

**JOURNAL OF LAW, ECONOMICS & POLICY**

**VOLUME 7**

**SUMMER 2011**

**NUMBER 4**

**EDITORIAL BOARD  
2010-2011**

Samuel Adelman  
*Editor-in-Chief*

Eva Choi  
*Executive Editor*

Allen Brooks  
*Managing Editor*

Reid MacHarg  
*Senior Articles Editor*

Laura Farley  
*Senior Notes Editor*

Andrew Hunt  
*Senior Research Editor*

Jacob Shorter  
*Articles Submissions  
Editor*

Sarah Nash  
*Notes Editor*

Katrina Doran  
*Research Editor*

Jessica Hoppe  
*Research/Notes Editor*

Murat Mungan  
*Associate Editor*

**MEMBERS**

Shamus Brennan  
William Knauss

Shane McCarrick  
Katherine McCormack

**CANDIDATE MEMBERS**

Melissa Alfano  
Katie Barnes  
Jarred Bomberg  
John Buckley, III  
Corey Carpenter, Jr.  
Malaikah Choudhry  
Michael DeRita  
Elyse Dorsey

Graham Dufault  
Rachel Fertig  
Andrew Galle  
Dallin Glenn  
Daniel Glynn  
Shannon Lautenschlager  
Laura Lieberman

Brendan Mullarkey  
Benjamin Nelson  
Christina Newton  
Larry Ponders  
Kay Teng  
John Ure  
William Wiegand  
Daniel Wisniewski

**MEMBERS EMERITUS**

Jennifer Bradfute  
Karuna Brunk  
Alexandra Zimmer

# JOURNAL OF LAW, ECONOMICS & POLICY

---

---

VOLUME 7

SUMMER 2011

NUMBER 4

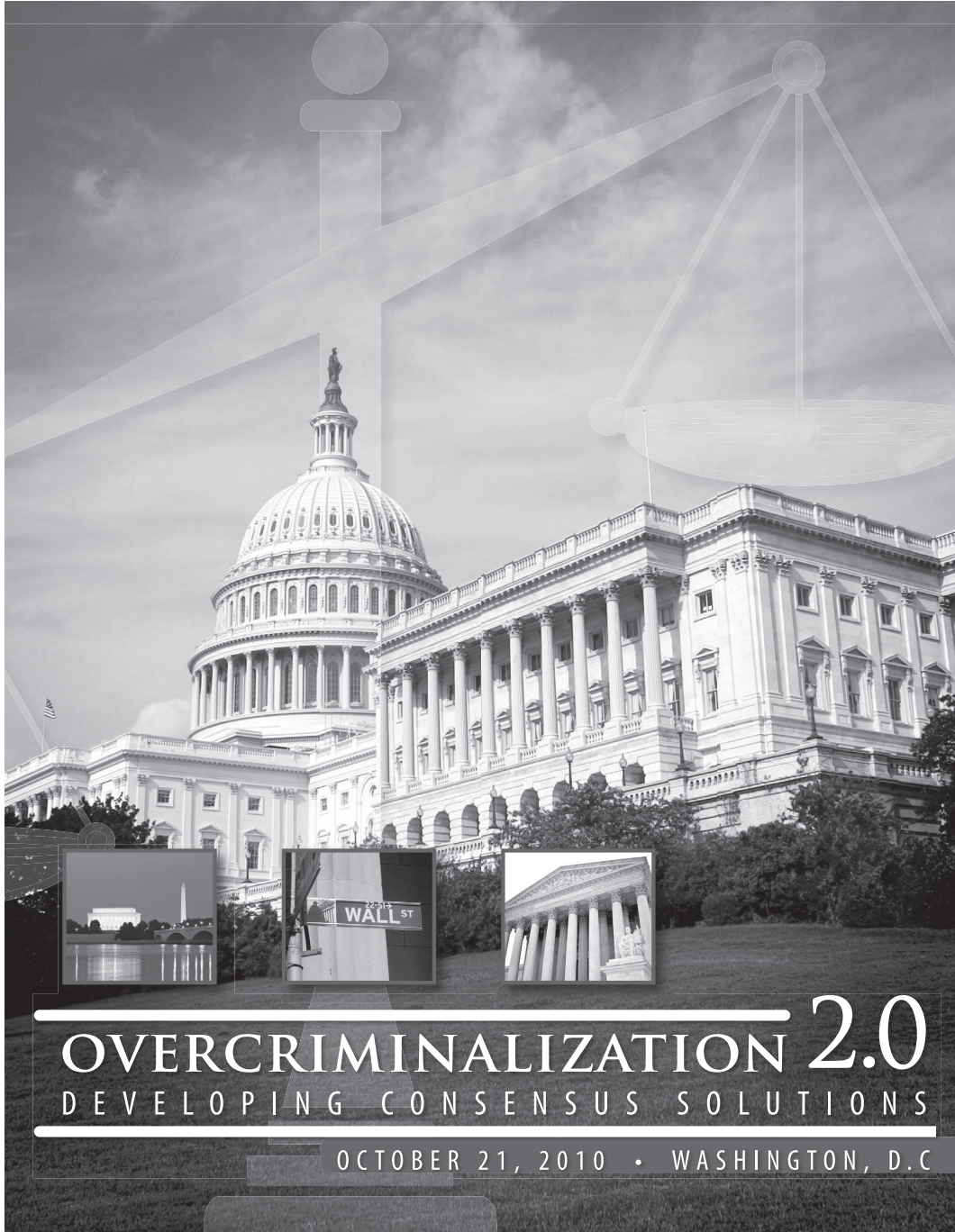
---

---

## BOARD OF ADVISORS

Lisa E. Bernstein  
James M. Buchanan  
Judge Guido Calabresi  
Lloyd R. Cohen  
Robert D. Cooter  
Robert C. Ellickson  
Richard A. Epstein  
Judge Douglas H. Ginsburg  
Mark F. Grady  
Bruce H. Kobayashi  
Henry G. Manne  
A. Douglas Melamed

Francesco Parisi  
Eric Posner  
Judge Richard A. Posner  
Roberta Romano  
Hans-Bernd Schäfer  
Steven M. Shavell  
Henry E. Smith  
Vernon L. Smith  
Gordon Tullock  
Thomas S. Ulen  
W. Kip Viscusi  
Todd J. Zywicki



---

# OVERCRIMINALIZATION 2.0

DEVELOPING CONSENSUS SOLUTIONS

---

OCTOBER 21, 2010 • WASHINGTON, D.C



# OVERCRIMINALIZATION 2.0

DEVELOPING CONSENSUS SOLUTIONS

OCTOBER 21, 2010 • WASHINGTON, D.C.

## AGENDA

	<p><b>Opening &amp; Keynote</b></p> <p>Welcome Samuel Adelman Daniel D. Polsby Norman L. Reimer</p> <p>Keynote Larry Thompson</p>
<b>Panel 1</b>	<p><b>The Potential of “Smart on Crime” Reform Initiatives</b></p> <p>Introduction Ronald L. Gainer</p> <p>Principal Presenter Roger A. Fairfax</p> <p>Commentary Cynthia E. Orr Ilya Somin Solomon L. Wisenberg</p> <p>Moderator Jim E. Lavine</p>
<b>Panel 2</b>	<p><b>Monitoring Prosecutors</b></p> <p>Principal Presenter Larry Ribstein</p> <p>Commentary Sara Sun Beale Lucian E. Dervan Glenn Lammi Paul Rosenzweig</p> <p>Moderator Craig Lerner</p>



# OVERCRIMINALIZATION 2.0

DEVELOPING CONSENSUS SOLUTIONS

OCTOBER 21, 2010 • WASHINGTON, D.C.

**AGENDA** *Continued*

<b>Panel 3</b>	<p><b>Regulation or Criminalization</b></p> <p>Principal Presenter Darryl K. Brown</p> <p>Commentary Carmen D. Hernandez Paul Kamenar Tim Lynch Kate Stith</p> <p>Moderator Shana-Tara Regon</p>
<b>Panel 4</b>	<p><b>Restoring the <i>Mens Rea</i> Requirement</b></p> <p>Principal Presenter Geraldine S. Moohr</p> <p>Commentary Lawrence S. Goldman Julie R. O'Sullivan Harvey Silverglate Marie Gryphon</p> <p>Moderators Tiffany M. Joslyn Brian Walsh</p>
<p><b>Developing Consensus Solutions—Judicial Perspectives</b></p> <p>Judges Hon. Frederic Block Hon. Cormac J. Carney Hon. Jed S. Rakoff Hon. Nancy Gertner</p> <p>Moderators Jeffrey S. Parker Ellen S. Podgor</p>	



JOURNAL OF LAW, ECONOMICS & POLICY

VOLUME 7

SUMMER 2011

NUMBER 4

CONTENTS

**OVERCRIMINALIZATION 2.0:  
DEVELOPING CONSENSUS SOLUTIONS  
OCTOBER 21, 2010**

565 FOREWARD  
*Ellen S. Podgor*

**OPENING & KEYNOTE**

573 OPENING REMARKS  
*Norman L. Reimer*

577 KEYNOTE SPEECH: THE REALITY OF OVERCRIMINALIZATION  
*Larry D. Thompson*

**PANEL 1: THE POTENTIAL OF “SMART ON CRIME” REFORM INITIATIVES**

587 REMARKS ON THE INTRODUCTION OF CRIMINAL LAW  
REFORM INITIATIVES  
*Ronald L. Gainer*

597 FROM “OVERCRIMINALIZATION” TO “SMART ON CRIME”:  
AMERICAN CRIMINAL JUSTICE REFORM—LEGACY AND PROSPECTS  
*Roger A. Fairfax, Jr.*

**PANEL 2: MONITORING PROSECUTORS**

617 AGENTS PROSECUTING AGENTS  
*Larry E. Ribstein*

645 OVERCRIMINALIZATION 2.0: THE SYMBIOTIC RELATIONSHIP BETWEEN  
PLEA BARGAINING AND OVERCRIMINALIZATION  
*Lucian E. Dervan*

**PANEL 3: REGULATION OF CRIMINALIZATION**

657 CRIMINAL LAW’S UNFORTUNATE TRIUMPH OVER  
ADMINISTRATIVE LAW  
*Darryl K. Brown*

**PANEL 4: RESTORING THE *MENS REA* REQUIREMENT**

- 685 PLAYING WITH THE RULES: AN EFFORT TO STRENGTHEN THE  
*MENS REA* STANDARDS OF FEDERAL CRIMINAL LAWS  
*Geraldine Szott Moohr*
- 711 REMARKS ON RESTORING THE *MENS REA* REQUIREMENT  
*Harvey Silverglate*
- 717 THE BETTER PART OF LENITY  
*Marie Gryphon*
- 725 DEVELOPING CONSENSUS SOLUTIONS TO  
OVERCRIMINALIZATION PROBLEMS:  
THE WAY AHEAD  
*Jeffrey S. Parker*



## FOREWARD

*Ellen S. Podgor\**

On October 21, 2010 scholars, practitioners, and policy advocates congregated at the Georgetown University Conference Center in Washington, D.C. to map out consensus solutions to the problem of overcriminalization.<sup>1</sup> This was the second academic symposium in a trilogy that explored overcriminalization. The first was at American University's Washington College of Law, taking place on October 19, 2004,<sup>2</sup> and it discussed the topic of overcriminalization and the "grave implications of a criminal justice system that fails to consider increased federalization, the diminished recognition of a *mens rea* element in criminal statutes, and a growing prosecution of conduct that could be addressed via civil sanctions."<sup>3</sup> The heart of the first gathering was to understand the problem. The second symposium recognized the issues faced and provided suggestions that can resolve this overcriminalization crisis. The third symposium, yet to be formulated, will focus on an action plan to bring the consensus solutions discussed in this symposium to a reality.

With the guidance of Professor Jeffrey Parker and myself, George Mason's *Journal of Law, Economics & Policy* invited an array of folks to explore ideas to alleviate difficult restraints on our legal system caused by overcriminalization. As with other initiatives pertaining to overcriminalization, the partners that joined together did not necessarily agree on policies and practices, yet all agreed that overcriminalization is a problem of immense proportions. At the helm of this symposium were the National Association of Criminal Defense Lawyers (NACDL) and the Foundation of Criminal Justice, who have long been key players in the fight against overcriminalization. Joining this time with NACDL and the Foundation for Criminal Justice was the Law & Economics Center at George Mason University and the *Journal of Law, Economics & Policy*. Samuel Adelman, Editor in Chief of the *Journal of Law, Economics & Policy* provided incredible organization and skill that allowed for a day, and this later law

---

\* Gary R. Trombley, Family White Collar-Crime Research Professor & Professor of Law, Stetson University College of Law.

<sup>1</sup> "Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes." Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011).

<sup>2</sup> Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

<sup>3</sup> Ellen S. Podgor, *Overcriminalization: The Politics of Crime: Foreword*, 54 AM. U. L. REV. 541, 541 (2005).

review issue, that captures the difficulties in resolving the overcriminalization issue.

The stage was set with the opening remarks of NACDL Executive Director, Norman Reimer, who noted the House Judiciary Committee's recent recognition of the problem of overcriminalization.<sup>4</sup> He told how the Heritage Foundation and NACDL highlighted overcriminalization to the congressional committee in a recent report titled, *Without Intent—How Congress is Eroding the Criminal Intent Requirement*. Reimer's opening comments served as the backdrop for a day that quickly moved to examine consensus solutions to this problem.

The keynote speaker for the Symposium was Larry Thompson, former Deputy Attorney General of the United States, and presently the Senior Vice-President in Government Affairs and General Counsel and Secretary at PepsiCo. Thompson focused on the problem of overcriminalization from a corporate context. He questioned the value of charging a corporation with criminal conduct and emphasized the need to protect innocent shareholders.<sup>5</sup> The answer is not overregulation, he said, offering critical remarks on the passage of the Dodd-Frank financial reform legislation.<sup>6</sup> Rather, "the ability of prosecutors to exercise power does not mean that such power should always be exercised."<sup>7</sup>

With the stage set, the four substantive panels of the day began: 1) The Potential of Smart on Crime Reform Initiatives; 2) Monitoring Prosecutors; 3) Regulation or Criminalization; and 4) Restoring the *Mens Rea* Requirement. They were followed by a closing session of judicial perspectives from three district court judges: the Honorable Frederic Block (Eastern District of New York); the Honorable Cormac J. Carney (Central District of California); and the Honorable Jed S. Rakoff (Southern District of New York).

The first session opened with a historical review of criminal law reform in the United States, including the failed efforts to correct problems in the federal code. Ron Gainer, a Washington D.C. attorney, and former Associate Deputy Attorney General and former ex officio member of the U.S. Sentencing Commission, noted the complexity, sheer number, and absurd location of many of our federal criminal laws.<sup>8</sup> He emphasized the need to think long-term when thinking about federal criminal law reform efforts.<sup>9</sup>

---

<sup>4</sup> *Overcriminalization 2.0 Symposium: Norman Reimer* (Oct. 21, 2010), <http://vimeo.com/19355538>.

<sup>5</sup> *Overcriminalization 2.0 Symposium: Larry Thompson* (Oct. 21, 2010), <http://vimeo.com/19354742>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Overcriminalization 2.0 Symposium: Ron Gainer* (Oct. 21, 2010), <http://vimeo.com/19356138>.

<sup>9</sup> *Id.*

His overview of criminal law reform was the lead into the main presentation for the first panel, a presentation by Professor Roger A. Fairfax of George Washington University School of Law, who spoke about “smart on crime” reform initiatives. Professor Fairfax walked the audience through a philosophical and historical overview of criminalization and ended by enlightening the audience on different smart on crime initiatives in the United States.<sup>10</sup> He noted that smart on crime initiatives have included grand jury reform. Three commentators followed:<sup>11</sup> Cynthia Orr,<sup>12</sup> Ilya Somin,<sup>13</sup> and Solomon L. Wisenberg.<sup>14</sup> Professor Ilya Somin discussed public opinion on crime and criminal justice reform, including politics and the war on drugs. He stressed that public opinion is less of an obstacle now than in the past. Cynthia Orr, spoke about many of the NACDL initiatives including its report on misdemeanors<sup>15</sup> and how money used for incarceration could be better spent on educating those who are being incarcerated.<sup>16</sup> Solomon L. Wisenberg, spoke about the need for grand jury reform and specifically the reforms related to overcriminalization such as the presentation of exculpatory evidence to preclude unnecessary indictments.<sup>17</sup>

The second session had Larry Ribstein, Mildred Van Voohis Jones Chair in Law and Associate Dean of Research at the University of Illinois College of Law, as the main presenter. His article, *Agents Prosecuting Agents*,<sup>18</sup> looks at the efficiency of criminalizing agency costs and the problems of excessive prosecution of crimes committed by corporate agents. Responding to his piece<sup>19</sup> were Glenn Lammi,<sup>20</sup> Professor Lucian E. Dervan,<sup>21</sup> Paul Rosenzweig,<sup>22</sup> and Professor Sara Sun Beale.<sup>23</sup> Glenn Lam-

---

<sup>10</sup> *Overcriminalization 2.0 Symposium: Roger Fairfax* (Oct. 21, 2010), <http://vimeo.com/19357155>.

<sup>11</sup> This panel was moderated by Jim E. Lavine, President of the National Association of Criminal Lawyers and a partner with the law firm of Zimmermann, Lavine, Zimmermann & Sampson, P.C.

<sup>12</sup> Attorney, Goldstein, Goldstein & Hilley and Immediate Past President of the National Association of Criminal Defense Lawyers.

<sup>13</sup> Associate Professor of Law, George Mason University School of Law.

<sup>14</sup> Partner and Co-Chair of the White Collar Crime Defense Practice Group, Barnes & Thornburg, LLP.

<sup>15</sup> *Overcriminalization 2.0 Symposium: Cynthia Orr, Part 1* (Oct. 21, 2010), <http://vimeo.com/19357956>; *Overcriminalization 2.0 Symposium: Cynthia Orr, Part 2* (Oct. 21, 2010), <http://vimeo.com/19358523>.

<sup>16</sup> *Overcriminalization 2.0 Symposium: Ilya Somin* (Oct. 21, 2010), <http://vimeo.com/19357731>.

<sup>17</sup> *Overcriminalization 2.0 Symposium: Solomon Wisenberg* (Oct. 21, 2010), <http://vimeo.com/19359367>.

<sup>18</sup> See Larry Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

<sup>19</sup> This panel was moderated by Craig Lerner, Associate Dean for Academic Affairs and Professor, George Mason University School of Law.

<sup>20</sup> Chief Counsel Legal Studies Division, Washington Legal Foundation.

