Supreme Court has recognized, "[a]ll are entitled to be informed as to what the State commands or forbids."[8] By its own terms, a criminal offense should prevent the conviction of an individual acting without intent to violate the law and knowledge that her conduct was unlawful or sufficiently wrongful so as to put her on notice of possible criminal liability. A person who acts without such intent and knowledge does not deserve the government's greatest punishment or the extreme moral and societal censure such punishment carries.

III. The Decline of Criminal Intent In Federal Law

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

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

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

[9] Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement In Federal Law* (The Heritage Foundation and National Association of Criminal Defense Lawyers) (2010) *available at* www.nacdl.org/withoutintent (last visited July 11, 2013) (hereinafter "*Without Intent* Report").

Specifically, the study revealed that offenses with inadequate criminal intent requirements are ubiquitous at all stages of the legislative process: Over 57 percent of the offenses introduced, and 64 percent of those enacted into law, contained inadequate criminal intent requirements, putting the innocent at risk of criminal prosecution.[10] The study also documented a pattern of poor legislative draftsmanship and found that "[n]ot only do a majority of enacted offenses fail to protect the innocent with adequate [criminal intent] requirements, many of them are so vague, far-reaching, and imprecise that few lawyers, much less non-lawyers, could determine what specific conduct they prohibit and punish" and concluded, ultimately, that Congress is frequently enacting "fundamentally flawed" criminal offenses.[11]

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

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[10] *Id.*

[11] *Id.*

[12] As the U.S. Supreme Court has recognized, "'[U]nless the text of the statute dictates a different result, the term "knowingly" merely requires proof of knowledge of the facts that constitute the offense.'" *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (quoting *Bryan v. United States*, 524 U.S. 184, 193 (1998)). Further, "[t]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law." *Bryan*, 524 U.S. at 192. In fact, in some federal circuits, any *mens rea* requirement based on knowledge (e.g., "knowingly," "knowing," or "knew") is likely to draw a government request for a jury instruction on willful blindness. *See, e.g.*, *United States v. Jewell*, 532 F.2d 697, 700–04 (9th Cir. 1976) (*en banc*) (holding that a jury may convict under a "knowingly" standard if it finds the evidence satisfies a liberal formulation of the "willful blindness" or "deliberate ignorance" doctrine). Any "willful blindness" instruction that follows, for instance, the *Jewel* line of cases is likely to be inferior to and less protective than the formulation of the doctrine in the American Law Institute's Model Penal Code. *See* Model Penal Code § 2.02(7) (2009) ("Requirement of Knowledge Satisfied by Knowledge of High Probability.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[28] 18 U.S.C. § 2261A(2) (2013).

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

Unfortunately, these examples only offer a tiny glimpse of the many dangerous offenses lurking in our ever-expanding federal criminal code. Historically, it was presumed that the law, and especially the criminal law, was "definite and knowable," even by the average person.[29] Ignorance of the law was therefore no defense to criminal punishment. The small number of criminal offenses, and the fact that the majority of offenses criminalized inherently wrongful conduct, made this presumption both reasonable and just. With the enormous growth of federal criminal offenses, however, this presumption has become a trap for the unwary. As criminal law professor Joshua Dressler has explained:

> Whatever its plausibility centuries ago, the "definite and knowable" claim cannot withstand modern analysis. There has been a "profusion of legislation making otherwise lawful conduct criminal (*malum prohibitum*)." Therefore, even a person with a clear moral compass is frequently unable to determine accurately whether particular conduct is prohibited. Furthermore, many modern criminal statutes are exceedingly intricate. In today's complex society, therefore, a person can reasonably be mistaken about the law.[30]

Indeed, with over 4,450 federal statutory crimes and an estimate of tens of thousands more in federal regulations, neither criminal law professors nor lawyers who specialize in criminal law can know all of the conduct that is criminalized. Average law-abiding individuals are at an even greater disadvantage.

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

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

IV. Solutions

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

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

[31] This practice could be guaranteed by changing congressional rules to require every bill that would add or modify criminal offenses or penalties to be subject to automatic sequential referral to the relevant Judiciary Committee. Sequential referral is the practice of sending a bill to multiple congressional committees. In practice, this first committee has exclusive control over the bill until it reports the bill out or the time limit for its consideration expires, at which point the bill moves to the second committee in the sequence, in the same manner. The positive impact of such a practice was documented in the *Without Intent* Report, which found a statistically significant positive correlation between the strength of a *mens rea* provision and Judiciary Committee action on a bill containing such a provision. *See Without Intent* Report at 20-21.

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

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

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

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

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

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

Id. at 250-51 (citations omitted).

Merely relying on a standard criminal intent term located in the introductory language of a criminal offense will almost never produce a criminal offense that is both clear and adequately protective. Criminal offenses that provide the best protection against unjust convictions are those that include specific intent provisions and provide sufficient clarity and detail to ensure that the precise mental state required for each and every act and circumstance in the criminal offense is readily ascertainable.

Enactment of default criminal intent legislation would be a significant step in the right direction, but it would not absolve lawmakers of their responsibility to draft with clarity and precision. The importance of sound legislative drafting simply cannot be overstated, for it is the drafting of the criminal offense that frequently determines whether a person, who acts without intent to violate the law and knowledge that their conduct is unlawful, will endure a life-altering prosecution and conviction, a deprivation of liberty, and the tremendous collateral consequences that follow.[34] Further, Members of Congress drafting criminal legislation must resist the temptation to bypass this arduous task by handing it off to unelected regulators to engage in criminalization by regulation. The United States Constitution places the power to define criminal responsibility and penalties in the hands of the legislative branch. Therefore, it is the responsibility of that branch to ensure that no one is criminally punished if Congress itself did not devote the time and resources necessary to clearly and precisely articulate the law giving rise to that punishment.

V. Conclusion

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

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