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LEGISLATIVE TESTIMONY

DEFINING THE PROBLEM AND SCOPE OF OVER-CRIMINALIZATION AND OVER-FEDERALIZATION

Testimony before the Committee on the Judiciary

Over-criminalization Task Force

U.S. House of Representatives

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

Thank you for the opportunity to speak to you today about the modern-day phenomenon of overcriminalization, a term used to describe the overuse and misuse of the criminal law and penalties. I applaud the House Judiciary Committee for establishing a Task Force designed to study this issue and for convening this hearing.

My name is John Malcolm. I am the Rule of Law Programs Policy Director and the Ed Gilbertson and Sherry Lindberg Gilbertson Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, where I supervise Heritage's Overcriminalization Project. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

I have also spent a good deal of my career involved in the criminal justice system—as an Assistant United States Attorney, an Associate Independent Counsel, a Deputy Assistant Attorney General in the Criminal Division at the Justice Department, and a criminal defense attorney. Therefore, I can speak to you today as someone who has experience on both sides of the courtroom.

On behalf of Heritage, I host regular meetings of the Overcriminalization Working Group consisting of organizations from across the political spectrum including, among others, the Manhattan Institute, the ACLU, the Federalist Society, the Vera Institute, Justice Fellowship, the National Association of Criminal Defense Lawyers, the Cato Institute, the American Bar Association, the U.S. Chamber of Commerce, and Families Against Mandatory Minimums. As you might imagine, these organizations do not agree on very many issues, but they do agree on this: overcriminalization is a serious and growing problem that needs to be remedied. The Heritage Foundation, under the leadership of former Attorney General Ed Meese¹, has also been writing about various facets of this problem for a long time.²

WHY IS OVERCRIMINALIZATION A PROBLEM?

In April 1940, Attorney General Robert Jackson addressed a room full of prosecutors. He told them that they were “one of the most powerful peace-time forces known to our country.” He continued: “The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.”³ What Robert Jackson said is as true today as it was then, if not more so. Even the simple act of charging someone with a crime can alter that person's life forever. Today, the fact of the matter is that if someone were to look hard enough, they'd likely discover that we're all criminals, whether we know it or not, and regardless of whether we have any intent to violate the law.

Under the common law, there were only a handful of criminal offenses, such as murder, rape, robbery, and arson. Each offense prohibited conduct that was widely recognized as morally blameworthy, so-called *malum in se* offenses. For most of our history, all the crimes in this country -- and there weren't many of them -- were *malum in se* offenses. If somebody

¹ Mr. Meese is now the Ronald Reagan Distinguished Fellow Emeritus at The Heritage Foundation.

² A list of Heritage publications addressing overcriminalization is attached as an Appendix to this testimony.

³ See The Federal Prosecutor, available at <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/>.

claimed not to know it was against the law to commit murder or robbery, it could fairly be said, to quote one of the great legal maxims, that “Ignorance of the law is no excuse.” If you knew something was morally blameworthy when you did it, it shouldn’t surprise you to discover it was a crime too.

Today, however, buried within the 51 titles of the United States Code and the far more voluminous Code of Federal Regulations, there are approximately 4,500 statutes and another 300,000 (or more) implementing regulations with potential criminal penalties for violations.⁴ There are so many criminal laws and regulations, in fact, that nobody really knows how many there are, with scores more being created every year. And that’s just federal offenses. Every new law gives prosecutors more power, and many of these laws, unfortunately, contribute to the overcriminalization problem.

Many federal laws are duplicative of other federal laws. For example, given the ubiquitous use of the mail and telecommunications facilities, the federal mail and wire fraud statutes⁵ can be used by federal prosecutors to reach almost any fraud scheme one could imagine, including many garden-variety schemes that could easily be handled by state authorities. Nonetheless, despite the existence of these two broad statutes, there are dozens of other federal fraud laws focused on different regulatory fields.⁶

And many federal laws duplicate state criminal laws. If something is already a state crime, unless there is some unique federal interest or expertise involved, there should be no reason to make the same conduct a federal offense just because a horrific crime is committed that leads to sensationalistic headlines.

Other statutes increase the penalties for crimes, adding to taxpayers’ burden, without any demonstrated need to impose an additional punishment on the offender.

While these are serious problems, perhaps the most fundamental problem caused by overcriminalization is the fact that the average person no longer has fair notice of what the criminal code makes an offense. It is an elementary principle of criminal and constitutional law that the government must provide everyone with notice of what the penal code outlaws.

Many, if not most, of these new laws are *malum prohibitum* offenses, which on their face do not violate any moral code. They are only offenses because Congress has said they are, not because they are inherently blameworthy. These laws and regulations touch nearly every aspect of our lives -- the food we eat, the property we own, how we run our businesses, and many of our routine activities.

⁴ See, e.g., John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008); 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).

⁵ 18 U.S.C. §§ 1341 & 1343.