<sup>21</sup> Assistant Professor of Law, Southern Illinois University School of Law.

<sup>22</sup> Principal, Red Branch Consulting, PLLC.

<sup>23</sup> Charles L.B. Lowndes Professor of Law, Duke University School of Law.

mi focused on the responsible corporate officer doctrine, what he called a “status crime.” Paul Rosenzweig looked at the role of the electoral process, providing justice statistics on those with prosecutorial responsibility.<sup>24</sup> Professor Lucian E. Dervan argued that “a symbiotic relationship exists between plea bargaining and overcriminalization because these legal phenomena do not merely occupy the same space in our justice system, but rely on each other for their very existence.”<sup>25</sup> Finally, Professor Sara Sun Beale said that if we look only at corporate agents we miss so much of the overcriminalization problem.<sup>26</sup> The bulk of the cases are gun, immigration and drug cases, and she looked at the effect of extending Professor Ribstein’s analysis to these contexts. She also argued that entity behavior is something that does need to be examined in a “smart fashion.”<sup>27</sup>

Professor Darryl Brown, O.M. Vicars Professor of Law, University of Virginia School of Law, presented the centerpiece for the third session on administrative and regulatory concerns.<sup>28</sup> He noted the broad base of different constituents joining together on the issue of overcriminalization, while also noting that prosecutors and the public are less accepting of this problem. He noted the move from regulatory remedies for improper conduct to it now being criminal law sanctions that “duplicate and supplement administrative law.”<sup>29</sup> He is critical of the excessive use of criminal law as regulation and offers an array of different solutions including “culpability terms, lenity, and priority for specific offenses.” He examines remedies of “limiting regulatory offenses to substantial harms and repeat offenders” as well as procedural reforms such as having a “law commission and legislative protocols” to monitor legislation.<sup>30</sup> Two other suggestions he proposes are “substantive judicial review of criminal law” and “desuetude rule and expiration dates for criminal statutes.”<sup>31</sup> With each of these suggestions he offers pros and cons of its acceptance. As a final compliment to his reform scheme, Professor Brown looks at “embarrassing the administrative state.”<sup>32</sup>

---

<sup>24</sup> *Overcriminalization* 2.0 *Symposium: Paul Rosenzweig* (Oct. 21, 2010), <http://vimeo.com/19362737>.

<sup>25</sup> *Overcriminalization* 2.0 *Symposium: Lucian Dervan* (Oct. 21, 2010), <http://vimeo.com/19363791>.

<sup>26</sup> *Overcriminalization* 2.0 *Symposium: Sara Sun Beale* (Oct. 21, 2010), <http://vimeo.com/19364355>.

<sup>27</sup> *Id.*

<sup>28</sup> This panel was moderated by Shana-Tara Regon, Director, White Collar Crime Policy, National Association of Criminal Defense Lawyers.

<sup>29</sup> *Overcriminalization* 2.0 *Symposium: Darryl Brown* (Oct. 21, 2010), <http://vimeo.com/19375287>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Several individuals responded to Professor Brown's work, including Professor Kate Stith,<sup>33</sup> Carmen D. Hernandez,<sup>34</sup> Paul Kamenar,<sup>35</sup> and Tim Lynch.<sup>36</sup> Professor Stith argued that merely inserting a *mens rea* requirement will not resolve the overcriminalization problem.<sup>37</sup> She also noted that many of the overcriminalization issues come in the sentencing phase. She questioned whether we would really want to give powers, such as investigatory powers, to regulatory agencies dealing with civil matters. Perhaps the problem, she said, is the growth of the administrative state with reduced constitutional rights.<sup>38</sup> Carmen Hernandez argued that the antidote to overcriminalization is not overregulation, and that you will end up with many of the same problems that we now find in the criminal law process if we move to a regulatory model.<sup>39</sup> Paul Kamenar looked at the problem of overcriminalization in the environmental context.<sup>40</sup> He disagreed with Professor Brown's remedy of using a repeat offender criteria. He suggested that judges need to show the deficiencies in the federal sentencing guidelines. Finally, Tim Lynch looked at whether the proposed solution fits with the police powers of the federal government.<sup>41</sup> He emphasized that the debate is likely to get louder on the role of the federal government.

The final centerpiece presentation was Professor Geraldine Moohr, a professor of law at Houston Law Center. Setting the stage for this presentation were two moderators, Tiffany Joslyn<sup>42</sup> and Brian Walsh,<sup>43</sup> who authored the Heritage–NACDL report on *mens rea*. Professor Moohr's paper, *Playing With the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*,<sup>44</sup> commented on this report. Panelists then commenting on her paper were Lawrence S. Goldman,<sup>45</sup> Harvey Silverglate,<sup>46</sup> Marie Gryphon,<sup>47</sup> and Professor Julie Rose O'Sullivan.<sup>48</sup> Lawrence S. Goldman looked at the practicalities of having a change in how we ap-

---

<sup>33</sup> Lafayette S. Foster Professor of Law, Yale Law School.

<sup>34</sup> Attorney and Past President of the National Association of Criminal Defense Lawyers.

<sup>35</sup> Senior Executive Counsel, Washington Legal Foundation.

<sup>36</sup> Director, Project on Criminal Justice, Cato Institute.

<sup>37</sup> *Overcriminalization 2.0 Symposium: Kate Stith* (Oct. 21, 2010), <http://vimeo.com/19390973>.

<sup>38</sup> *Id.*

<sup>39</sup> *Overcriminalization 2.0 Symposium: Hernandez* (Oct. 21, 2010), <http://vimeo.com/19391498>.

<sup>40</sup> *Overcriminalization 2.0 Symposium: Paul Kamenar* (Oct. 21, 2010), <http://vimeo.com/19390382>.

<sup>41</sup> *Overcriminalization 2.0 Symposium: Tim Lynch* (Oct. 21, 2010), <http://vimeo.com/19392203>.

<sup>42</sup> Counsel, White Collar Crime Policy, National Association of Criminal Defense Lawyers.

<sup>43</sup> Senior Legal Research Fellow, The Heritage Foundation.

<sup>44</sup> *Overcriminalization 2.0 Symposium: Geraldine Moohr* (Oct. 21, 2010), <http://vimeo.com/19415222>.

<sup>45</sup> Law Offices of Lawrence S. Goldman and Past President National Association of Criminal Defense Lawyers.

<sup>46</sup> Author and Of Counsel, Zalkind, Rodriguez, Lunt & Duncan, LLP.

<sup>47</sup> Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research.

<sup>48</sup> Professor of Law, Georgetown University Law Center.

proach *mens rea* analysis.<sup>49</sup> Harvey Silverglate emphasized the need to look at overcriminalization by also looking at a “distinct problem of vagueness.”<sup>50</sup> Marie Gryphon looked at the pros and cons of accepting a codified lenity rule, as proposed by the Heritage–NACDL report.<sup>51</sup> She advocated for this doctrine being left with the judiciary, as opposed to being congressionally mandated.<sup>52</sup> Professor O’Sullivan noted how criminal law is different and why the delegation doctrine should be different in criminal law matters.<sup>53</sup> She said Congress needs to provide the notice of what is the criminal law.

Summing up the proceedings of the day, and offering a judicial perspective, were three district court judges.<sup>54</sup> The Honorable Frederic Block looked at whether there should be more uniformity between the federal and state system.<sup>55</sup> Later in the panel discussion, he noted how prosecutorial discretion may be different in different parts of the country.<sup>56</sup> The Honorable Cormac J. Carney accepted the concept of overcriminalization in the non-violent sphere, but was not as accepting in the drug area. He expressed concern on the strain to the jury system and the cost of the trial in a case that failed to result in a conviction.<sup>57</sup> The Honorable Jed S. Rakoff remarked that overcriminalization is not widely accepted by the general public, and in the great majority of cases, these problems do not exist.<sup>58</sup> He used tax cases as an example. But he said one area that has faced overcriminalization is in the sentencing area.

The day and this journal issue offers differing views of overcriminalization, different perspectives on when and where it occurs in the judicial process, and different remedies of how to resolve the problem. As suspected, there was no one resolution that was forthcoming from this discussion. But many thoughts were presented to move the discussion to a new level. It

---

<sup>49</sup> *Overcriminalization 2.0 Symposium: Lawrence Goldman* (Oct. 21, 2010), <http://vimeo.com/19415841>.

<sup>50</sup> *Overcriminalization 2.0 Symposium: Harvey Silverglate* (Oct. 21, 2010), <http://vimeo.com/19416326>.

<sup>51</sup> *Overcriminalization 2.0 Symposium: Marie Gryphon* (Oct. 21, 2010), <http://vimeo.com/19416546>.

<sup>52</sup> *Id.*

<sup>53</sup> *Overcriminalization 2.0 Symposium: Julie O’Sullivan* (Oct. 21, 2010), <http://vimeo.com/19420218>.

<sup>54</sup> This panel was moderated by Professor Ellen S. Podgor, Gary R. Trombley Family White Collar-Crime Research Professor & Professor of Law, Stetson University College of Law, and Jeff Parker, Professor of Law, George Mason University School of Law.

<sup>55</sup> *Overcriminalization 2.0 Symposium: Hon. Fredrick Block* (Oct. 21, 2010), <http://vimeo.com/19420763>.

<sup>56</sup> *Overcriminalization 2.0 Symposium: Judges Panel* (Oct. 21, 2010), <http://vimeo.com/19421282>.

<sup>57</sup> *Overcriminalization 2.0 Symposium: Hon. Cormac J. Carney* (Oct. 21, 2010), <http://vimeo.com/19420977>.

<sup>58</sup> *Overcriminalization 2.0 Symposium: Untitled*, (Oct. 21, 2010), <http://vimeo.com/19435480>.

is now for the next symposium to provide an action plan to resolve the existing problems of overcriminalization.





## OPENING REMARKS

*Norman L. Reimer\**

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

---

\* Executive Director of the National Association of Defense Lawyers.

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

---

<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.

KEYNOTE SPEECH:  
THE REALITY OF OVERCRIMINALIZATION

*Larry D. Thompson\**

Good morning. Thank you very much, Norman that was a very kind introduction. I look around the room, one of the things I think we all need to do because we are a community with a common interest, a community of lawyers and scholars, is stay together. I look at Professor Ellen Podgor, and when I was in Atlanta trying cases, getting beat up, I could always call on Ellen for some point that I wanted to make in a brief, or some point I wanted to make in summation or opening statement. Because I had some clients who could pay, I attempted to pay her and she would never accept anything. So, congratulations on your honor Ellen, it is much deserved.

Well, you would think from that introduction that I have had trouble holding a job. I have been around a long time. I've been a prosecutor, a defense attorney, special counsel, a deputy attorney general, and a general counsel of a large company. But I do think that the variety of jobs I've had over the years gives me a perspective on overcriminalization, and this is the issue we are here this morning to address. I have some prepared remarks and I will present them, and I will try to answer your questions.

I. THE THOMPSON POLICY MEMO

Norman, I should probably try to ignore this, but you opened the door, so I'm going to go there and talk about the famous, or infamous, memorandum that I authored. I am sometimes, to my dismay, perhaps most known for that memorandum—infamous in some criminal defense circles—for the 2003 policy memo I authored as Deputy Attorney General.<sup>1</sup>

The memo set forth my view that “[c]orporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment.”<sup>2</sup> I also noted that “[i]ndicting corporations for wrongdoing enables the government to address, and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.”<sup>3</sup> In outlining the factors prosecutors should

---

\* Senior Vice President of Government Affairs, General Counsel and Secretary, PepsiCo, Inc., and former U.S. Deputy Attorney General.

<sup>1</sup> See Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components & U.S. Att’ys (Jan. 20, 2003).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Id.*

consider when deciding whether or not to charge a corporation, I included not just the traditional factors like the seriousness of the offense, the pervasiveness of the wrongdoing in the organization, and the corporation's cooperation and remedial efforts.<sup>4</sup> I also asked prosecutors to consider collateral consequences—like disproportionate harm to innocent shareholders—the adequacy of prosecuting individuals, and the appropriateness of alternative civil or regulatory remedies.<sup>5</sup>

Now, when I reissued and revised an earlier version of that memorandum, I actually thought that I was trying to be a force for good public policy and bring some much-needed certainty to the area of corporate criminal liability, and take authority away from the whims of a single prosecutor. I have been told that a Westlaw search with “Thompson Memo” or “the Thompson Memorandum” in the law journals database produces over 700 results. And reading those comments sometimes reaffirms for me the old adage that no good deed goes unpunished. My sons tell me, “Get a life, Dad. This is going to be in your obituary so forget about it.”

Today, I think that corporations and corporate officers charged with legal non-compliance have come to feel a bit like the person that really can never accomplish a single good deed. No matter how gold-plated your corporate compliance efforts, no matter how upstanding your workforce, no matter how hard one tries, large corporations today are walking targets for criminal liability. There really is little certainty in the world of corporate criminal liability.

So this morning, I want to discuss how we got here and how, perhaps, we need to readjust prosecutorial and regulatory attitudes. I should warn everyone that I do see some value, and sometimes great value, in consistent and appropriate enforcement. The mere threat of enforcement does deter misconduct. That is a much more efficient way to ensure adherence to the law than a plethora of regulatory compliance measures that burden the innocent and culpable alike. But effective and efficient enforcement requires, as Norman said, an exercise of discretion that I fear may be lacking.

## II. OVERCRIMINALIZATION TODAY

Now, let's take sort of a thumbnail sketch of the background of corporate criminal liability. As we all know—and let me remind you—corporations can be charged with crimes based on the acts of their authorized agents when acting on behalf of the company. The Supreme Court accepted this proposition just over 100 years ago in *New York Central and Hudson River Railroad v. United States*, based on agency principles bor-

---

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

rowed from tort law.<sup>6</sup> While recognizing that “there are some crimes, which in their nature cannot be committed by corporations,” the Court stated that it need “go only a step farther” than the tort-law principle of respondeat superior to impose liability in the criminal context.<sup>7</sup> Without corporate criminal liability, the Court asserted over 100 years ago, “many offenses might go unpunished.”<sup>8</sup>

So corporate criminal liability has thus emerged as a logical counterpart to respondeat superior liability in the civil context. The principle that corporations are liable for the torts of their employees is certainly a familiar one, and it seems, goes unquestioned by most lawyers today. But let’s think about it. Perhaps that doctrine is not as inevitable as it may seem, or even as appropriate as it may seem. In recent years, in a number of contexts, courts have challenged the basic assumptions underlying respondeat superior. These developments hold valuable lessons, I believe, for criminal responsibility as well. Let’s look at a few of these.

In *Burlington Industries, Inc. v. Ellerth*, for example, the Supreme Court addressed whether, under Title VII, an employer could be held liable for harassment by its supervisors.<sup>9</sup> The Court held that absent a tangible employment action, the employer may defend on the ground that it “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” by a supervisor, and that the “plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities.”<sup>10</sup> The Court thus preserved vicarious liability as a general matter, but created sort of an affirmative defense based on the reasonableness of both the employer’s and the victim’s conduct.<sup>11</sup>

In *Kolstad v. American Dental Association*, the Supreme Court considered when an employer could be held vicariously liable for punitive damages for the discriminatory acts of its employees.<sup>12</sup> The Court prohibited such liability where the employee’s acts were “contrary to the employer’s ‘good-faith efforts to comply with Title VII.’”<sup>13</sup>

In a recent case, *Correctional Services Corp.*, the Supreme Court addressed whether a federal prisoner could sue a corporation that operated the private prison where he was incarcerated, for Constitutional violations by the private employer’s employees.<sup>14</sup> The Court held that he could not, rea-

---

<sup>6</sup> *New York Cent. & Hudson River R.R.*, 212 U.S. 481, 494 (1909).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 495.

<sup>9</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>10</sup> *Id.* at 765.

<sup>11</sup> *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

<sup>12</sup> *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999).

<sup>13</sup> *Id.* at 545.

<sup>14</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001).

soning that “[t]he purpose of *Bivens* is to deter the officer,” and that the availability of relief against the individual was sufficient.<sup>15</sup>

And finally, just a month ago the Second Circuit in *Kiobel v. Royal Dutch Petroleum Co.* rejected the theory that a private corporation could be held liable under the Alien Tort Claims statute for violations of international law.<sup>16</sup> The Court held that “offenses against the law of nations for violations of human rights can be charged against States and against individual men and women, but not against juridical persons such as corporations.”<sup>17</sup> While the employees, managers, officers, and directors of a corporation could be held liable, the corporation itself could not under this case.<sup>18</sup>

So, you can see that in a variety of contexts, courts have reexamined the underlying wisdom of automatically attributing the wrongs of corporate agents to the corporation itself. I would suggest this morning that it is high time we asked those same sorts of questions in the criminal context too. We have to take a step back and ask what purpose corporate criminal liability serves. Does it add to deterrence? Does it punish the culpable or the innocent? Is it necessary in view of other remedies? In other words, let’s take a look at, and revisit, some of the underlying premises of the so-called and infamous Thompson Memorandum.

### III. THE PURPOSES OF CORPORATE CRIMINAL LIABILITY

So let’s consider these things. First, what purpose is served by attaching criminal liability to corporations based on vicarious liability? If we go back far enough in history, ladies and gentlemen, the law saw *no* purpose. “A corporation,” Blackstone stated, “cannot commit treason, or felony, or other crime.”<sup>19</sup> That was true, even though Blackstone approved of respondeat superior in the tort context.<sup>20</sup>

I think Blackstone, many years ago, was onto something here. He recognized that there are fundamental differences between corporations and humans. First, and most obviously, a corporation cannot act except through natural persons; natural people can act without the benefit of a corporation. Second, a corporation cannot be incarcerated. It can be fined, but it cannot be physically placed in jail. Given that, there is a bit of an ill fit, it seems, in applying criminal law indiscriminately to corporations.

But maybe, we ask ourselves about the contemporary purposes of criminal law—deterrence and retribution—which can only be served by

---

<sup>15</sup> *Id.* at 74.

<sup>16</sup> *See* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

<sup>17</sup> *Id.* at 120.

<sup>18</sup> *Id.* at 122.

<sup>19</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 464 (1765).

<sup>20</sup> *Id.* at 417-19.



corporate criminal sanctions. I did talk about that in my memo. Let's start with deterrence. On the one hand, the threat of incarceration might deter corporate employees from committing a crime, but it does nothing to deter the corporation directly. On the other hand, corporations can be fined, but fines can be imposed civilly rather than criminally, so the need for deterrence through monetary penalties certainly can be served without resorting to criminal sanctions.

