

## OPENING REMARKS

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I would like to thank Sam Adelman and the other editors at the *Journal of Law, Economics & Policy* for convening this conference. On behalf of NACDL and the Foundation for Criminal Justice, we are thrilled to partner with the *Journal of Law, Economics & Policy* and the Law & Economics Center at George Mason University School of Law to present Overcriminalization 2.0.

I was born during the last days of the administration of Harry Truman. There is no need to do the arithmetic—I'm in the northern hemisphere of my 50s! The point is, over the past half century, I cannot recall a more disturbingly partisan era than today's. One is reminded of the classic words of Yeats describing a time when "the center cannot hold." Politics has been reduced to sport, with talking heads handicapping not only elections, but every day of our national life, reducing issues of complexity and nuance to vapid sound bites. Partisan voices representing both major parties and all philosophies are quite comfortable in evading or manufacturing facts at will. The notion that the truth may be found in the subtle shades of gray, rather than through the prism of a blue or red lens, is in disfavor.

And so, just a little more than three and one-half weeks ago, it was striking beyond words to sit in the historic chambers of the House Judiciary Committee, and hear the members of the Subcommittee on Crime jointly recognize the problem of overcriminalization—and what is more—to hear them pledge to cooperate in tackling this problem in the next Congress.

Chairman Bobby Scott observed that "there is great concern about the overreach and perceived lack of specificity in criminal law, i.e. the vagueness and the disappearance of the common law requirement of *mens rea*, or guilty mind." Commenting upon the joint report recently published by The Heritage Foundation and NACDL, Chairman Scott remarked that "the legislative proposal is notable not only for its content, but also for the fact that such seemingly odd political bedfellows can come together on this common ground issue. The report is a remarkable nonpartisan study that raises important questions about the proper role of the federal criminal code."

Chairman Scott's counterpart, Ranking Member Louie Gohmert, addressed not only the vagueness of federal criminal provisions but also the abusive enforcement practices used by a cascade of federal investigatory agencies. He said, "I am concerned that along with broad, sweeping criminal regulations, comes a host of investigatory agencies eager to enforce

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them, and we have seen over and over again—overly eager at times to enforce them.” Representative Gohmert joined the Chairman in supporting reform when he said to the panel of witnesses, “I appreciate your helping us bring attention to this issue so that we can convince people on both sides of the aisle, because people on both sides of the aisle are responsible.”

It is impossible to overemphasize the significance of this development, especially in an era when cooperation is not simply rare, it is virtually nonexistent. To have political leaders coalesce around this issue is a milestone.

We have traveled a long distance since the first Overcriminalization Symposium just a few years ago. It has not been an easy road. It has taken grit and determination. It has required a sense of purpose and the courage for unlikely allies to find common ground. *Without Intent: How Congress is Eroding the Criminal Intent Requirement*,<sup>1</sup> the report issued jointly by The Heritage Foundation and NACDL, is a seminal work that has catalogued one dimension of the problem—the evisceration of *mens rea*—but also sends a powerful message that the broader problem of overcriminalization transcends politics and ideology. It is a bipartisan phenomenon and it will require a non-partisan effort to solve it.

Today we embark on the next steps along the road to reform. We have invited a distinguished array of scholars, practitioners and jurists—as the title of the program suggests—to develop consensus solutions. If we are to succeed, it will be because of that one pivotal adjective: consensus. Each of us can readily articulate our own perfect solutions shaped by our own parochial perspective. The challenge, and the real opportunity for reform, lies in broadening our thinking to find that elusive consensus.

Today we will explore in considerable depth myriad innovative remedies to address the many manifestations of overcriminalization. We will weigh new approaches to law enforcement, new ways to rein in excessive and abusive prosecution. We will look at the relationship between civil and criminal enforcement and evaluate whether a redefinition of the boundary between the two can promote viable reform. And we will consider how a return to traditional intent requirements may be essential. I do not expect that you will solve a vexatious problem that has been decades in the making with this one conference. But I have no doubt that you will make great strides.

What happened on the Hill a few weeks ago proves that our mutual efforts can succeed and should inspire a reinvigorated determination to restore balance, integrity and restraint to the most powerful weapon in a government’s arsenal: the power to prosecute and condemn.

For NACDL, support for rational and humane criminal justice policies is not limited to the white collar crime arena. We are concerned not only

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<sup>1</sup> See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010).

with economic costs of overly expansive prosecution, but with the enormous human toll of the policies and practices that have created the largest prison population in history: 2.3 million people. As Chairman Scott observed the other day, this is a 500% increase in the past thirty years.

Reform is never easy. Then again, the work of the criminal defense lawyer is never easy. But criminal defense lawyers are battle tested every day in every courtroom in the nation. So we are ready for the challenge. And we are grateful to have so many wonderful partners in this exciting endeavor.

I want to prospectively thank the presenters, the moderators, the commentators, and the judges who are participating in this discussion. You are all luminaries in your respective fields. Your ideas command respect. Your analysis demands attention. Your interest in this subject is gratifying, and your commitment to search for consensus solutions is inspiring.

I especially want to acknowledge our conveners, Professors Jeff Parker from GMU and Ellen Podgor of Stetson. The two of them have worked tirelessly for months to plan the program and assemble an outstanding array of talent. I also want to note that Ellen was the recent recipient of NACDL's highest accolade, The Heeney Award, for her lifetime of service to the defense function and core mission of NACDL.

And now, it is my great honor to present our keynote speaker: Larry D. Thompson, PepsiCo's Senior Vice President in Government Affairs, General Counsel, and Secretary, is as qualified a person as there is in this nation to set the tone for this conclave. His background in government, private practice, and corporate governance, imbue him with the breadth of experience essential to articulate a reform agenda that can embrace the legitimate concerns of all constituencies in the criminal justice system. You have his biography, you all know the many distinguished positions he has held, including Deputy Attorney General of the United States. You certainly know that he is the first and ever-growing chain of DAGs to have an infamous memorandum named in his honor. Beyond all that, I have come to learn that he cares passionately about the "justice" in our justice system.

I had the good fortune to meet with him about a year ago to seek his guidance on NACDL's grand jury reform initiative. He was wise and helpful. But he brought up an issue that is seldom considered by policy makers, but as a practitioner it resonated with me. He spoke about the enormous discretion vested in our prosecutors, and how so many of them are just so young, so lacking in life experience, so zealous, and so self-righteous, and that this was a problem in how the laws are enforced. As someone who has been in the trenches, and walked out of many a prosecutor's office shaking my head at the breathtaking lack of understanding of the human condition, this was a great moment. I realized that Larry Thompson brings a lot more to our discussion than his titles and achievements. He brings an appreciation for the human considerations that are at the core of the criminal justice system. And, on top of all that, he is an NACDL member!

To deliver the keynote remarks, it is my great pleasure to introduce Larry Thompson.