⁶ See, e.g., STUART P. GREEN, *LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME* 152 (2006) (“Under American federal law, for example, there are now dozens of statutory provisions that criminalize offenses such as mail fraud, wire fraud, bank fraud, health care fraud, tax fraud, computer fraud, securities fraud, bankruptcy fraud, accounting fraud, and conspiracy to defraud the government.”); William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1881 (2000) (“The federal criminal code contains over three hundred separate fraud and misrepresentation offenses, some of which cover not just lies but concealment, and many of which do not require that the false or misleading statement be material to anything.”).

Unlike *malum in se* offenses, these regulations do not prohibit morally indefensible conduct. Regulations *allow* conduct, but they circumscribe -- often in ways that are very hard for the non-expert to understand -- when, where, how, how often, and by whom certain conduct can be done. When criminal penalties are attached to violations of obscure regulations, overcriminalization problems often ensue.

But there's an even bigger problem. It used to be the case that, before somebody could be convicted of a crime, a prosecutor would have to prove that the defendant committed some act that constituted a crime (the *actus reus*) and that he did so knowing that he was violating the law and therefore had a "guilty mind" (the *mens rea*). So, for example, to convict a person of murder, a prosecutor must prove the accused (1) caused the death of the victim, and (2) intended to kill or cause serious bodily injury to the victim. Only when an *actus reus* and a *mens rea* coincided could a person be convicted for his conduct, providing protection against criminal liability for unknowing or unblameworthy conduct.

Today, many criminal laws lack an adequate (or any) *mens rea* requirement -- meaning that a prosecutor does not even have to prove that the accused knew he was violating a law in order to convict him. Innocent mistakes or accidents are transformed into crimes. For example, to convict someone of violating the Clean Water Act, a prosecutor only has to show that the accused committed the physical acts which constitute the violation, regardless of that individual's knowledge of the law or intent to violate the law. Many of these "offenses" are so arcane or incomprehensible that a reasonable person would not know that what he was doing was, in fact, a crime.

And there's another problem. If somebody wanted to find out what was legal and illegal, there is no conveniently accessible place to go that has a complete list of federal crimes. The best you could do is to read through the entirety of the massive federal code and the even more massive code of federal regulations -- that is, if you had the time and the ability to understand what you were reading. And even that might not be enough! For example, under some laws, such as the Lacey Act, it may be a criminal violation in this country to do something in a manner that violates another country's laws.

The criminal code today is so vast, and some of the criminal statutes and regulatory crimes are so complex, that even judges and lawyers have a lot of trouble discerning what conduct is illegal. So what hope do ordinary citizens have? The best that most people who want to stay out of trouble can do is to proceed cautiously and hope for the best. For some, that's not good enough.

FOR WHOM IS OVERCRIMINALIZATION A PROBLEM?

The size and complexity of today's laws, along with the absence of a usable yardstick to guide non-lawyers, mean that morally blameless parties inevitably, but unwittingly, will commit some acts that turn out to be crimes and, as a result, could wind up in prison. While overcriminalization is certainly a problem for corporations, it is important to remember that this problem can, and frequently does, ruin the lives of ordinary persons.

- Abner Schoenwetter spent six years in a federal prison for importing Honduran lobsters that were packed in plastic bags rather than cardboard boxes and for supposedly violating a

Honduran regulation (later declared invalid by the Honduran Attorney General) that made his lobsters marginally too small.⁷

- The federal government pursued a criminal investigation of the Gibson Guitar Company for importing wood for guitar frets allegedly exported illegally from India and Madagascar in violation of those nations' laws—which, in the case of Madagascar, were not even written in English. In other words, the federal government claimed that Gibson was guilty of a *federal* crime because it did not know the law of a *foreign nation*.⁸
- Steven and Cornelia Joyce Kinder, who own a caviar business in Kentucky, were charged by the federal government for reporting that all of their caviar had been harvested from Kentucky waters when, in fact, some of their caviar had been harvested from adjoining Ohio waters.⁹
- Lawrence Lewis, a man who worked his way up from humble beginnings to become the head engineer at a military retirement home, was charged with a felony and pleaded guilty to a misdemeanor for following the procedure he had been instructed to use (and which had been used for years) to clean up accidental toilet overflows which wound up, unbeknownst to Lewis, in a small creek that flows into the Potomac River.¹⁰

The Heritage Foundation, along with several of our coalition partners, has just published a booklet entitled “USA vs. You” that outlines the tragic stories of several morally blameless individuals who got caught in the web of overcriminalization. For those interested in obtaining a copy of this booklet and in reading other overcriminalization stories, I would invite you to go to www.USAvsYOU.com.