I think, when you look at our experiences, especially in recent times, there is a real risk of over-deterrence when corporations are convicted of crimes. A criminal conviction often results in the death of a corporation. We know this from recent examples in the Arthur Andersen indictment and the Drexel Burnham plea deal.

As these examples suggest, conviction typically sounds the death knell for a corporation. Indeed, even the *indictment* can have that effect. People just do not want to do business with a corporation that has been indicted. An indictment can impose collateral consequences such as a bar on contracting with the government, or participating in the industry where the corporation formerly operated.<sup>21</sup> Over-deterrence, thus, comes at a price. Costs to shareholders, to the economy, to the community in which the corporation is located, to employees, as entities that formerly contributed to a thriving organization, that may disappear forever.

What about retribution? If the Justice Department believes that a crime has been committed by an agent of the corporation, that agent should be prosecuted. But who gets punished, who hurts, when a corporation is convicted? The shareholders and the employees, whether blameworthy or not. I wrote an essay several years ago, in which I set forth some of these principles, and I entitled the essay, "The Blameless Corporation."<sup>22</sup> It was an interesting concept, and I spoke to some students, I think at Georgetown Law, and they were aghast that a corporation should ever be considered blameless. So this is the kind of context we operate in today.

Pulling these strands together, I think that every prosecutor considering indicting a corporation should ask, at a minimum, the following two questions:

1. Is a corporate criminal prosecution really necessary? In other words, given the availability of civil sanctions against the corporation, and

---

<sup>21</sup> See Miriam Hechler Baer, *Insuring Corporate Crime*, 83 IND. L.J. 1035 (2008) ("Federal law, for example requires all federal agencies to debar or suspend any contract with any indicted contractor or its affiliate, regardless of whether the indictment is in any way related to the agency's contract. Similarly, indicted organizations may become ineligible to receive federal aid. Apart from debarment, a corporate indictment may also result in the corporation's loss of licenses, permits, or ability to participate in entire areas of regulated commerce, including accounting, banking, health care, law, and other industries.").

<sup>22</sup> Larry Thompson, *The Blameless Corporation*, 46 AM. CRIM. L. REV. 1323 (2009).

civil and criminal sanctions against individual bad actors, does a corporate criminal prosecution really serve the goals, of deterrence and retribution?

2. If so, do the benefits of a conviction outweigh the costs to the government of taking the case to trial, and the costs to shareholders and employees from the corporation's likely demise?

If a prosecutor asks these two fundamental questions, and honestly considers them, then I believe based on all my experience as a defense lawyer and as a prosecutor; that in most cases, there is no good or sound policy reason for a corporate criminal prosecution. There are effective and viable alternatives.

#### IV. PROBLEMS WITH PROSECUTORIAL DISCRETION

While I believe that most government officials are fair and high-minded in making these sorts of determinations, there are forces at work that can create a temptation for even the most sensible of these prosecutors to deviate sometimes. Those forces are by no means unique to corporate prosecutions, but the greater stakes in dealing with a corporation and its innocent employees and shareholders makes them all the more important.

First, as Norman alluded to in his opening remarks, we live in a world dominated by the media, where catching the public eye and the public imagination can be the ticket to greater success and sometimes political success. For example, we all know that some—not all—state attorneys general now make names for themselves through highly publicized prosecutions. I think we need to consider a policy of shunning publicity, particularly for criminal cases and actions and putative investigations. I will confess a high degree of consternation when I see and hear press conferences with highly sensationalized language being used by the prosecutor, well outside the four corners of the indictment or the written complaint.

Second, a prosecutor really ought to be aware of the awesome power her office wields over the grand jury process. We have all heard the saying that a prosecutor could get a grand jury to indict a ham sandwich. There is an element of truth to this, and it stems from the aspects of our grand jury system that have really gone unquestioned for too long. One example is the fact that defense counsel are excluded from the proceedings. Would there not be some restraining effect on potential excess if defense counsel were there just for observation, not to ask questions, not to participate in the proceeding, but just to be present? If the presence of defense counsel is allowed for lineups, and for witness identification, then why not grand jury proceedings? I think reform in this area is long overdue. In the meantime, prosecutors must approach grand juries with a certain humility in light of the largely unchecked power exercised in the grand jury room.

## V. CORPORATE REGULATION

But I digress. Let me return to the subject at hand. I have criticized the premise upon which corporate criminal responsibility is based, and I have suggested that in many instances, deterrence and retribution are best served by some combination of corporate civil fines, and individual criminal and civil liability. But I do not want you to leave here today thinking that Larry Thompson is calling for more corporate regulation instead of more enforcement. To the contrary, I believe that corporate regulation tends to be overbroad and over-inclusive.

Targeting specific, individual wrongdoers for civil or criminal violations tends to do a better job of minimizing negative spillover that harms innocent third parties. If a corporate official commits a crime, he should be punished. The Justice Department and the SEC can target the official and enforce the laws and regulations. But I get a little leery when the response to *individual* acts of wrongdoing is to call for more regulation that affects everybody. Regulations, especially those found in multi-thousand-page legislation that gets pushed through the Congressional sausage factory without enough time for legislators to even read the bill, has a serious potential to overregulate innocent parties. And, as has been brought to my attention, these regulations not only impact the civil arena, but many of them actually do away with *mens rea*, which is a very disturbing development.

So, let me offer a hypothetical to you and one real-world example to illustrate my point. First, a hypothetical. Imagine 1% of corporate CFOs commit individual frauds against their companies that cost \$1,000,000 each to the corporation's shareholders and impose \$1,000,000 of cost on the public. Each of the frauds could have been detected with a \$100,000 compliance program. The public is outraged at this turn of events. It demands that Congress prevent future CFOs from defrauding it again. So Congress enacts legislation that makes every company implement that \$100,000 compliance program. Now, since only 1% of CFOs were engaging in illegal behavior, and the regulation requires *every* company to put the compliance program in place, think about it, society—perhaps—and shareholders, are far worse off with this kind of regulation than an individual enforcement action.

But that type of argument does not play well in our twenty-four hour news cycle, which focuses on scandal rather than efficiency or rationality. Now I readily confess, especially at an event sponsored by George Mason, that my example is not a particularly original one. Law and economics scholars have been making this same point for many, many years. At the same time, I can't help but think that the argument needs to be made again and again. The scandal-regulation cycle repeats itself over and over, and I have seen this throughout my career.

So let's talk about a real-world example. I fear that the latest round of reforms we have seen in Dodd-Frank are a prime example of overregulation in response to the bad acts of some corporate executives and some corporations. So, we now have a new law that is over 2,000 pages long. One major law firm published a 117-page *summary* of the Act.<sup>23</sup> Several legislators confessed to the fact that they did not even read the bill. And the law delegates extraordinary power—*extraordinary* power—to federal regulators. That same law firm summary I just mentioned, estimates that “the Act requires 243 rulemakings and 67 studies” after the Act has been passed, to be conducted by almost a dozen regulatory agencies.<sup>24</sup> This fundamental financial reform shifts immense power to already-powerful regulatory agencies that will be further empowered to regulate both good and bad corporate actions.

## CONCLUSION

I am going to wrap up my formal presentation and prepared remarks and then open the floor for questions. I've tried to be a bit provocative in my remarks today, I've questioned some basic assumptions about whether and when charging a corporation with a crime is appropriate. I have argued that the ability of prosecutors to exercise power does not mean that such power should always be exercised, and I've suggested that overregulation is not the answer.

Many of you will think that my remarks today are contradictory, perhaps with my Justice Department memorandum. I don't think so, but perhaps you could say, that most of my remarks today might be traced back to that memo. But the public's reaction to the memo certainly emphasized different aspects of the memo than what I've been discussing here. And yes, I did enforce laws holding corporations criminally liable. But as the Deputy Attorney General, I was sworn to uphold all the laws, not just the ones that I favored. I think it would be a bad world for a prosecutor to just uphold the laws he or she favored, and ignore the ones that he or she did not like.

So, after viewing the issue of corporate criminal liability from every side for almost forty years of my career, I am comfortable telling you that overcriminalization is a problem. The problem is growing. Some of the basic assumptions that extended liability to corporations, I think have now

---

<sup>23</sup> *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010* (Davis Polk & Wardwell LLP, Wash. D.C.), July 21, 2010, available at [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7e025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_Financial\\_Reform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7e025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf).

<sup>24</sup> *Id.* at i.

been undermined. I hope that we can reverse the trend and perhaps allow corporations that are attempting to obey the law to have a little more certainty in carrying out their responsibilities and protecting the innocent shareholders and communities, which depend on these organizations. I think this conference is a good step beginning to get scholars and lawyers, and practitioners and judges together to come to grips with this important problem that we face. Thank you. I will try to answer any questions that you might have.



## REMARKS ON THE INTRODUCTION OF CRIMINAL LAW REFORM INITIATIVES

*Ronald L. Gainer\**

It might be noted that I have been asked to speak on the topic of “*introduction* to criminal law reform”—not criminal law reform itself—presumably because the symposium organizers were well aware of my shortcomings in actually helping to *achieve* significant law reform. Those of us who had been working on the broad-scale federal reform effort from the late 1960s to the mid-1980s were not able to help move legislation beyond the introductory phase long enough to achieve congressional enactment, except for sentencing, which was untimely ripped, without its qualifying context, from the substantive portions of the proposed new code.

### THE STATE OF THE FEDERAL PENAL LAW

There was little doubt at the time—nor is there now—that the present federal criminal “code” (as it is euphemistically characterized) is not only in need of reform, it is in need of complete replacement. Of course, its provisions had never been designed to constitute a code; they were simply a scattering of laws that grew through accretion as the responsibilities of the federal government were expanded by congressional enactments. This leisurely process of aggregation was occasionally punctuated by significant additions prompted by crises of the moment, or by perceptions of public outrage. As examples of the latter: in the wake of John Dillinger’s successful bank robberies, Congress made such robberies a federal crime; after the kidnapping of the Lindbergh baby, Congress added kidnapping to the list of federal crimes; following President John Kennedy’s assassination, Congress decided to make it a crime to assassinate the President; when Senator Robert Kennedy was shot, Congress concluded that the killing of a Senator should be a federal crime, and, in a rare burst of foresight, decided also to make it a federal crime to kill a member of the House of Representatives.

Over a period exceeding two centuries, this approach has left us with a hodgepodge of about 4,500 penal statutes, hastily cobbled together, and bearing little relationship to each other in terms of either structure or terminology. They are not only multiplicitous, but internally confusing. They are also overlapping and redundant. We have accumulated a total of about

---

\* Attorney and former Associate Deputy Attorney General and former ex officio of the U.S. Sentencing Commission.

700 federal statutes dealing with just four kinds of offenses: theft, forgery, false statements, and property destruction. They contain their own idiosyncratic verbiage and definitions, and bear some semblance of uniformity only with regard to the substantial nature of the penalties specified for their breach; instead of being confined within Title 18, the main penal title, they are scattered among the fifty titles of the United States Code; and the great majority are unknown even to the most experienced federal prosecutors. When the more quiescent statutes are occasionally prosecuted, their awkward structures are commonly found to harbor hiatuses that federal judges attempt to bridge, frequently with eminently reasonable propositions, but those attempts collectively have left the accumulated case law as a tower of legal babble.

#### STATE PENAL CODE REFORM

The criminal statutes in the majority of our states, although far less numerous, were not significantly better until the enlightenment generated by the promulgation of the American Law Institute's Model Penal Code. Its singular innovation, introduced by Professor Herbert Wechsler as the director of the project, was to remove from the statutory framework the vestiges of common law language that had been rooted in concepts of evil and wickedness and that had proved to be ill-adapted for application in courts of law. For centuries, the approach to mental components of crimes had been a quagmire of legalese—both in Latin and in English—through which legislators and judges had vainly attempted to give some coherence to concepts of wrongfulness. The archaic verbiage suggesting evil and wickedness was replaced in the in the Model Penal Code with concepts of purpose, knowledge, recklessness, and (very rarely) negligence, which could be applied separately to actions, circumstances in which actions take place, and results.

While retaining the capacity to reflect the moral values of society, the Model Penal Code promoted clearer, more objective thinking about mental elements of offenses. It also promoted clearer thinking about defenses, presumptions, and several other concepts related to the mental elements. This has provided standardized building blocks that may be employed with variations for construction of penal codes that, when compared with predecessor attempts at drafting codes for common law jurisdictions, are able to make significant advances in simplicity, in clarity, and in ordered interrelationships. It has been employed by over two-thirds of the states as a template for reforming the structure and substance of their respective codes. It has also been employed as a valued guide by several foreign jurisdictions that have sought to shed the confusion and inefficiency accompanying their English common law heritage.



## FEDERAL PENAL CODE REFORM

In view of the opportunities for simplicity and clarity provided by the drafting approach of the Model Penal Code, the question arose whether the approach could be adapted for the purpose of undertaking reform of the federal penal laws. In 1966, the National Commission on Reform of Federal Criminal Laws was created to devise such a reform. The most vexing difficulty facing the new Commission's staff lay in trying to develop a drafting mechanism that would reduce unnecessary redundancy and permit similar treatment of, for example, the substantive provisions of the various federal theft offenses which covered—among other kinds of takings—theft of federal property, theft from an interstate shipment, and theft on a federal enclave. The Commission's director, Professor Louis Schwartz, who had been the deputy director of the Model Penal Code project, eventually produced a remarkably simple solution. He contemplated a code in which there would be, with regard to the theft example, a single theft section drafted along the lines of the Model Penal Code, but specifically limited by its final subsection to offenses that Congress had determined to be appropriate for coverage under one or another of the various jurisdictional predicates for federal action (in this example, that the subject of the theft was federal property, or that the theft affected interstate commerce, or that the theft occurred in a geographic area subject to federal, rather than state, administration). This simple solution proved to be as significant in its own right as Professor Weschler's culpability approach had been in relation to the drafting of the Model Penal Code. It was adopted by the Commission and enabled the Commission's final draft of a proposed federal criminal code to achieve a dramatic improvement in simplicity—replacing, for example, several hundred federal offenses pertaining to theft, forgery, false statements, and property destruction, with about a dozen sections set forth in the form of the Model Penal Code and employing its clear approach to the mental elements of the offenses.

The Commission's Final Report, issued in 1971, included a comprehensive and systematic proposed new federal criminal code that was based, in large measure, on the Model Penal Code. A series of federal code proposals, all built upon the Commission's model, were introduced as legislative bills with the strong support of sponsors from across the political spectrum. In 1978, a bill (S. 1437) that was championed by Senators Kennedy and Hatch, among several others, passed the Senate by a margin of 72 to 15, and in 1980 the House Judiciary Committee reported its own version after extensive hearings. Although code reform bills had been supported by every President from Johnson to Reagan and had been actively encouraged by every Attorney General from Clark to Smith (and by Attorney General Meese in his earlier capacity as counselor to the President)—and although the relatively few differences between conservatives and liberals had largely been resolved—the sponsors of the last Senate bill (S. 1630 in 1982)

were unable to overcome a filibuster threat. Political fatigue set in, and ultimately, despite resuscitation efforts by Attorney General Thornburgh, no federal criminal code proposal was enacted. There has been no collective effort to undertake federal criminal code reform since that time.

During the prolonged introductory phase of the past federal effort, Professor Norval Morris often referred to the reaction of Jeremy Bentham, probably the premier law reformer of 19th Century England, when Bentham himself was presented with a proposal for reform. Purportedly, he admonished the proposer not to speak to him of reform since “things are bad enough as they are.”

The so-called “federal criminal code” at that time was indeed “bad enough,” but it is worse today. The nation needs a simple, focused, reasonable, fair and effective criminal code. Achieving such a code, even in the best of times, will take a considerable number of years and will generate heated, if not always enlightened, controversy. It will be criticized from the left, the right, and the center; by the informed and the uninformed; by those with special interests that would be affected by reform and by those who seek only objective rationality. Anyone with a law degree will feel especially well-qualified to propose changes, despite exhibiting not much more than a layman’s knowledge of penal law and philosophy. Those who do possess a thorough, practical understanding of wide segments of the existing law, will fear that passage of a new code would deprive them of their special expertise upon which their careers have been founded; a substantial number of both prosecutors and defense counsel will demonstrate a strong trade union syndrome, and will work both covertly and overtly to forestall the adoption of such sweeping changes. Congressional inertia will prove formidable: it is an article of faith that no member of Congress has ever lost an election as a result of appearing too tough on crime and criminals, and a legislator’s willingness to reform demonstrably harsh laws may be exploited by political opponents as “softness.”

This, as noted, is what would take place upon the launching of a federal code reform effort in the *best* of times. Our current political environment does not seem to offer the circumstances required to engender reasoned and dispassionate congressional cooperation. Certainly, it is not the time to initiate a particularly lengthy effort that will demand unusually careful analysis and thoughtful discourse, and that will inevitably require a range of principled compromises. It is preferable at this point, simply to work quietly toward a sound foundation for eventual broad-scale criminal code reform, while awaiting a period of relative political quiescence that might carry the potential for responsible accommodation, and only then formally introduce such a proposal.

## FEDERAL REGULATORY PENALTY REFORM

There exists, however, one particular subset of federal code reform that may be timely—the subset that would need to be addressed to rectify, or at least reduce, the problem presented by the subject of this symposium—overcriminalization. This would be particularly true if the problem were to be addressed by legislation that is relatively short in length, simple in concept, and broad in sweep, thereby carrying a greater possibility of being enacted over the next two or three years. There would, of course, be formidable difficulties, but some significant degree of success would seemingly be possible. That possibility now exists, in large measure, because of the unusual amount of current interest and enlightened outrage initially provoked, in particular, by the dogged efforts of the Washington Legal Foundation and the Heritage Foundation, and subsequently by George Mason University and others. They have pulled the subject from its academic origins and set out to make it a popular concern.

The “over” in the word “overcriminalization” of course refers to the extension of the penal law to reach conduct that most persons would never consider anything other than innocuous, inadvertent, or inconsequential. In the past, such extensions have received relatively little notice. Violations of the traditional criminal law, on the other hand, regularly provoke our interest. As noted by one would-be law reformer, “Its raw materials are greed, lust, violence, treachery, political fanaticism, and madness”—key elements of our theater and our films. Regulatory violations on the other hand, are infinitely more boring, particularly when committed by corporations, and it is hard to generate much beyond indifference with regard to artificial entities committing artificial crimes. Yet individuals and organizations are sometimes caught up in a Kafka-esque net when charged with such “offenses,” and we ignore this area at our peril.

I was once asked by a group of foreign visitors to the United States, what it was that made an offense a *federal* offense. I replied rather flippantly, “The Congress.” I then reflected for a moment in order to supplement the response with a more sober answer predicated upon jurisprudential philosophy, societal needs, the concept of federalism, and other grand principles, but I was disturbed then, and I am disturbed now, that I was unable to do so. The fact is simply that Congress may make a criminal offense of virtually anything, and, particularly in the regulatory area, Congress seems to have done so. It has criminalized so much fundamentally innocuous behavior that recently it has become almost a cottage industry among concerned researchers and academics to gin out examples of the breathtaking absurdity of the range of conduct that Congress has subjected to penal sanctions through accident, inattention, pandering to constituents, over-reliance upon junior staff, and, inexplicably, the trusting of employees of federal agencies to rein in their agency’s delegated authority and differentiate sensibly be-

tween actions or inactions warranting sanctions and actions or inactions warranting only reminders of compliance requirements.

The traditional penal law of most nations may be viewed as aimed at preventing three general categories of harm: harm to persons, harm to property interests, and harm to governmental institutions designed to protect persons and property interests. In the early part of the 19th Century, the forerunners of today's regulatory offenses were rooted in these traditional areas. In England, and later in the United States, legislatures slowly began to apply minor criminal penalties to acts directly affecting the welfare of the public. Such offenses appeared initially in the field of public health with proscriptions on the sale of adulterated or unsafe foodstuffs. With the rapid growth of the Industrial and Commercial Revolutions, a great increase took place in the means by which serious endangerment of persons and property might occur on a broad scale and, correspondingly, laws were enacted to protect public safety. The Congress then began prescribing minor criminal penalties for violations of regulatory provisions that somewhat less directly related to the protection of public health and public safety. Some of those provisions carried no requirement of proof of a culpable mental state, and given the nature of the danger to be averted, the courts ruled that violators could be held strictly accountable, no matter how accidental the conduct.

The congressional criminalization of regulated conduct gradually became common. Eventually, Congress began to apply criminal penalties to activities that involved no endangerment of persons or property. Criminalization of new regulatory provisions became almost mechanical. Today, when a congressional committee adopts a new requirement—concerning commercial transactions, agricultural acreage allotments, welfare programs, or virtually any other regulated activity—it routinely incorporates at the end of the provision a boilerplate statement that any deviation from the new set of requirements constitutes a federal crime. This tendency, together with the lack of any requirement that the legislation pass through the Judiciary Committees of Congress (which are at least theoretically responsible for keeping an eye on the rationality of newly proposed criminal offenses) has led to a gradual expansion of the criminal law to encompass virtually any kind of conduct that a congressional committee or an administrative agency sees fit to regulate. As a result, we are left with a panoply of essentially regulatory crimes, some legislated and some invented by agency employees, which are so numerous that their total can only be guessed. Department of Justice lawyers in the early 1980s identified about 1,700 criminal statutes essentially of a regulatory nature and estimated that administrative agencies, through their regulatory authority, had contributed at least an additional 10,000. Since that time, Professor John Baker and other researchers have found far more, with each new count uncovering additional instances of agency busyness. One recent estimate places the agency contribution at over 300,000 regulations enforceable by criminal or civil sanctions.

The situation has passed the point of absurdity and reached the point of caricature.

As a result of the recent, ongoing exposure of this accelerating trend of legislative and administrative inventiveness, there is a possibility that Congress may be induced to think about the subject with greater care than it has in the past. Certainly, it is becoming increasingly apparent that the current approach to regulatory violations is not only largely ineffective in providing notice of what is prohibited; it carries the potential for intolerable unfairness to many of the individuals and organizations that are surprised to find themselves prosecuted for such violations. It also tends to bring the whole federal judicial system into public disrespect. As noted by Professor Glanville Williams, “[w]hen it becomes respectable to be convicted, the vitality of the criminal law has been sapped.” This carries consequences that can be enormously costly to the nation.

A principal question is how best to alleviate the problem short of broad-scale federal criminal code reform which, as noted, is not now timely. If one can get past the irony of Bentham’s disinclination to consider reform because things are “bad enough as they are,” I would like to think that the heart of his comment, taken seriously, is that less than carefully thought through reforms can make matters worse. This constitutes an important caution in addressing any criminal law reform, whether directed to the heart of the criminal law or to peripheral regulatory prohibitions. In both instances, before proceeding we might well borrow a principle from the physicians’ Hippocratic Oath: “First, do no harm.”

If we are to avoid the potential for serious harm caused by inadvertent circumscription of legitimate federal criminal prosecutions of traditional offenses, any near-term reform of regulatory offenses should be restricted so that it would affect regulatory offenses alone. Broad-scale criminal code reform reaching the heart of federal criminal law should await a time when it can be treated properly along Model Penal Code lines with a scope and structure that can assure smooth interrelationships among culpability provisions, penal offenses, and defenses.

An approach focused solely upon reform of regulatory offenses and their prosecution should be simple in concept, brief in form, and broad in coverage. If those criteria can be met, it is less likely to be intimidating to members of Congress and senior staff members to the extent that it would discourage their active consideration. It is also less likely to become mired in a swamp of particulars. In any event, it certainly would not be helpful to address only a limited number of comical or otherwise outrageous “offenses” that have been brought to public attention either as rueful jokes or as tragic examples highlighted by their application. Any attempt to reform regulatory offenses must reach these ridiculous “offenses” only as a subpart of a larger group.

The defining characteristics of such a potential group would not rest upon their current location being outside of Title 18, since a great number

of what we would deem to be regulatory proscriptions appear within that title. The characteristics would not rest upon their penalty levels as they vary irrationally. Nor would the characteristics rest upon the federal interest potentially affected by their breach since an exceedingly wide range of obscure federal interests in the past have been “protected” by these offenses.

One example of legislation meeting desirable criteria for such an approach would, in brief compass, involve the following steps. First, it would move all serious federal felonies that are currently located outside Title 18 (such as aircraft hijacking and espionage offenses) into a new Title 18 Appendix. This would permit an easy means of reference within the legislation by which Congress might limit application of specified reform provisions to “offenses described outside Title 18 and Title 18 Appendix.” Second, it would move out of Title 18, and to more appropriate titles of the U.S. Code, as many of the purely regulatory offenses as the bill’s sponsors believe that they could accomplish without treading on the sensitivities of the original proponents of such offenses or otherwise proving impolitic. Third, it would provide that, “notwithstanding any other provision of law,” violation of regulatory offenses that are criminalized by *statutes* described outside Title 18 and its Appendix: (a) would require proof, for conviction, of a “knowing” level of culpability regarding the conduct proscribed (unless the purpose of the statutory provision is directly related to endangerment of public health or safety, in which case the level of required culpability for conduct would be at the “reckless” level); (b) would specify that the level of culpability for any required attendant circumstances and results would be at the “reckless” level; and (c) would provide that the maximum penalty would be within the misdemeanor range (unless the act was a repeat offense by the offender, in which case the maximum penalty would be that set forth in the statute criminalizing such conduct). Fourth, it would stipulate that violation of regulatory offenses that are criminalized through *agency rules, regulations, or orders*—the vast majority of regulatory offenses—would, notwithstanding any other provision of law, be an administrative violation only and would be subject only to an administrative penalty after a show cause order inviting the subject to explain why a sanction should not be imposed (unless the act was a repeat offense by the offender, in which case the matter could be referred for prosecution at the misdemeanor level). In all these instances, the legislation would provide for the availability of an increased penalty for intentional, repeated breaches, and for breaches involving serious endangerment of public health or safety.

It is important to note that—for the eminently pragmatic purpose of increasing the chances of achieving wholesale reform of regulatory penalties—this proposal would avoid addressing whether the extant regulations that are criminalized by statute are either legally sound or sensible, or whether their violation should be punished criminally at all. It would simply address what mental states should be required and what penalties would

appear appropriate if such violations are to be considered criminal. Specific changes to the substantive aspects of such regulations could then follow in a more deliberate fashion once the broad-scale defangment has taken place.

The particulars set forth above may vary as reason and political considerations require. Certainly, they will need at least some degree of modification and refinement. The important factors are the use of simplicity, brevity, and breadth to achieve a general approach that will imbue far greater rationality and fairness into the regulatory process. Any legislation setting forth an approach of this general nature will, of course, prove somewhat more complicated than has here been detailed. With proper groundwork, however, the approach does offer a pathway that is relatively simple and thus might be able to engender quick understanding on the part of busy legislators to the extent that it could achieve acceptance by both houses of Congress in a single session.

#### PREVIOUS ATTEMPTS TO ACHIEVE FEDERAL REGULATORY PENALTY REFORM

It should be noted that a broad reform of peripheral offenses is not as far-fetched a possibility as it might appear. There may now be few people who are aware of it, but a regulatory reform approach was drafted during the Ford Administration and was introduced in Congress with bipartisan support during the Carter Administration. Moreover, it passed the Senate by a vote of 72 to 15 (it was part of S. 1437, the Criminal Code Reform Act of 1978, which was designed primarily to bring a Model Penal Code kind of structure to Title 18). That earlier congressional work on the regulatory offenses could provide a significant head start in the drafting of a regulatory reform bill along the lines noted above. First, the detailed Senate Report accompanying S. 1437 included 175 pages describing the particular changes that would be necessary to revise the non-Title 18 statutory offenses one by one in order to incorporate appropriate culpability references. Second, in the 1,569 pages of the Senate Report concerning the successor bill four years later, S. 1630, a revised version of that description was set forth. Third, in the course of the consideration of federal criminal code reform by the Judiciary Committee of the House of Representatives, the House staff developed a six-volume compendium of changes that the Senate bill would make to criminal offenses located outside of Title 18.

If nothing else, these existing materials provide a substantial head start in identifying the regulatory offenses that would need to be reviewed in the course of any future consideration of a reform initiative. Although they were produced at a time when computer analysis was not available to undertake a reliable exposure of telltale statutory verbiage indicating criminal penalties, such an approach is now readily available to supplement the earlier efforts and to achieve a reasonably accurate compilation of federal regulatory offenses.

## THE PROSPECTS FOR SUCCESSFUL CONGRESSIONAL ACTION

The question remains whether the broad scale reform of regulatory offenses can be achieved today, absent its incorporation in the context of a broader Title 18 reform along the lines of the Model Penal Code. It certainly would be an uphill battle, and would face most of the impediments encountered during prior attempts to achieve reform of Title 18 without possessing the advantage of offering a result that would substantially advance fairness and effectiveness at the heart of federal criminal law. It would require a similar amount of energy and commitment while aiming at a far more modest result. Moreover, the political component of the enactment process presents a greater barrier than it did thirty years ago, with reasonable accommodation being far more difficult to achieve. Nonetheless, given the relatively recent public exposure of the twin problems of the current approach—unfairness to unsuspecting violators and ineffectiveness as a general deterrent—it is worth attempting. Moreover, it may well be possible, particularly if the initiators of the effort are able to develop a sound working relationship with the Administrative Conference of the United States with regard to the development of non-judicial sanctioning processes, and with the Department of Justice with regard to the drafting of provisions legitimately falling within the criminal justice sphere.

In short, broad scale regulatory reform is worth exploring as an independent initiative, but any undertaking of the effort needs to be done with full awareness of the observation once made by Justice Vanderbilt of New Jersey, “[r]eform is no sport for short-winded.”



FROM “OVERCRIMINALIZATION” TO “SMART ON CRIME”:  
AMERICAN CRIMINAL JUSTICE REFORM—LEGACY AND  
PROSPECTS

*Roger A. Fairfax, Jr.\**

INTRODUCTION

There is a long and rich history of criminal justice reform efforts in the United States, including the early twentieth century reformers advocating for the improvement and normalization of criminal procedural and substantive law, the large-scale criminal law study and reform efforts undertaken in the late 1960s, and the more recent “overcriminalization” movement.

All of these reform movements have sought to make criminal justice more effective, rational, efficient, and fair, although the extent to which they have succeeded is a matter for debate. With Americans feeling less safe (even in the face of dropping crime rates),<sup>1</sup> strained law enforcement budgets,<sup>2</sup> staggering rates of incarceration and recidivism,<sup>3</sup> and real and perceived inequities in the administration of criminal justice,<sup>4</sup> it is beyond peradventure that criminal justice is long overdue for an overhaul.

In recent years, a new approach to criminal justice reform—“smart on crime”—has gained traction in policy circles. The smart on crime philosophy emphasizes fairness and accuracy in the administration of criminal justice; alternatives to incarceration and traditional sanctions; effective preemptive mechanisms for preventing criminal behavior, the transition of

---

\* A.B., Harvard College; M.A., University of London; J.D., Harvard Law School. Associate Professor of Law, George Washington University Law School. The author would like to thank Ellen Podgor, Jeffrey Parker, Ron Gainer, Cynthia Orr, Sol Wisenberg, Ilya Somin, Jim Lavine, the editors of the *Journal of Law, Economics & Policy*, and the other organizers and participants associated with the Overcriminalization 2.0: Developing Consensus Solutions Symposium. I appreciate the research assistance of Samuel Gilbert and Cristina Zamora. All errors are mine. This Article is dedicated to the memory of Ms. Jeanette A. Michael, Esq. (1950-2009).

<sup>1</sup> See, e.g., JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75-110 (2007).

<sup>2</sup> See, e.g., Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution? The Limits of Criminal Justice Privatization*, 2010 U. CHI. L. FORUM 265 (2010).

<sup>3</sup> See, e.g., PAUL BUTLER, LET'S GET FREE: A HIP HOP THEORY OF JUSTICE (2010); VANESSA BARKER, THE POLITICS OF IMPRISONMENT: HOW THE DEMOCRATIC PROCESS SHAPES THE WAY AMERICA PUNISHES OFFENDERS, 3-6 (2009); Todd R. Clear, *The Great Penal Experiment: Lessons for Social Justice*, in AFTER THE WAR ON CRIME: RACE DEMOCRACY, AND A NEW RECONSTRUCTION, 61-62 (Mary Louise Frampton et al. eds., 2008).

<sup>4</sup> See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

formerly incarcerated individuals to law-abiding and productive lives; and evidence-based assessments of costliness, efficiency, and effectiveness of criminal justice policies. Such approaches, which represent a refreshing break from the existing unproductive “soft on crime” and “tough on crime” binary, appeal to policymakers because a number of the initiatives associated with the smart on crime movement have produced demonstrably successful outcomes.

The overcriminalization movement’s aims—including the proper allocation of sovereign enforcement authority and priorities, fidelity to traditional requisites of criminal culpability, and the streamlining of criminal codes—are not incompatible with those of the smart on crime movement. Indeed, this latest effort at American criminal justice reform presents a tremendous opportunity to address the issue of overcriminalization.

Part I of this article traces the evolution of American criminal justice reform from the Progressive criminal justice reform agenda in the early twentieth century to the work of private law reform coalitions and government-sponsored crime commissions of the interwar period. Part II explores the emergence of the overcriminalization movement and its relationship to the major criminal law reform efforts of the last third of the twentieth century, including the Commission on Law Enforcement and the Administration of Justice (the Johnson Crime Commission) and the Brown Commission. Finally, Part III suggests how critics of overcriminalization might situate their goals and proposals within the emerging smart on crime agenda and highlights some smart on crime initiatives that dovetail particularly well with the philosophy of the overcriminalization movement.

## I. THE ARC OF AMERICAN CRIMINAL JUSTICE REFORM

In the early twentieth century, reformers took on the project of improving the administration of criminal justice in the United States. As the author has observed elsewhere:

Much like today, many commentators in the early twentieth century considered the American criminal justice system to be broken. With regard to all of its phases—substance, sentencing, and procedure—the criminal justice system was thought to be inefficient and ineffective, and it failed to inspire the confidence of the bench, bar, or public.<sup>5</sup>

At the same time, legal realists and allied reformers sought “the recognition of the importance of social realities” in the administration of the

---

<sup>5</sup> Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 433 (2009).

criminal law.<sup>6</sup> In response, policymakers, academics, practitioners, and judges began to examine avenues for reform.<sup>7</sup>

### A. *The Cleveland Study*

Although the early twentieth century criminal justice reform project boasted the participation of many prominent individuals (such as Lester Orfield, Hebert Hadley, and John Henry Wigmore),<sup>8</sup> it is fair to say that Roscoe Pound was the leading figure.<sup>9</sup> One of the classic products of Pound’s reform efforts was an examination of criminal justice administration in Cleveland, Ohio.<sup>10</sup> Pound’s comprehensive empirical study, which Felix Frankfurter co-directed, examined a wide variety of issues within Cleveland’s criminal justice system, including those related to police administration, prosecution, criminal courts, corrections, medicine and mental health, legal education, the media, and urbanization.<sup>11</sup> In the words of Frankfurter, the in-depth study “proved what was already suspected by many and known to a few. The point is that the survey proved it. Instead of speculation, we have demonstration.”<sup>12</sup> The Cleveland study, with its thoughtful design and effective methodology,<sup>13</sup> represented the blueprint for those who later would seek to advance evidence-based proposals for criminal justice reform in jurisdictions across the country.<sup>14</sup>

---

<sup>6</sup> Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 425 (2006).

<sup>7</sup> Fairfax, *supra* note 5, at 433 (noting that “judges, lawyers, and law professors often gathered to discuss various topics in criminal law. These discussions and collaborations ultimately produced concrete reform proposals, many of which would go on to be implemented in law and practice”).

<sup>8</sup> See, e.g., *id.* at 437-40.

<sup>9</sup> *Id.* at 441 (describing Pound as “the father of the larger early twentieth-century criminal procedure reform project”); see also SHELDON GLUECK, *ROSCOE POUND AND CRIMINAL JUSTICE* (1965); ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930). Indeed, it was Pound’s 1906 speech to the American Bar Association, entitled “The Causes of Popular Dissatisfaction with the Administration of Justice,” which served as an indictment of sorts of the American justice system. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. ANN. MEETING REP. 395, 405 (1906). Pound’s address, which has been described as “the most influential paper ever written by an American legal scholar,” set the tone for twentieth century reformers interested in improving both civil and criminal justice in the United States. Rex E. Lee, *The Profession Looks at Itself—The Pound Conference of 1976*, 3 B.Y.U. L. REV. 737, 738 (1981).

<sup>10</sup> See THE CLEVELAND FOUND., *CRIMINAL JUSTICE IN CLEVELAND* (Roscoe Pound & Felix Frankfurter eds., 1922).

<sup>11</sup> See *id.*

<sup>12</sup> *Id.* at v.

<sup>13</sup> See *id.* at vii-ix (noting that the study benefited from a number of attributes, including “impersonal aims,” “scientific and professional direction,” local advisory cooperation,” “indifference to quick results,” and “checks against inaccuracy”).