Why Relying on Prosecutorial Discretion is Not Enough

The frequent retort of prosecutors to the overcriminalization problem is that they are very busy people and that we can “trust them” to decide which cases to prosecute and which to reject when it comes to enforcing vague laws. I know this argument very well because I used to make it myself. Upon reflection, though, I have come to believe that this argument is wrong, not because most prosecutors are untrustworthy, but because it is fundamentally unfair and undermines the very foundations of our legal system. It is not part of a prosecutor's constitutional function to draw the line between lawful and unlawful conduct. That is the job of the legislature, and the prosecutor is hardly a disinterested player in the process.

Most prosecutors are people of good will, but as is the case in any profession, there are good ones and bad ones. Some, fortunately very few, may be prejudiced against a particular group or individual. Some prosecutors are ambitious and might see some personal advantage in

⁷ See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), discussed in detail in Chapter 1 of *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2013). To see a video about this story, go to <http://www.youtube.com/watch?v=6vSmOwGTRDM>.

⁸ See Daniel Dew & Gavriel Swerling, *DOJ Bullies Gibson into Submission: Will Congress Allow this to Happen Again?*, The Heritage Foundation, The Foundry (Aug. 7, 2012), available at <http://blog.heritage.org/2012/08/07/doj-bullies-gibson-into-submission-will-congress-allow-this-to-happen-again/>.

⁹ See *The Great Kentucky Caviar Criminal Caper Comes To An End In Ohio*, Forbes (Jan. 18, 2012), available at <http://www.forbes.com/sites/billsinger/2012/01/18/the-great-kentucky-caviar-criminal-caper-comes-to-an-end-in-ohio/>.

¹⁰ See Gary Fields & John R. Ernshwiller, *A Sewage Blunder Earns Engineer a Criminal Record*, Wall St. J., Dec. 12, 2011. To see a video about this story, go to <http://www.youtube.com/watch?v=CqEtlp0x50s>.

pursuing a questionable prosecution against a big company or an infamous person. There are, after all, many incentives for prosecutors to bring charges, and very few not to bring charges. Prosecutors get public kudos for bringing cases. They rarely get praised for declining to prosecute a case. Some might succumb to pressure from law enforcement officers, who may have spent a lot of time investigating a case, to find some charge to file to justify that effort, even when doing so is unfair and unjust. And some might simply have bad judgment or be mistaken about what a vague law really means.

Whatever the reason, when you boil it down, the government's "trust us" argument asks the public to bear the risk that prosecutors might not always do the right thing. This should not be permitted in a system that is premised on being a government of laws, and not men.

As a former prosecutor, I do not mean to denigrate the motives or integrity of the many dedicated public servants who endeavor to keep us safe and to uphold the rule of law. Much of the blame for this problem lies at Congress's doorstep for passing vague statutes and for empowering unelected bureaucrats to promulgate nebulous regulations enforced with criminal penalties.¹¹ However, when law enforcement officials investigate and prosecute otherwise law-abiding people for "crimes" that no reasonable person would have known was a crime, they do more harm than good.

AN AGENDA TO ADDRESS OVERCRIMINALIZATION

These are the kinds of problems that occur when we divorce legal guilt from moral blameworthiness and place excessive reliance on criminal law, rather than the administrative or civil justice systems, to address social problems. On behalf of my colleagues at The Heritage Foundation, I look forward to working with the members of this Task Force toward devising creative ways to address this problem. There are a number of proposals that we are anxious to discuss with you, such as having Congress pass a default *mens rea* provision for crimes in which no *mens rea* has been provided unless Congress manifests its clear intent to enact a strict liability offense, passing a law requiring the government to identify every federal statute and regulation that contains a criminal provision and to post it in a manner that is easily accessible to the public without charge, and amending or repealing statutes such as the Lacey Act that criminalize violations of foreign law.

The notion that a crime ought to involve a purposeful culpable intent has a solid historical grounding. In 1952, Robert Jackson, now a Supreme Court Justice, wrote in *Morrisette v. United States*: "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."¹²

Honest mistakes should not result in prison time. Absent extraordinary circumstances, criminal laws should require proof beyond a reasonable doubt that the person acted with the intent to violate the law. When morally blameless people unwittingly commit acts that turn out to be crimes and are prosecuted for those offenses, not only are the lives of the accused adversely

¹¹ To see a "checklist" of questions that federal legislators ought to ask themselves when contemplating enacting a new federal crime, go to http://thf_media.s3.amazonaws.com/2013/pdf/CriminalLawChecklist.pdf.

¹² *Morrisette v. United States*, 342 U.S. 246, 250 (1952)

impacted, perhaps irreparably, but the public's respect for the fairness and integrity of our criminal justice system is diminished, which is something that should concern everyone.

I thank you for inviting me here today. I look forward to future hearings in which some of these proposals are discussed in greater detail. With that, I would be happy to answer any questions you may have.

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APPENDIX

HERITAGE BOOKS

Paul Rosenzweig, ed., *One Nation, Under Arrest: How Crazy Laws, Rogue Prosecutors, and Activist Judges Threaten Your Liberty* (2013)

Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law* (Apr. 2010)

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