<sup>14</sup> See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND SOCIAL SCIENCE* 82 (1995) (noting that study of Cleveland’s criminal justice system was “the best of many such surveys”); see also

## B. *The National Crime Commission*

In addition, private law reform groups worked on criminal justice reform in a number of areas, including procedural and substantive law. Leading groups included the American Bar Association, American Law Institute, American Institute for Criminal Law & Criminology, and the Joint Committee on the Improvement of Criminal Justice.<sup>15</sup> In the 1920s, the National Crime Commission studied and proposed a number of criminal justice reforms in response to growing public concern over the perceived increase of crime in the United States.<sup>16</sup> The Commission, which was first organized in New York City in 1925<sup>17</sup> and enjoyed the support of President Calvin Coolidge,<sup>18</sup> counted among its membership “statesmen, great financiers, college presidents, deans of great law schools, former governors of states and a former justice of the Supreme Court.”<sup>19</sup> Included among this distinguished group were the likes of Franklin D. Roosevelt,<sup>20</sup> John Henry Wigmore,<sup>21</sup> Charles Evans Hughes,<sup>22</sup> George Wickersham,<sup>23</sup> and Roscoe Pound.

The National Crime Commission was led by an executive committee which oversaw the work of several subcommittees charged with studying subjects such as criminal procedure, firearms regulation, education, and the relationship of crime to medicine and education.<sup>24</sup> The Commission,

---

MO. ASS'N FOR CRIMINAL JUSTICE, MISSOURI CRIME SURVEY (1926); ILL. ASS'N FOR CRIMINAL JUSTICE, THE ILLINOIS CRIME SURVEY (1929).

<sup>15</sup> See, e.g., Fairfax, *supra* note 5, at 445, 448 & n.23. The Joint Committee on the Improvement of Criminal Justice “featured the combined efforts of the American Bar Association, American Law Institute, and the Association of American Law Schools.” *Id.* at 438 (citing WILLIAM R. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER 221 (1977)).

<sup>16</sup> See, e.g., M.O. Prentiss, *War on the Growing Menace of Crime*, 23 CURRENT HISTORY 1, 1-8 (1925); JESSE O. STUTSMAN, CURING THE CRIMINAL 387-92 (1926); G.W. Kirchwey, *Breasting the Crime Wave*, THE SURV. MIDMONTHLY, Apr. 15, 1927, at 69, 70; Esther Conner, *Crime Commissions and Criminal Procedure in the United States Since 1920—A Bibliography*, 21 AM. INST. CRIM. L. & CRIMINOLOGY 129, 129 (1930) (“The high rate of crime in the United States has resulted in a country wide movement against crime.”); Fairfax, *supra* note 5, at 438-39.

<sup>17</sup> *Will Enlist Nation in Fight on Crime*, N.Y. TIMES, Apr. 29, 1926, at 25.

<sup>18</sup> See John Henry Wigmore, *National Crime Commission: What Will it Achieve?*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 312, 312 (1926).

<sup>19</sup> Kirchwey, *supra* note 16, at 71.

<sup>20</sup> Franklin D. Roosevelt was a former Assistant Secretary of the Navy and the future Governor of New York and President of the United States.

<sup>21</sup> John Henry Wigmore was the Dean of Northwestern University Law School and the first leader of the American Institute for Criminal Law and Criminology.

<sup>22</sup> Charles Evans Hughes was a former Associate Justice of the Supreme Court of the United States. Wigmore, *supra* note 18, at 312.

<sup>23</sup> George Wickersham was a former United States Attorney General and the future chairman of the National Commission on Law Observance and Enforcement.

<sup>24</sup> See Kirchwey, *supra* note 16, at 122.

though criticized for having no real authority and being “a merely recommendatory, consultative national body,”<sup>25</sup> achieved its goals of creating and supporting local criminal justice reform organizations, studying and collecting data on the workings of the criminal justice system, and advancing legislative proposals.<sup>26</sup> The National Crime Commission’s lasting legacy can be found in the large number of state and local criminal justice reform organizations formed or strengthened during the late 1920s, some of which are still in existence today.<sup>27</sup>

### C. *The Wickersham Commission*

The National Commission on Law Observance and Enforcement (often referred to as the Wickersham Commission) represented the single-most comprehensive criminal justice reform activity under government auspices. Starting in 1929, following on the heels of Pound’s study and the National Crime Commission, the Wickersham Commission undertook a comprehensive review of American criminal justice and set forth many recommendations for reform.<sup>28</sup> The Commission, chaired by George W. Wickersham (former United States Attorney General and name partner of Cadwalader, Wickersham, and Taft), included “a who’s who of mid-twentieth-century criminologists, lawyers, and social and behavioral scientists” among its membership and staff,<sup>29</sup> including Ada L. Comstock,<sup>30</sup> William S. Kenyon,<sup>31</sup> and, of course, Roscoe Pound.<sup>32</sup>

President Hoover, commenting just prior to the release of the Wickersham Commission Reports, bemoaned the “increasing enactment of Federal criminal laws over the past 20 years” which placed “a burden upon the Fed-

<sup>25</sup> Wigmore, *supra* note 18, at 314.

<sup>26</sup> See George W. Wickersham, *The Work of the National Crime Commission*, 51 A.B.A. REP. 233, 234 (1926).

<sup>27</sup> See Conner, *supra* note 16, at 134-44 (listing states influenced by the National Crime Foundation and respective sources detailing changes in state and local law enforcement in the 1920s).

<sup>28</sup> See 1 NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REP. NO. 1-14 (1931). Although the Commission looked broadly at the American criminal justice system, the study was prompted by the effect of Prohibition on American criminal justice. See 1 NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION 1 (1931); David Booth, *Review: On Crime Commission Reports*, 2 POLITY 92 (1969).

<sup>29</sup> JAMES D. CALDER, *THE ORIGINS AND DEVELOPMENT OF FEDERAL CRIME CONTROL POLICY* 77, 81 (1993).

<sup>30</sup> 1 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION (1931). Ada L. Comstock was the president of Radcliffe College.

<sup>31</sup> *Id.* William S. Kenyon was a Circuit Judge on the United States Court of Appeals for the Eighth Circuit and a former United States Senator from Iowa.

<sup>32</sup> *Id.* The seven other members of the Wickersham Commission were Henry W. Anderson, Newton D. Baker, William I. Grubb, Monte M. Lemann, Frank J. Loesch, Kenneth Mackintosh, and Paul J. McCormick. *Id.*

eral courts of a character for which they are ill-designed, and in many cases entirely beyond their capacity.”<sup>33</sup> The Reports covered a wide variety of topics, including the enforcement of prohibition laws, criminal statistics, prosecution, deportation enforcement, juvenile offenders, federal courts, criminal procedure, penal institutions, probation and parole, crime and the “foreign born,” lawlessness in law enforcement, the costs and causes of crime, and the police.<sup>34</sup> However, the Wickersham Commission’s many proposals for reform failed to command much influence.<sup>35</sup> Indeed, in 1935, the president of the American Bar Association noted that the Wickersham Commission Reports were merely “gather[ing] dust on the shelves of college libraries.”<sup>36</sup>

#### D. *Federal Rules of Criminal Procedure*

One triumph of these early twentieth century reform efforts came just after World War II in the form of the Federal Rules of Criminal Procedure (FCRP), which sought to promote fairness, efficiency, finality, and public confidence in the administration of justice.<sup>37</sup> The FCRP transformed federal criminal practice and influenced state adjudicatory criminal procedure as well.<sup>38</sup> However, up through the middle of the twentieth century, most criminal reform successes (outside of the juvenile justice arena) had been achieved in the procedural, rather than substantive criminal law, realm.<sup>39</sup>

---

<sup>33</sup> HERBERT HOOVER, PROPOSALS TO IMPROVE ENFORCEMENT OF CRIMINAL LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-252, at 1 (2d Sess. 1930), *reprinted in* 1 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REP. NO. 1, PRELIMINARY REPORT ON PROHIBITION, at 1 (1931).

<sup>34</sup> 1-6 NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REP. NOS. 1-14 (1931).

<sup>35</sup> *See* Robert B. Reich, *Solving Social Crises by Commissions*, 3 YALE REV. L. & SOC. ACTION 254, 258 (1972).

<sup>36</sup> *See id.* In December of 1934, Attorney General Homer Cummings held a “Conference on Crime,” which brought together luminaries from the policy, practice, media, and academic circles to discuss causes and solutions associated with the crime problem in the United States. *See generally* PROCEEDINGS OF THE ATTORNEY GENERAL’S CONFERENCE ON CRIME (1934). The four day conference, held in Washington, D.C., even attracted the participation of President Franklin D. Roosevelt, who noted in his address the importance of “recogniz[ing] clearly the increasing scope and complexity of the problem of criminal law administration.” *Id.* at 18.

<sup>37</sup> *See* Fairfax, *supra* note 5, at 455-56; *see also* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 68 FORDHAM L. REV. 2027, 2061-65 (2008).

<sup>38</sup> *See* Fairfax, *supra* note 5, at 455-56.

<sup>39</sup> Perhaps this should not be surprising, given that the Progressive criminal reform project was originally conceived with a primary focus on *procedural* reform. *See, e.g.*, Nathan William MacChesney, *A Progressive Program for Procedural Reform*, 3 J. CRIM. L. & CRIMINOLOGY 528, 528 (1913).

### E. *Model Penal Code*

The American Law Institute’s drafting and adoption of the Model Penal Code (MPC) began an era of reform efforts focused on the *substantive* criminal law. Although the American Law Institute originally proposed the drafting of a model code in 1931, the project did not begin in earnest until the early 1950s.<sup>40</sup> Led by Herbert Wechsler of Columbia University and Louis Schwartz of the University of Pennsylvania, the model code drafting project would span more than a decade.<sup>41</sup> With its comprehensive and streamlined codification of crimes and modern approach to *mens rea* and other criminal law doctrines, the MPC was—and still is—one of the most significant and influential products of twentieth century American criminal law reform.<sup>42</sup> The MPC set the stage for the Johnson Crime Commission and Brown Commission of the late 1960s and early 1970s, respectively, which picked up where the Wickersham Commission had left off more than three decades prior and foreshadowed the emergence of the overcriminalization movement.

## II. THE GREAT SOCIETY CRIME COMMISSIONS AND THE EMERGENCE OF THE OVERCRIMINALIZATION MOVEMENT

The modern overcriminalization movement can trace its lineage to the broad and ambitious efforts of President Lyndon Johnson’s commissions on crime and criminal code reform in the late 1960s. A number of the themes animating contemporary critiques of overcriminalization are apparent in the rhetoric, findings, and recommendations of those crime commissions.

### A. *The Johnson Crime Commission*

President Lyndon Johnson established the Commission on Law Enforcement and Administration of Justice in 1965. The Commission was chaired by Nicholas deB. Katzenbach<sup>43</sup> and included the likes of Kingman

---

<sup>40</sup> See Paul Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 321 (2007); Ron Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 90-91 (1998).

<sup>41</sup> See Gainer, *supra* note 40, at 92.

<sup>42</sup> See Robinson & Dubber, *supra* note 40, at 333-35; Gainer, *supra* note 40, at 90-92.

<sup>43</sup> PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMIN. OF JUSTICE, TASK FORCE ON THE ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS iv (1967) [hereinafter TASK FORCE REPORT: THE COURTS]. Katzenbach was the United States Attorney General.

Brewster,<sup>44</sup> Leon Jaworski,<sup>45</sup> Lewis F. Powell, Jr.,<sup>46</sup> William P. Rogers,<sup>47</sup> Herbert Wechsler,<sup>48</sup> and Whitney M. Young, Jr.<sup>49</sup>

The Johnson Commission had a broad mandate, including a comprehensive review of American criminal justice.<sup>50</sup> Johnson administration Attorney General Ramsey Clark observed in 1967 that “America [had] failed to accept the challenge” of the Wickersham Commission and that the effort had been “resurrected” by Johnson’s Commission.<sup>51</sup> To be sure, both commissions, separated by some thirty-five years, had the same broad goals, including consideration of the economic and social costs of crime and criminalization. But whereas the Wickersham Commission operated against the backdrop of growing public dissatisfaction with the Prohibition’s impact on the administration of criminal justice,<sup>52</sup> the Johnson Commission responded to rising crime rates in the 1960s (and concomitant increases in levels of fear and anxiety), as well as continued urbanization and increasing racial, societal, and political tensions.<sup>53</sup> In fact, suggestions were

<sup>44</sup> *Id.* Kingman Brewster was the president of Yale University and the future United States Ambassador to the United Kingdom.

<sup>45</sup> *Id.* Leon Jaworski was a future Watergate special prosecutor.

<sup>46</sup> Lewis F. Powell, Jr. was a future Associate Justice of the Supreme Court of the United States. *Lewis F. Powell, Jr. (1907-1998)*, WASHINGTON & LEE UNIVERSITY SCHOOL OF LAW <http://law.wlu.edu/alumni/bios/powell.asp> (last visited Apr 13, 2011).

<sup>47</sup> William P. Rogers was a former United States Attorney General and a future United States Secretary of State. David Stout, *William P. Rogers, Who Served as Nixon’s Secretary of State, Is Dead at 87*, N.Y. TIMES, Jan. 4, 2001, <http://www.nytimes.com/2001/01/04/us/william-p-rogers-who-served-as-nixon-s-secretary-of-state-is-dead-at-87.html?src=pm>.

<sup>48</sup> Herbert Wechsler was a professor at Columbia Law School and the principal drafter of the Model Penal Code. *Herbert Wechsler 1909-2000*, THE AMERICAN LAW INSTITUTE, [http://www.ali.org/ali\\_old/R2204\\_Wechsler.htm](http://www.ali.org/ali_old/R2204_Wechsler.htm) (last visited July 3, 2011).

<sup>49</sup> Whitney M. Young, Jr. was the Executive Director of the National Urban League. Rudy Williams, *Whitney M. Young, Jr.: Little Known Civil Rights Pioneer*, U.S. DEP’T OF DEF. (Feb. 1, 2002), <http://www.defense.gov/news/newsarticle.aspx?id=43988>; *see, e.g.*, TASK FORCE REPORT: THE COURTS, *supra* note 43. James Vorenberg (future Watergate special prosecutor and dean of Harvard Law School) served as Executive Director and led an all-star corps which included: deputy director Henry S. Ruth, Jr.; staffer Gerald M. Caplan; consultants Norman Abrams, Anthony Amsterdam, Gilbert Geis, Sanford Kadish, Patricia Wald, and Lloyd Weinreb; and advisers Sylvia Bacon, Gary Bellow, Geoffrey Hazard, Jr., Peter Low, Frank Miller, Herbert Packer, David Shapiro, and Jack Weinstein, among others. *See id.* at iv-vi.

<sup>50</sup> *See Gainer, supra* note 40, at 93.

<sup>51</sup> *See* Henry S. Ruth, Jr., *To Dust Shall Ye Return?*, 43 NOTRE DAME L. REV. 811, 831 (1967) (quoting Ramsey Clark, *Report of the 97th Annual Congress of Correction*, 29 AM. J. OF CORR. 13, 17-18 (1967)); *see also generally* RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATIONS ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* (1970).

<sup>52</sup> *See* NAT’L COMM’N ON LAW OBSERVANCE AND ENFORCEMENT, *ENFORCEMENT OF THE PROHIBITION LAWS*, S. DOC. NO. 73-307, at 13-14 (1931).

<sup>53</sup> *See* PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT 24* (1967) [hereinafter *THE CHALLENGE OF CRIME IN A FREE SOCIETY*]; Jeffrey Fagan, *Continuity and Change in American Crime: Lessons from Three Decades*, in Symposium, *THE CHALLENGE OF CRIME IN A FREE SOCIETY: LOOKING BACK*,



made that the Johnson Crime Commission was an attempt to appease a public clamoring for broad and hasty legislative responses to perceived spikes in crime.<sup>54</sup> As Todd Clear observed, "the [Johnson] Commission might well be seen as the first foray of politics into the crime policy arena."<sup>55</sup>

The Johnson Crime Commission released its 1967 report, *The Challenge of Crime in a Free Society*, with a great deal of attention and fanfare.<sup>56</sup> The report spanned twelve substantive chapters covering a snapshot of crime in America, juvenile delinquency and youth crime, police, courts, corrections, organized crime, narcotics and drug abuse, drunkenness, control of firearms, science and technology, research, and a national strategy on crime.<sup>57</sup> Additionally, the report contained over two hundred recommendations to "cities, to States, to the Federal Government; to individual citizens and their organizations; to policemen, to prosecutors, to judges, to correctional authorities, and to the agencies for which these officials work[ed]."<sup>58</sup> Furthermore, the report concluded:

Taken together these recommendations and suggestions express the Commission's deep conviction that if America is to meet the challenge of crime it must do more, far more, than it is doing now. It must welcome new ideas and risk new actions. It must spend time and money. It must resist those who point to scapegoats, who use facile slogans about crime by habit or for selfish ends. It must recognize that the government of a free society is obliged to act not only effectively but fairly. It must seek knowledge and admit mistakes. . . . Controlling crime in America is an endeavor that will be slow and hard and costly. But America can control crime if it will.<sup>59</sup>

Some of the Johnson Crime Commission's rhetoric may sound familiar to those currently engaged in efforts concerning the issues of overcriminalization, particularly the notion that some antisocial conduct would be better addressed through civil or other non-criminal sanctions.<sup>60</sup> Indeed, Chapter 8 ("Substantive Law Reform and the Limits of Effective Law En-

LOOKING FORWARD 16-17 (1998); Warren Lehman, *Crime, The Public, and the Crime Commission: A Critical Review of The Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487, 1492 (1967).

<sup>54</sup> *Hearings Before the Subcommittee on Administrative Practice and Procedure, Comm. on the Judiciary*, U.S. Senate, 92nd Cong., 1st Sess., (1971) (statement of Nicholas Katzenbach).

<sup>55</sup> Todd R. Clear, *Societal Responses to the President's Crime Commission: A Thirty-Year Retrospective*, in Symposium, *supra* note 53, at 134.

<sup>56</sup> See Ruth, *supra* note 51, at 830-31 (1967) (noting that over one hundred thousand copies of the report, which was the subject of a ninety minute special on NBC's *Meet the Press*, were distributed).

<sup>57</sup> See THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 53, at 17-291.

<sup>58</sup> See *id.* at 291, 293-301. Although the report did not make many specific and concrete legislative proposals, see Clear, *supra* note 55, at 137, the report's policy recommendations did help to shape the 1968 Omnibus Crime Control and Safe Streets Act and the Organized Crime Control Act of 1970. See Michael Tonry, *Building Better Policies on Better Knowledge*, in Symposium, *supra* note 53, at 94; Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 667 n.25 (1987).

<sup>59</sup> THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 53, at 291.

<sup>60</sup> See, e.g., *id.* at 126-27, 211-37; TASK FORCE REPORT: THE COURTS, *supra* note 43, at 97-107.

forcement”) of the Johnson Crime Commission’s task force report on the Courts (the Court Report) referred to “overreliance on the criminal law”<sup>61</sup> and lamented “the sheer bulk of penal regulations”<sup>62</sup> and the “remarkable range of human activities now subject to the threat of criminal sanctions.”<sup>63</sup> In addition, the Court Report recommended the “appropriate redefinition”<sup>64</sup> of certain crimes in order to achieve “a substantial contraction of the area of criminality.”<sup>65</sup> Interestingly, Sanford Kadish, one of the consultants for the Court Report, even explicitly used the term overcriminalization in a 1968 article amplifying his views of the Johnson Crime Commission’s work.<sup>66</sup>

### B. *The Brown Commission*

The work of the Johnson Crime Commission prompted calls for the substantial revision of federal criminal law.<sup>67</sup> The National Commission on Reform of Federal Criminal Laws (popularly known as the Brown Commission) sought to propose a comprehensive and integrated federal criminal code.<sup>68</sup> Established by Congress in 1966,<sup>69</sup> the Brown Commission originally had a broad statutory mandate, “including a review not only of substantive criminal law and the sentencing system, but also of procedure and all other aspects of ‘the federal system of criminal justice.’”<sup>70</sup> Ultimately, the Brown Commission decided to focus its three-year enterprise on reform of the substantive federal criminal law.<sup>71</sup>

The Brown Commission—like the Wickersham Commission and Johnson Crime Commission before it—boasted the participation of many leading lights of the bench, bar, and academy. For instance, its members included Edmund Brown, Sr.,<sup>72</sup> Judge George C. Edwards,<sup>73</sup> Sam J. Ervin,

---

<sup>61</sup> *Id.* at 98.

<sup>62</sup> *Id.* at 99.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); see also Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 972 & n.8 (2009).

<sup>67</sup> See Gainer, *supra* note 40, at 94.

<sup>68</sup> See NATL. COMM’N ON REFORM OF FED. CRIM. LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) xi (1971).

<sup>69</sup> See Pub. L. No. 89-801, 80 Stat. 1516 (1966).

<sup>70</sup> See *supra* note 68.

<sup>71</sup> *Id.* The legislation was later amended to expand the timeframe from three years to four years. See Public Law 91-39, 83 Stat. 44 (1969). The Commission’s final report was submitted in 1971. See FINAL REPORT, *supra* note 68; Paul Marcus, *The Proposed Federal Criminal Code: Conspiracy Provisions*, 1978 U. ILL. L. F. 379, 379.

<sup>72</sup> Edmund Brown was a former governor of California.

<sup>73</sup> Judge George C. Edwards sat on the United States Court of Appeals for the Sixth Circuit.

Jr.,<sup>74</sup> Judge A. Leon Higginbotham,<sup>75</sup> and Abner Mikva.<sup>76</sup> The Advisory Committee included Justice Tom C. Clark,<sup>77</sup> Patricia Roberts Harris,<sup>78</sup> Robert M. Morgenthau,<sup>79</sup> Louis Pollak,<sup>80</sup> Elliot Richardson,<sup>81</sup> and Professor James Vorenberg.<sup>82</sup>

The Brown Commission completed the Herculean task of proposing a federal criminal code, consisting of a general part, a specific part, and a sentencing portion. The final report also noted statutes residing within and outside of Title 18 of the United States Code that would be impacted by the proposed laws. The completion of the Brown Commission’s work, which spilled over into the Nixon Administration, coincided with the beginning of more than a decade’s worth of efforts to pass a comprehensive criminal code in both houses of Congress. The 1984 Comprehensive Crime Control Act (which passed both houses of Congress and was supported by the Reagan Administration) did represent some progress, but largely paled in comparison to what the Brown Commission had originally proposed.<sup>83</sup> Nevertheless, the failed attempt to streamline and refine the federal criminal code would help to spawn what would become known as the overcriminalization movement.<sup>84</sup> Although there were at least a half-dozen other national

---

<sup>74</sup> Sam J. Ervin, Jr. was a United States Senator from North Carolina.

<sup>75</sup> Judge A. Leon Higginbotham, Jr. was a District Judge on the United States District Court for the Eastern District of Pennsylvania when he served on the Brown Commission and later became the Chief Judge of the United States Court of Appeals for the Third Circuit.

<sup>76</sup> Abner Mikva was a United States Representative from Illinois when he served on the Brown Commission and later became White House Counsel and the Chief Judge of United States Court of Appeals for the District of Columbia Circuit. *See supra* note 68, at 361-62.

<sup>77</sup> Justice Tom C. Clark was a recently retired Associate Justice of the Supreme Court of the United States and former United States Attorney General.

<sup>78</sup> Patricia Roberts Harris was a former United States Ambassador to Luxembourg and former Dean of Howard University School of Law.

<sup>79</sup> Robert M. Morgenthau is a former United States Attorney for the Southern District of New York and became a long-serving Manhattan District Attorney.

<sup>80</sup> Louis H. Pollak was the Dean of the Yale Law School and later became Dean of the University of Pennsylvania Law School and a District Judge on the United States District Court for the Eastern District of Pennsylvania.

<sup>81</sup> Elliot Richardson was a former United States Attorney for the District of Massachusetts during his service on the Brown Commission and later became the United States Attorney General, United States Secretary of Commerce, United States Secretary of Defense, and United States Secretary of Health, Education, and Welfare.

<sup>82</sup> Professor James Vorenberg was a prominent criminal law scholar and professor at Harvard Law School who later became Dean at Harvard. *See supra* note 68, at 363-64. As a point of personal privilege (and institutional pride), I would like to note that several of the key Brown Commission participants were then-current and former members of the George Washington University Law School faculty, including advisory committee member Patricia Roberts Harris, and consultants Robert G. Dixon, Jr., David Robinson, and James Starrs.

<sup>83</sup> *See Gainer, supra* note 40, at 136.

<sup>84</sup> However, as Professor Julie O’Sullivan has noted, “[a]lthough previous code reform efforts in the 1960s through the 1980s failed, they did yield something that made the deficiencies of the substan-

government or private commissions focused on criminal law reform in the 1960s and 1970s,<sup>85</sup> the Brown Commission and the Johnson Crime Commission deserve recognition for laying the foundation for today's overcriminalization movement.

### C. *The Overcriminalization Movement*

Over the four decades since the work of the Johnson Crime Commission and the Brown Commission, a philosophical and advocacy movement has developed. Built on the foundation of the earlier criminal law reform commissions, the visibility and influence of the "overcriminalization" movement continues to grow. Notably, the movement has enjoyed broad-based participation across the ideological spectrum, support that is typically elusive on hot-button social issues such as crime. The roster of organizations active in the overcriminalization movement demonstrates the broad ideological coalition at its core. For example, diverse groups such as the Washington Legal Foundation, the Federalist Society, the Cato Institute, the Heritage Foundation, Families Against Mandatory Minimums, the American Civil Liberties Union, and the National Association of Criminal Defense Lawyers have come together in recent years to support the movement.<sup>86</sup>

Not surprisingly for a group marked by such ideological diversity, the characterization of the movement's central aim may differ depending upon who is asked. During the "Overcriminalization: The Politics of Crime" symposium held in 2004, scholars, practitioners, and policy analysts had the opportunity to ponder the meaning of overcriminalization.<sup>87</sup> Although overcriminalization may mean many different things to different people,<sup>88</sup> one or more of five core critiques likely come to mind for people outside of the movement when the term is invoked. The first is what has come to be

---

tive code more tolerable: the U.S. Sentencing Guidelines." Julie O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 645 (2006).

<sup>85</sup> See FINAL REPORT, *supra* note 68, at xi; Michael Scott, *Progress in American Policing? Reviewing the National Reviews*, 34 L. & SOC. INQUIRY 171, 173 (2009); AM. BAR ASS'N, REPORT OF THE CRIMINAL JUSTICE SECTION TASK FORCE ON CRIME (1981); ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL RELATIONS IN THE CRIMINAL JUSTICE SYSTEM; A COMMISSION REPORT (1971).

<sup>86</sup> See, e.g., Press Release, National Association of Criminal Defense Attorneys, *Diverse Coalition Urges Congress to Rein in Overcriminalization* (Sept. 29, 2010), <http://www.nacd.org/public.nsf/NewsReleases/2010mn32?OpenDocument>.

<sup>87</sup> See Symposium, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

<sup>88</sup> See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748-49 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712-19 (2005).

known as “overfederalization,”<sup>89</sup> which is a critique of the improper allocation of sovereign enforcement authority and priorities between the federal government and the states.<sup>90</sup> A second meaning of overcriminalization is a critique of the improper criminalization of “relatively trivial conduct”<sup>91</sup> or conduct better made “a matter of individual morality.”<sup>92</sup> The third meaning is a critique of the lack of fidelity to traditional requisites of criminal culpability.<sup>93</sup> A fourth meaning is a critique of the failure to streamline expansive and often redundant criminal codes.<sup>94</sup> Finally, overcriminalization also has been used to describe harsh sanctions of “excessive punishment attached to uncontroversial (or at least plausible) criminal statutes.”<sup>95</sup> All of these critiques fairly fall under the umbrella of the overcriminalization movement.<sup>96</sup>

### III. FROM OVERCRIMINALIZATION TO ‘SMART ON CRIME’

#### A. *The Emergence of the ‘Smart on Crime’ Agenda*

The well-documented financial struggles of federal, state, and local governments in the United States have hit criminal justice administration

---

<sup>89</sup> Beale, *supra* note 88, at 748-49 & n.4.

<sup>90</sup> See, e.g., Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1573 & n.25 (2010); Beale, *supra* note 88, at 748-49 & n.4; see also generally Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541 (2002); James A. Strazzella, *The Federalization of Criminal Law: Task Force on the Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. L. REP.; Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995). *But see* Susan R. Klein, *Debunking Claims of Over-Federalization of Criminal Law* (draft manuscript on file with author).

<sup>91</sup> Beale, *supra* note 88, 748. *But see* Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461 (2009).

<sup>92</sup> Beale, *supra* note 88, at 748.

<sup>93</sup> See, e.g., Podgor, *supra* note 90, at 1573; Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, NACDL & THE HERITAGE FOUNDATION (2010), <http://www.heritage.org/Research/Reports/2010/05/Without-Intent>.

<sup>94</sup> See, e.g., Brown, *supra* note 91, at 463; O’Sullivan, *supra* note 84, at 645; John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes*, 54 AM. U. L. REV. 545, 548-54 (2005).

<sup>95</sup> Brown, *supra* note 91, at 462; see also Lisa H. Nicholson, *Sarbanes-Oxley’s Purported Over-Criminalization of Corporate Offenders*, 2 J. BUS. & TECH. L. 43, 45-46 (2007).

<sup>96</sup> For an in-depth treatment of the topic of overcriminalization, see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); see also IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” (Timothy Lynch ed., 2009); GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004); Brown, *supra* note 91.

particularly hard. All across the nation, governments must do more with less and make difficult decisions regarding the reduction of enforcement or punishment capacity.<sup>97</sup> The tremendous economic challenges facing governments have prompted the desire for new approaches to the delivery of cost-effective services. Although governments have always focused on how to punish and rehabilitate offenders to keep the community safe, they now seek to do so economically and efficiently.<sup>98</sup>

Certainly, all of the aforementioned historical reform efforts sought to make criminal justice more effective, rational, efficient, and fair, although the extent to which they have succeeded is a matter for debate. However, with strained law enforcement budgets, staggering rates of incarceration and recidivism,<sup>99</sup> and real and perceived inequities in the administration of criminal justice,<sup>100</sup> it is beyond debate that an overhaul of American criminal justice is long overdue.

In recent years, a newly packaged approach to criminal justice reform—smart on crime—has gained traction in policy circles. The smart on crime philosophy emphasizes: (1) fairness and accuracy in the administration of criminal justice; (2) recidivism-reducing alternatives to incarceration and traditional sanctions; (3) effective pre-emptive mechanisms for preventing criminal behavior; (4) the transition of formerly incarcerated individuals to law-abiding and productive lives; and (5) evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies.<sup>101</sup>

Although the term had been in use for some time,<sup>102</sup> the smart on crime approach and proposals recently have been championed by current office-

---

<sup>97</sup> See, e.g., Fairfax, *supra* note 2, at 275-76; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 418-19 (2009).

<sup>98</sup> A recent story highlighted on Professor Doug Berman's blog tells of the Ohio Department of Rehabilitation and Correction's cost-cutting decisions, *inter alia*, to charge inmates \$1 per day for electricity in their cells and to limit the inmates' lunch and dinner beverage options to water. See Doug Berman, *Do the Crime, Pay More than Time*, SENTENCING LAW AND POLICY, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2011/03/do-the-crime-pay-more-than-time.html](http://sentencing.typepad.com/sentencing_law_and_policy/2011/03/do-the-crime-pay-more-than-time.html) (quoting Alan Johnson, *Do the Crime, Pay More than Time*, COLUMBUS DISPATCH, Mar. 18, 2011) (last visited March 18, 2011).

<sup>99</sup> See, e.g., BUTLER, *supra* note 3; Mary D. Fan, *Beyond Budget Cut Criminal Justice*, 90 N.C. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1804539>.

<sup>100</sup> See, e.g., ALEXANDER, *supra* note 4.

<sup>101</sup> See, e.g., THE SMART ON CRIME COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS, iv-v (2011). Perhaps seeds of the current smart on crime approach, particularly in the area of sentencing, can be found in the American Bar Association's Justice Kennedy Commission Report, issued in August 2004. See AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION: REPORTS WITH RECOMMENDATIONS (Aug. 2004).

<sup>102</sup> See, e.g., Mary Price, *Sentencing Reform: Eliminating Mandatory Minimums, Easing Harsh Sentencing Structures and Building "Smart-on-Crime" Solutions—One State at a Time*, CHAMPION MAGAZINE, June 2004, at 18; Press Release, Am. Bar Ass'n, ABA Commission Cites Over-Reliance on Incarceration, Calls for New "Smart on Crime" Approach (June 23, 2004),

holders on the federal, state, and local levels.<sup>103</sup> Perhaps most notably, smart on crime rhetoric has begun to seep into political campaigns, including those run by individuals seeking elected prosecutorial office.<sup>104</sup> However, the smart on crime rhetoric received the greatest amount of attention—and, perhaps, legitimacy—when Attorney General Eric Holder endorsed the philosophy during his address to the American Bar Association Convention in August of 2009:

There is no doubt that we must be “tough on crime. But we must also commit ourselves to being “smart on crime.” . . . Getting smart on crime requires talking openly which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government’s ability to enhance public safety before the crime is committed and after the former offender is returned to society.<sup>105</sup>

Such approaches, which represent a refreshing break from the all-too-common and unproductive soft on crime and tough on crime binary, appeal to voters and policymakers because a number of the initiatives associated with the smart on crime movement have produced demonstrably successful outcomes. Just as the overcriminalization movement has enjoyed broad-based support, the smart on crime mantle has been picked up by those across the ideological spectrum. For example, the “Smart on Crime Coalition,” which has developed a comprehensive set of specific smart on crime proposals, includes a diverse set of over forty institutions interested in criminal justice reform.<sup>106</sup> In addition, various groups have taken up the cause of smart on crime reform.<sup>107</sup>

---

<http://www.abanow.org/2004/06/aba-commission-cites-over-reliance-on-incarceration-calls-for-new-smart-on-crime-approach/>.

<sup>103</sup> See, e.g., KAMALA HARRIS, SMART ON CRIME: A CAREER PROSECUTOR’S PLAN TO MAKE US SAFER (2009); Kamala D. Harris, *Smart on Crime*, in AFTER THE WAR ON CRIME: RACE DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton et al. eds., 2008).

<sup>104</sup> On the website for Ms. Harris’ successful 2010 campaign for California Attorney General, her philosophy was made clear:

Since her election in 2003, Kamala Harris has proven herself to be a District Attorney who not only stands her ground, but breaks new ground in the fight to fix our failing criminal justice system. . . . Her pledge is to move beyond the false choice of being either ‘tough’ or ‘weak’ on crime. Kamala Harris is Smart on Crime, and it’s working.

*Smart on Crime*, KAMALA HARRIS FOR CALIFORNIA ATTORNEY GENERAL 2010, (Apr. 16, 2011), <http://www.kalaharris.org/smartoncrime>.

<sup>105</sup> Hon. Eric Holder, U.S. Attorney Gen., Address at the 2009 American Bar Association Convention (Aug. 3, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>; see also Charles M. Blow, Op-Ed., *Getting Smart on Crime*, N.Y. TIMES, Aug. 14, 2009, at A19.

<sup>106</sup> See SMART ON CRIME, *supra* note 101, at vi. The report was an update of an earlier report, SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS, issued by the

This sort of diverse and influential advocacy has the potential to gain political traction if the timing is right. Such a window opened in 2009, when Senator Jim Webb, a Democrat from Virginia, spearheaded a legislative campaign to form a National Criminal Justice Commission.<sup>108</sup> As originally conceived, Senator Webb's Commission would be made up of eleven members, including a chair appointed by the President, and ten others appointed by majority and minority leaders in the Senate and House, as well as the chairs of the Republican and Democratic Governors Associations.<sup>109</sup> The members were to be experts in a number of areas, including law enforcement, criminal justice, national security, prison administration, prisoner reentry, public health (including drug addiction and mental health), victims' rights, and social services.<sup>110</sup> The proposed Commission would be the first major government-sponsored reform effort since the Johnson and Brown Commissions and would have a broad mandate to "review the [criminal justice] system from top to bottom"<sup>111</sup>:

---

"2009 Criminal Justice Transition Coalition" on November 5, 2008. As the front matter of the more recent report states, "[t]he efforts of the Smart on Crime Coalition are coordinated by the Constitution Project . . . [which] brings together unlikely allies—experts and practitioners from across the political spectrum—in order to promote and safeguard America's founding charter." *Id.*; see also Tony Mauro, *Reforming the Criminal Justice System*, THE BLOG OF LEGAL TIMES (Feb. 10, 2011), <http://legaltimes.typepad.com/blt/2011/02/refroming-the-criminal-justice-system.html> (reporting on the release of the Smart on Crime Coalition report, noting "[t]he last time the federal criminal justice system under went major reform was more than 40 years ago" and that "[a] broad coalition of organizations, ranging from the American Civil Liberties Union to the Heritage Foundation, today agreed that the time has come for another overhaul"). *But see* Michelle Alexander, *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011, at WK9.

<sup>107</sup> See, e.g., *The Conservative Case for Reform: Fighting Crime, Prioritizing Victims, and Protecting Taxpayers*, RIGHT ON CRIME, <http://www.rightoncrime.com> (last visited July 9, 2011). The American Bar Association recently identified a set of priorities for criminal justice reform, many of which overlap with typical smart on crime solutions. See Bruce Green, *Criminal Justice—What's Ahead? Roadblocks and New Directions*, 25 CRIMINAL JUSTICE 4 (2011); *State Policy Implementation Project—Save States Money While Improving the Criminal Justice System*, AM. BAR ASS'N., <http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/statepolicyproject.aspx> (last visited July 22, 2011); see also AM. BAR ASS'N., *THE STATE OF CRIMINAL JUSTICE* (2009).

<sup>108</sup> National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. (as reported by the S. Comm. on the Judiciary, Mar. 26, 2009). It should be noted that there previously was a "National Criminal Justice Commission," which was a project of the National Center on Institutions and Alternatives, a private criminal justice research and practice organization. Commissioners included the likes of Professor Derrick Bell, Elaine Jones, Professor Charles Ogletree, and Professor James Vorenberg. Among the many distinguished advisors and consultants were Marc Mauer, Professor Tracey Meares, Professor Jamin Raskin, Professor Randolph Stone, and Professor Franklin Zimring. See THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION xi-xxvi (Steven R. Donziger ed., 1996). The Commission proposed its "Pathway to a Safer Society: 2020 Vision," which was a set of eleven recommendations for improving the administration of criminal justice in the United States. *Id.* at 195-219.

<sup>109</sup> S. 714, at 12.

<sup>110</sup> *Id.* at 13.

<sup>111</sup> Editorial, *Reviewing Criminal Justice*, N.Y. TIMES, Mar. 30, 2009, at A0.



The Commission shall undertake a comprehensive review of the criminal justice system, make findings related to Federal and State criminal justice policies and practices, and make reform recommendations for the President, Congress, and State governments to improve public safety, cost-effectiveness, overall prison administration, and fairness in the implementation of the Nation’s criminal justice system.<sup>112</sup>

Although Senator Webb’s thorough and energetic campaign to garner early broad support buoyed the legislation, the Commission ran into legislative stumbling blocks. A revised version of the legislation introduced in the summer of 2010 expanded the membership to fourteen Commissioners, including two co-chairmen appointed by the President in consultation with the leadership of the House and Senate, and two local representatives appointed by the President in agreement with the Senate Majority Leader and Speaker of the House.<sup>113</sup> The stated mandate of the Commission was changed in the revised legislation, providing that “[t]he Commission shall undertake a comprehensive review of the criminal justice system, encompassing current Federal, State, local, and tribal criminal justice policies and practices, and make reform recommendations for the President, Congress, State, local, and tribal governments.”<sup>114</sup> The National Criminal Justice Commission legislation was approved by the House of Representatives in July of 2010 but failed to clear the Senate.<sup>115</sup> Senator Webb reintroduced the legislation in February of 2011,<sup>116</sup> reiterating his earlier smart on crime sentiment: “We can be smarter about whom we incarcerate, improve public safety outcomes, make better use of taxpayer dollars, and bring greater fairness to our justice system.”<sup>117</sup> If the legislation ultimately passes,<sup>118</sup> the National Criminal Justice Commission would represent a tremendous opportunity for the proposal and implementation of smart on crime reforms.

---

<sup>112</sup> S. 714, at 6.

<sup>113</sup> National Criminal Justice Commission Act of 2010, S. 714, 111th Cong. (as reported by the S. Comm. on the Judiciary, May 6, 2010), at 23-24.

<sup>114</sup> *Id.* at 19-20.

<sup>115</sup> See National Criminal Justice Commission Act of 2010, H.R. 5143, 111th Cong., 2d Sess.; Press Release, Senator Webb Reintroduces National Criminal Justice Commission Act (Feb. 8, 2011), <http://www.webb.senate.gov/newsroom/pressreleases/02-08-2011-02.cfm>.

<sup>116</sup> See National Criminal Justice Commission Act of 2011, S. 306, 112th Cong.; Press Release, *supra* note 115.

<sup>117</sup> Press Release, *supra* note 115.

<sup>118</sup> The recent announcement of Senator Webb’s planned retirement from the U.S. Senate in 2012 has left the initiative in some limbo. See Mauro, *supra* note 106. However, such a commission presumably also could be created through an executive order or under the auspices of a governmental agency.

B. *The Compatibility of Overcriminalization with the ‘Smart on Crime’ Agenda*

This latest effort at American criminal justice reform presents an opening to address the issue of overcriminalization. The aims of the overcriminalization movement—including the proper allocation of sovereign enforcement authority and priorities, fidelity to traditional requisites of criminal culpability, and the streamlining of criminal codes—are not incompatible with those of the smart on crime movement. Indeed, the Smart on Crime Coalition’s report, “Smart on Crime: Recommendations for the Administration and Congress,” devotes its very first chapter to proposals addressing overcriminalization.<sup>119</sup> However, other core smart on crime proposals also dovetail well with the overcriminalization philosophy. In particular, certain innovative criminal justice policies identified with the smart on crime movement may serve the overcriminalization movement’s interest in avoiding criminal sanctions such as incarceration where other controls on antisocial conduct may be more desirable.

One example might be found in the use of restorative justice and alternative dispute resolution (ADR) in the criminal process.<sup>120</sup> For instance, victim-offender mediation is a voluntary process by which the victim of a crime and the alleged offender are joined by a neutral mediator in a face-to-face meeting.<sup>121</sup> With the help of the mediator, the parties reveal and discuss the root causes of the conduct at issue.<sup>122</sup> Experience has proven that most such mediations “result in an agreement resolving the issues and conflict underlying the criminal conduct, and a plan for prospective avoidance of repeat incidents.”<sup>123</sup> An apology and, where appropriate, financial restitution are also components of the agreement.<sup>124</sup> Overcriminalization advocates should be impressed by the fact that successful mediations mean that the criminal process is not invoked (or prolonged), criminal sanctions are not imposed unnecessarily, and victims are made whole.<sup>125</sup>

---

<sup>119</sup> See THE SMART ON CRIME COALITION, *supra* note 101, at 1-17.

<sup>120</sup> See, e.g., Kimberlee K. Kovach, *Expanding the Use of Mediation and ADR*, in AMERICAN BAR ASSOCIATION, THE STATE OF CRIMINAL JUSTICE 2009 203-208 (2009).

<sup>121</sup> See Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS J. 339, 362 (2010). Other methods of integrating alternative dispute resolution into the criminal process include sentencing circles and peacemaking circles. See, e.g., *id.*; Carol L. Izumi, *The Use of ADR in Criminal and Juvenile Delinquency Cases*, in ADR HANDBOOK FOR JUDGES 196 (Donna Steinstra & Susan M. Yates eds., 2004); Maggie T. Grace, *Criminal Alternative Dispute Resolution: Restoring Justice, Respecting Responsibility, and Restoring Public Norms*, 34 VT. L. REV. 563 (2010).

<sup>122</sup> See Izumi, *supra* note 121.

<sup>123</sup> Fairfax, *supra* note 121, at 362-63; Izumi, *supra* note 121, at 196-97.

<sup>124</sup> See Fairfax, *supra* note 121, at 364.

<sup>125</sup> See Fairfax, *supra* note 121, at 363 (noting that victim-offender mediation “has proven to be very successful and well-received by victims and offenders alike”) (citing Izumi, *supra* note 121, at 196-

Likewise, drug courts are another criminal justice innovation that may hold appeal for the overcriminalization movement. One of a variety of “problem-solving courts,”<sup>126</sup> which address a wide range of social ills giving rise to criminal conduct,<sup>127</sup> drug courts attempt to prevent and address the root causes of, antisocial conduct related to narcotics use. Using a system of sanctions to incentivize completion of drug treatment and other rehabilitation, drug courts give drug-addicted offenders the chance to avoid serious criminal charges, incarceration, and collateral consequences.<sup>128</sup> Although there are some concerns regarding how drug courts operate in practice and impact vulnerable offenders,<sup>129</sup> they have been celebrated as a successful criminal justice innovation.<sup>130</sup> For overcriminalization advocates, such opportunities to prevent recidivism by low-level, non-violent offenders without imposing harsh criminal sanctions should be attractive.

Criminal ADR and problem-solving courts are but two smart on crime initiatives that advance the multi-faceted aims of the overcriminalization movement. Certainly, many other smart on crime proposals—such as those related to improving the grand jury’s screening function, protecting innocence, enhancing indigent defense, and reforming sentencing laws—would all seem to fit within the overcriminalization philosophy. The overcriminalization movement and the smart on crime movement have much more in common than might be appreciated at first glance. In addition to the fact that certain specific policy proposals advance the goals of both movements, broad and ideologically diverse coalitions undergird the two movements—both of which are focused on the improvement of criminal justice in the United States. Furthermore, one can trace the DNA of both movements back to the historical criminal law reform efforts of the twentieth century. As such, the overcriminalization movement and the smart on crime movement may be natural partners as both continue to evolve.

---

97). However, victim-offender mediation certainly is not without criticism on procedural and substantive grounds, particularly because it can be employed in serious felony cases as well as misdemeanors. See, e.g., Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247, 1262, 1291-1301 (1994).

<sup>126</sup> See, e.g., Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 420-24 (2009); Michael O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 463-65 (2009); Michael C. Dorf & Jeffrey A. Fagan, *Problem Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501 (2003); Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Treatment Movement*, 76 WASH. U. L.Q. 1205 (1998).

<sup>127</sup> Dorf & Fagan, *supra* note 126, at 1507 (citing specialized courts directed at “mentally ill offenders, drunk drivers, parole or probation violators, gun carriers, [and] domestic violence offenders”); see also Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006).

<sup>128</sup> See, e.g., Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 784 (2008).

<sup>129</sup> See, e.g., *id.*; Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2001).

<sup>130</sup> See, e.g., Aruna Jain, *For Drug Offenders, A Second Chance*, WASH. POST, Dec. 14, 2006.

## CONCLUSION

The American historical experience with criminal justice reform presents a valuable lesson for today's reformers. Efforts to tackle the significant shortcomings of the criminal justice system throughout the twentieth century were largely episodic and failed to achieve their goals. Such disappointments have not been due to the lack of human or other resources. Indeed, twentieth century criminal reform efforts were able to attract the intellect, vision, and energy of some of the leading figures in society and the relevant fields, and enjoyed the support of the political establishment. Nevertheless, more than four decades after the last major effort to overhaul our criminal justice system, we seem to have progressed very little. To be sure, our strained politics and sometimes-misplaced priorities have not facilitated innovation in the criminal justice arena. However, recent developments seem to represent a rare opportunity for the real exchange of ideas across the political and ideological spectrum. To the extent that the overcriminalization and smart on crime movements may be emblematic of the next phase of criminal justice reform approach, the outcome this time around very well may be different.

## AGENTS PROSECUTING AGENTS

*Larry E. Ribstein\**

## ABSTRACT

Significant questions have been raised concerning the efficiency of criminalizing agency costs and the problems of excessive prosecution of crimes committed by corporate agents. This paper provides a new perspective on these questions by analyzing them from the perspective of agency cost theory. It shows that there are close analogies between the agency costs associated with prosecutors in corporate crime cases and those of the agents being prosecuted. The important difference between the two contexts is that prosecutors are not subject to many of the standard mechanisms for dealing with corporate agency costs. An implication of this analysis is that society must decide if prosecuting corporate agents is worth incurring the agency costs of prosecutors.

---

\* Mildred Van Voorhis Jones, Chair and Associate Dean for Research, University of Illinois College of Law. Prepared for "Overcriminalization 2.0: Developing Consensus Solutions," sponsored by the *Journal of Law, Economics, and Policy*, The Law and Economics Center at George Mason University School of Law and the National Association of Criminal Defense Lawyers, Foundation for Criminal Justice, October 21, 2010. Thanks for helpful comments from Eric Johnson, Nuno Garoupa, Jeffrey Parker and conference participants.

## TABLE OF CONTENTS

INTRODUCTION .....	619
I. AGENCY PROBLEMS IN FIRMS .....	620
A. <i>Agency Costs in General</i> .....	621
B. <i>Strategies For Controlling Agency Costs in Firms</i> .....	622
1. Monitoring and Incentives .....	622
2. Investor Exit .....	622
3. Restricting Agents' Power .....	623
4. Criminal Liability .....	623
II. PROSECUTORS AS AGENTS .....	623
A. <i>Delegation of Control</i> .....	624
1. Power to Decide Which Crimes are Prosecuted .....	624
2. Power to Manage the Trial: Imperfections in the Adversary System .....	628
B. <i>Imperfect Incentives</i> .....	630
C. <i>Disciplining Prosecutorial Agents</i> .....	633
1. Incentive Compensation .....	633
2. Fiduciary Duties .....	634
3. Civil Liability .....	634
4. Monitoring and Discipline .....	635
5. Market or Reputational Penalties .....	637
III. PROSECUTORIAL AGENCY COSTS AND CORPORATE CRIMINAL LIABILITY .....	638
A. <i>Increasing Constitutional Constraints on Prosecutors</i> ....	638
B. <i>Changing Prosecutors' Incentives</i> .....	639
C. <i>Changing Corporate Liability Rules</i> .....	639
1. Reducing Agent Liability and Penalties .....	639
2. Reducing the Scope of Corporate Agent Criminal Liability .....	641
3. Reducing or Eliminating Corporate Criminal Liability .....	642
CONCLUSION .....	642

## INTRODUCTION

Commentators have long debated the costs and benefits of criminally prosecuting corporations and their agents. Recently commentators have focused on the significant leverage prosecutors have when prosecuting corporate crimes as well as the implications of this leverage for criminal procedure and the standards of corporate criminal liability.<sup>1</sup>

This paper contributes to this debate by approaching the subject from the perspective of agency theory and analogizing abuses of power by prosecutors to those of corporate agents.<sup>2</sup> It shows that prosecutors' conduct involves many of the same agency cost problems as the corporate conduct they are prosecuting. At the same time, the sort of market and institutional mechanisms that can constrain corporate agents may not be effective for prosecutorial agents. Moreover, the particular challenges of corporate criminal prosecutions exacerbate prosecutorial agency costs in this context.

Agency analysis illuminates whether and to what extent corporate agency costs should be criminalized. The analysis shows that if the criminal justice system is used to punish corporate agents for harm they cause in the course of their employment, then society must tolerate increased costs associated with delegating discretion to its own agents, those who prosecute these crimes. Prosecutorial agency costs, in turn, must be taken into account in designing and weighing the costs and benefits of corporate agent criminal liability.

This paper does not suggest that prosecutorial agency costs are limited to the corporate context.<sup>3</sup> However, focusing on prosecutions of corporate agents is justified by special considerations that apply in this context. First, the fact that prosecutors themselves are agents highlights the question

---

<sup>1</sup> See generally HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007); Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997); Larry E. Ribstein, *The Perils of Criminalizing Agency Costs*, 2 J. BUS. & TECH. L. 59 (2007); Sarah Ribstein, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857 (2009); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007).

<sup>2</sup> Several commentators have used the agency framework to generally analyze prosecutorial conduct in the course of examining particular incentive effects. See *infra* note 9. This paper is a more complete overview and consideration of the policy implications of this agency analysis in the context of corporate crime.

<sup>3</sup> See generally Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 Am. Crim. L. Rev. 1503 (2007). For extended discussion of several prominent examples of prosecutorial excesses, see Silverglate, *supra* note 1.

whether analogous conduct by corporate agents is sufficiently serious to justify criminal sanctions. Second, special problems of corporate prosecutions heighten the abuse of prosecutorial power, including the difficulty of isolating responsibility for wrongdoing within organizations, the hazy line between criminal and non-criminal conduct in this context, and the particularly high cost of defending these cases. Third, the “revolving door” between prosecutors’ offices and corporate suites raises special questions about prosecutors’ incentives in exercising this power.

These considerations suggest that concerns with over-criminalization are particularly applicable to corporate agents even if they are not limited to this context. Given the availability of other mechanisms for disciplining agents and the particularly high costs of criminal prosecutions, these particular prosecutions are likely less efficient than criminal prosecutions generally.

Part I of this paper discusses agency costs in firms and how government and private firms deal with such costs. Part II applies agency theory analysis to prosecutors and shows that despite the agency costs associated with prosecutorial power, prosecutors face weaker institutional, regulatory and market discipline than corporate agents. Part III discusses ways to deal with prosecutorial agency costs, including the implications of these costs for the criminalization of corporations’ and their agents’ conduct.

## I. AGENCY PROBLEMS IN FIRMS

This Part discusses the basic problem involved in criminal liability of corporate agents—that is, deviations between firms’ and agents’ interests, often referred to as agency costs. It is important to emphasize at the outset that there is nothing inherent in a crime’s being committed by a corporate agent in connection with her job that necessarily should insulate the conduct from criminal liability. There is no apparent reason why the criminal laws should apply to an individual’s theft from another individual but not to her theft from her employer. Such conduct can raise questions concerning the integrity of corporate governance generally, and therefore harm the capital markets. Moreover, just as the criminal law economizes on the cost of self-protective measures, including by expressing the public’s condemnation of the activity, so criminal sanctions against corporate agents may be more cost-effective than forcing firms to rely on contracts and the civil law.<sup>4</sup>

A key problem with criminalizing agency costs lies in finding the appropriate dividing line between civil wrongs and criminal conduct. There is only a hazy line between the conduct of corporate agents that deserves

---

<sup>4</sup> See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 200-01 (1968).



criminal sanctions and ubiquitous agent behavior best constrained by private governance mechanisms and non-criminal sanctions. This article does not attempt to analyze all the considerations that are relevant to the decision to criminalize corporate agents' conduct. Rather, it only discusses the implications of prosecutorial agency costs relevant to criminalizing corporate agent conduct.

This Part begins with a general analysis of agency costs and then turns to specific ways to minimize these costs. This discussion has two purposes. First, a brief look at the well-trodden area of corporate agency costs provides a familiar context for the discussion below of identifying and determining ways to constrain prosecutorial agency costs. Second, showing the alternative mechanisms for dealing with agency costs provides background for Part III's discussion of the role of prosecutorial agency costs in determining whether to criminalize corporate agent behavior.

#### A. *Agency Costs in General*

Agency costs are a venerable concept in the corporate literature. Adam Smith observed in his *Wealth of Nations* that while the market's invisible hand guides property owners' selfish behavior toward society's good, this is not necessarily the case when the property is managed by agents: "Being the managers rather of other people's money than of their own, it cannot well be expected that they should watch over it with the same anxious vigilance with which partners in a private copartnery frequently watch over their own."<sup>5</sup> Jensen and Meckling later modeled more precisely how the disparity of interests between owners and creditors can cause the shareholders to control the firm in a way that maximizes their own wealth but not that of the firm as a whole, including its creditors.<sup>6</sup> Jensen and Meckling also observed that agency costs can be controlled by the principal's "monitoring" of the agent and the agent's "bonding" to provide some assurance of good behavior and thereby induce the principal to employ him or pay a higher wage. The principal bears the "residual loss" left by gaps in monitoring and bonding.

Agency costs are never zero because there is always some cost of hiring a non-owner agent to manage property. Agents and principals therefore necessarily bear some combination of monitoring and bonding costs and residual loss. The principal may spend nothing on monitoring and get no bond from the agent but bear a lot of residual loss from cheating. At the other extreme, the principal can reduce residual loss to zero by monitoring

---

<sup>5</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

<sup>6</sup> Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

the agent's conduct very closely or credibly threatening to severely punish the agent for cheating. But close monitoring has direct costs by reducing the benefits of delegating power to agents and indirect costs by deterring the agent from engaging in conduct that benefits the principal.

Agency cost theory is critical in analyzing the behavior and appropriate regulation of corporate executives. As with Jensen and Meckling's shareholders, executives exercise power over corporate resources on behalf of others, including the shareholders, who finance the firm's acquisition of the resources. The corporation's financiers benefit from delegating power to agents because it enables them to focus on what they do best and leave management to the specialists. But the delegation also entails agency costs because the agents do not fully own the property they are managing. The firm must control these costs through the optimal mix of monitoring and bonding costs and residual agency loss.

#### B. *Strategies for Controlling Agency Costs in Firms*

There are myriad potential strategies for controlling agency costs.<sup>7</sup> Consider the following illustrations from the corporate context.

##### 1. Monitoring and Incentives

The firm can establish devices for examining agents' behavior, rewarding good conduct and punishing bad. For example, independent directors can supervise managers, shareholders can vote on certain corporate acts and to elect the board, courts can enforce fiduciary duties and remedies, corporate agents can be required to disclose information concerning the quality of their management, and incentive compensation can align shareholder and manager incentives.

##### 2. Investor Exit

The firm can enable investors to withdraw their capital by selling shares back to the firm, thereby forcing firm managers to go into the market to replace this capital. This strategy disciplines managers because the market price for new capital depends on manager quality. Additionally, the firm can enable shareholders to sell management and economic rights to

---

<sup>7</sup> See generally REINIER KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA & EDWARD ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* (2d ed. 2009).

third party governance experts who can aggregate voting power to take control of the firm away from bad managers.<sup>8</sup>

### 3. Restricting Agents' Power.

Limiting the extent to which agents can bind the firm addresses the source of agency problems by reducing the agent's control over the firm's property or ability to expose the firm to harm or liability.

### 4. Criminal Liability

The main question for this paper is the extent to which the public needs to get involved in prosecuting corporate agency costs given the other potential ways of dealing with the problem discussed above. Answering this question involves a comparison between the costs and benefits of internal firm devices and those of using the criminal law.

Criminal penalties can be efficient in some agency situations, as firms may lack either adequate market incentives to control agents or the power to do so. For example, the agent may engage in hard-to-detect fraud or cause harm that primarily affects the public but that increases the firm's short-term profits and the agent's compensation. Criminal penalties may be justified in these situations if their benefits in reducing social harm, considered in the light of other constraints on agents' conduct, outweigh their social costs, including deterring honest executives from engaging in socially productive risk-taking. The net benefits of criminalizing corporate agency costs also reflect the fact that criminal penalties are administered by other agents—prosecutors—who are subject to their own set of agency costs.

## II. PROSECUTORS AS AGENTS

Like corporate executives, prosecutors are agents in the sense that they exercise their power to execute the criminal laws on the government's behalf rather than their own.<sup>9</sup> Society as a whole receives much of the benefit

---

<sup>8</sup> See generally Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

<sup>9</sup> For other commentary analyzing the public and private incentives of prosecutors as agents of the public, see Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from Careers of U.S. Attorneys*, 7 AM. L. ECON. REV. 379 (2005) (finding that prosecutors have incentives to maximize sentence length); Edward L. Glaesar, Daniel P. Kessler & Anne Morrison Piehl, *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. ECON. REV. 259 (2000) (showing that federal prosecutors focus on high income defendants); Nuno Garoupa, *Some Reflections on the Economics of Prosecutors: Mandatory vs. Selective Prosecution*, 29 INT'L REV. L. ECON. 25 (2009)

and incurs the costs of the prosecutors' actions, with the brunt falling on individual criminal defendants. The prosecutorial context shares the following general characteristics with agency costs in firms: (1) delegation of control by the principal to the agent; (2) the agent's imperfect incentives to maximize the controlled assets' value because the agent does not bear all the costs and benefits of her conduct; (3) the principal's monitoring and agent's bonding expenses incurred to control agency costs; and (4) residual loss incurred by the principal because monitoring and bonding are not fully effective. The following subparts discuss some details of these shared characteristics.

#### A. *Delegation of Control*

Prosecutorial agency costs, like agency costs in other contexts, arise because of prosecutors' broad discretion in deciding which crimes are prosecuted and their power to affect the nature of the prosecution. This subpart discusses specific sources of this discretion.

##### 1. Power to Decide Which Crimes are Prosecuted

Prosecutors have significant leeway to decide which crimes to prosecute. This raises the question whether they exercise this power consistent with the interests of their principal—the state.

Prosecutors' discretion derives from uncertainty as to when behavior is criminal. Harvey Silverglate has chronicled many situations in which prosecutors are empowered by the vagueness and breadth of criminal laws, including those relating to sale of prescription narcotics and public corruption.<sup>10</sup> In the business context it may be particularly unclear when behavior crosses the line from hard-nosed competition that is at most subject to a civil action to what society considers criminal.<sup>11</sup> For example, it may not be clear how to distinguish aggressive but legitimate competitive behavior from criminal violations of the antitrust laws, between clever tax shelters and tax fraud, or between disclosures and accounting that are technically accurate and those that are criminally misleading. By contrast, most non-

---

(showing how prosecutorial incentives, including risk aversion, matter in deciding whether prosecutions should be mandatory or selective); Eric Rasmussen, Manu Raghav & Mark Ramseyer, *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. L. ECON. REV. 47 (2009); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005) (discussing prosecutors' incentives in using crimes as pretexts to punish other activity).

<sup>10</sup> See generally, Silverglate, *supra* note 1.

<sup>11</sup> See generally, Richard A. Booth, *What Is a Business Crime?*, 3 J. BUS. & TECH. L. 127 (2008).

corporate criminal behavior is criminal because it breaches clear social norms.

Prosecutorial discretion is enhanced by the increasing breadth of criminal law, particularly federal criminal law.<sup>12</sup> A notorious example is “honest services” fraud, which permits the government to prosecute virtually any kind of agent misconduct.<sup>13</sup> Although the Supreme Court interpreted this provision to reach only bribes and kickbacks,<sup>14</sup> this still leaves prosecutors with significant discretion. Many federal crimes have loose mens rea standards,<sup>15</sup> which simplify prosecution and increase prosecutorial discretion. Also, federal prosecutors need not wait until criminal violations are brought to their attention. They can investigate notorious or unpopular behavior and find crimes in the course of the investigation, or that occur as a result of it (particularly lying to investigators), but that have little or nothing to do with the public concern that gave rise to the investigation.<sup>16</sup>

It can be particularly hard to define when corporate agents’ behavior crosses the line into criminal conduct. The basic problem, as discussed in Part I, is that agents’ incentives are never perfectly aligned with their principals’ interests and agency costs are never zero. It follows that agents often cheat at least a little bit. The line between conduct that triggers these intra-corporate or civil remedies and conduct that is criminal is therefore

---

<sup>12</sup> See John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, CRIME REPORT (Federalist Soc’y for Law & Pub. Pol’y Studies), 2004, at 3, available at [http://www.fed-soc.org/doclib/20080313\\_CorpsBaker.pdf](http://www.fed-soc.org/doclib/20080313_CorpsBaker.pdf) (finding over four thousand criminal offenses in the United States Code, one-third more than in 1980); Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1578-81 (2010) (discussing scope of federal prosecutorial discretion). An indication of that breadth is the many new crimes just within one recent federal law. See Tiffany M. Joslyn, *Criminal Provisions in the Dodd-Frank Wall Street Reform & Consumer Protection Act*, THE FEDERALIST SOC’Y (Dec. 10, 2010), [http://www.fed-soc.org/doclib/20101210\\_NFIPCrimProvisionsinDoddFrank.pdf](http://www.fed-soc.org/doclib/20101210_NFIPCrimProvisionsinDoddFrank.pdf).

<sup>13</sup> See 18 U.S.C. § 1346 (West 2011) (defining “scheme or artifice to defraud” for purposes of mail fraud and other federal statutes as including “a scheme or artifice to deprive another of the intangible right of honest services”). See also Podgor, *supra* note 12 at 1579-80 (discussing breadth of mail fraud statute).

<sup>14</sup> *Skilling v. United States*, 130 S.Ct. 2896 (2010).

<sup>15</sup> See BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010), available at <http://www.heritage.org/Research/Reports/2010/05/Without-Intent> (describing large number of federal statutes that do not have mens rea requirement); Geraldine Moohr, *What the Martha Stewart Case Tells Us About White Collar Crime*, 43 HOUS. L. REV. 591, 601 (2006) (“There is no definition of the culpability, or mens rea, element of “willful” in the criminal statute. In this vacuum, courts have applied standards that are strikingly similar to the civil scienter standard to criminal cases.”); Podgor, *supra* note 12 at 1580-81 (discussing lack of mens rea requirement as contributor to prosecutorial discretion).

<sup>16</sup> See Richman & Stuntz, *supra* note 9, at 609 (discussing “strategic” crimes used as a pretext for criminal prosecutions, such as that against Al Capone); Podgor, *supra* note 12 at 1580 (discussing prosecutorial discretion to use “short-cut” offenses such as perjury and obstruction of justice to obtain convictions on less evidence that would be required to prove the main crimes such as accounting fraud). For examples, see *infra* text accompanying notes 46-47.

murky. Among other things, conduct that is questionable in hindsight because of media attention or its connection with broader wrongdoing might have been approved by the appropriate corporate decision-makers when the wrongdoing was less obvious. Even if the decision-making process is imperfect, perhaps because it involves other agents who are subject to the defendant's control, the firm's owners have explicitly or implicitly accepted the process. Such conduct may be closer to ordinary agent behavior than to criminal theft.

Consider two recent prosecutions of corporate agents. First, Dennis Kozlowski, former Tyco CEO, was convicted and sentenced to hard time on Riker's Island.<sup>17</sup> As one observer commented:

Kozlowski wasn't convicted for overspending, nor for defrauding investors—the most common charges leveled against corrupt CEOs. He was convicted instead of grand larceny, that is, of stealing his bonuses, which were certainly oversized. But even if you believe the worst about Kozlowski and his co-defendant former Tyco CFO Mark Swartz, they were paid according to a contract, and that is not stealing.<sup>18</sup>

The jury ultimately concluded otherwise, which highlights the fine line between “stealing” and getting paid what a significantly lower-paid jury later concludes is too much.

The other example concerns Lord Conrad Black, who was convicted of mail fraud and obstruction of justice and later freed by the Supreme Court's opinion limiting the use of the honest services theory the government used to convict him.<sup>19</sup> The conviction was based on conduct arising out of a sale of control<sup>20</sup> and involved an offense that may or may not even give rise to a civil claim. The case focused on the legitimacy of a non-competition agreement that, as in Kozlowski, the board may have approved. One of the directors was former U.S. attorney and Illinois Governor Jim Thompson. Despite the trial's publicity it never became clear why Black was charged when the directors who enabled his scheme escaped trial.

The cases that emerged from the highly publicized backdating of stock options provide another illustration of prosecutors' power to decide what to prosecute. Although in hindsight the conduct (misreporting option grant dates) might have seemed to be fraud or breach of fiduciary duty, a closer look from the perspective of when the relevant decisions were made reveals that the conduct more closely resembled standard agent behavior that was not clearly contrary to shareholders' interests. The conduct was very com-

---

<sup>17</sup> *People v. Kozlowski*, 11 N.Y.3d 223, 898 N.E.2d 891 (2008).

<sup>18</sup> Dan Ackman, *Free Dennis Kozlowski*, WALL ST. J., Oct. 25, 2007 at A23.

<sup>19</sup> *Black v. United States*, 130 S. Ct. 2963 (2010).

<sup>20</sup> See Larry E. Ribstein, *The Conrad Black Story*, IDEOBLOG (July 14, 2007, 6:16 AM), <http://busmovie.typepad.com/ideoblog/2007/07/the-conrad-blac.html>.

mon,<sup>21</sup> suggesting that it conformed to norms of corporate behavior. The questions concerning the criminalization of backdating include whether the market was misled, the actual grant dates, the credibility of the relevant accounting rules, whether corporate agents authorized or vetted the relevant conduct, and the business purposes of the conduct, including the firms' need to attract qualified employees.<sup>22</sup>

In addition to the hazy line between criminal and non-criminal agent cheating, there are additional problems with allocating responsibility for harm to particular agents. Corporate conduct is inherently group conduct. Firms typically divide responsibility among specialists then coordinate these individuals' behavior. Criminal prosecutions must penetrate these organizational decisions in order to affix individual responsibility. For example, an important issue in the Gregory Reyes–Brocade backdating case was whether Brocade's finance department shared knowledge of the backdating with Reyes.<sup>23</sup>

Finally, even if an agent's conduct might be deemed criminal, there still may be questions about whether the individual defendant had the requisite criminal state of mind. Circumstantial evidence of a defendant's state of mind may be open to many interpretations, particularly when placed in its full context. As discussed further below, defendants' discussions of possible risks or concerns do not necessarily indicate that they thought the problems needed to be disclosed. Also, defendants' candid discussion of problems does not necessarily indicate their consciousness of wrongdoing, particularly since the criminality of the conduct may shift after the statements were made.

These ambiguities relate not only to what must be shown in order to justify criminal penalties. They also relate to prosecutors' power to decide when to prosecute corporate agents and therefore to the agency costs associated with the exercise of that power. The important question is whether the costs of delegating this discretion to prosecutors outweigh the benefits in this context.

## 2. Power to Manage the Trial: Imperfections in the Adversary System

Prosecutors have significant power to decide not only whether but how to prosecute a case. Ideally, the adversary system would check this prose-

---

<sup>21</sup> See Randall A. Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated?*, 55 MGMT. SCI. 513, 513 (April, 2009) (finding that almost 20% of management options were backdated during the study period).

<sup>22</sup> See Holman W. Jenkins Jr., *The 'Backdating' Witch Hunt*, WALL ST. J., June 21, 2006 at A13.

<sup>23</sup> See Holman W. Jenkins, Jr., *A Backdating Sentencing*, WALL ST. J., Dec. 19, 2007 at A20.

curatorial power. However, several features of corporate criminal cases limit the adversary system's ability to constrain such power.

First, prosecutors can inflict significant costs just by deciding to prosecute, even before the adversary system comes fully into play. High-profile defendants or potential defendants, who are frequent prosecutorial targets, may suffer substantial reputation loss and defense costs even if they are ultimately exonerated.<sup>24</sup>

Second, prosecutors can avoid having to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty.<sup>25</sup> Corporate employees usually have far less resources, including legal talent, computer resources, access to experts, and funds for general litigation support, than prosecutors. Accordingly, the defendant faces a strong temptation to plead guilty to avoid a higher penalty than the mismatch of resources could yield at trial. A notorious illustration involved Jamie Olis, a minor player in an accounting fraud case. He maintained his innocence but could not afford to adequately defend a case in which the government used computer programs to sort through twelve million pages of documents. Simply printing those pages would have cost Olis \$100,000.<sup>26</sup> Because of government pressure on Olis's employer, Olis's defense team had only about \$14,000 for his defense.<sup>27</sup> Olis was convicted and sentenced to a twenty-four-year prison sentence.

Third, the threat of lengthy sentences like Olis's increases defendants' incentive to settle. These sentences often depend on the harm the defendant's misconduct allegedly caused as reflected by the fall in the firm's stock price. It is very difficult to isolate the effect of the fraud and the defendant's involvement in it on the stock price. These problems ultimately helped persuade a court to significantly reduce Jamie Olis's sentence from twenty-four years to seventy-two months based on an "intended loss" measure of harm.<sup>28</sup> However, risk-averse defendants may focus on their potential exposure rather than the possibility of a similar reduction.

---

<sup>24</sup> See David Glovin, *Reputations Don't Return When Prosecutors Drop Charges*, BLOOMBERG, June 23, 2010, <http://www.bloomberg.com/news/2010-06-23/stockman-reveals-no-way-to-get-reputations-back-when-prosecutors-walk-away.html> (discussing the abortive prosecution of former Congressman and budget chief David Stockman).

<sup>25</sup> See Griffin, *supra* note 1, at 311-13; Ribstein, *A Question of Costs*, *supra* note 1, at 857-60. Several of the stories in Silverglate, *supra* note 1, arguably involve this scenario.

<sup>26</sup> Paul Davies & David Reilly, *Executives on Trial: In KPMG Case, the Thorny Issue of Legal Fees*, WALL ST. J., June 12, 2007, at C5.

<sup>27</sup> See Memorandum of Points and Authorities in Support of Jamie Olis' Motion to Set Aside His Conviction Pursuant to 28 U.S.C. § 2255 at 6, *United States v. Olis*, 2008 WL 620520 (S.D. Tex. Mar. 3, 2008) (No. H-03-CR-217), 2007 WL 3114018.

<sup>28</sup> See *United States v. Olis*, CRIM. H-03-217-01, 2006 WL 2716048 (S.D. Tex. Sept. 22, 2006) (opinion on resentencing).



Fourth, prosecutors can pressure corporate agents through their firms. Like individual defendants, firms face strong incentives to plead guilty to avoid even worse penalties at trial. These penalties could include fatal sanctions for firms that must stay clean to continue in business, like those imposed on Arthur Andersen. Unlike individuals, firms can negotiate for deferred prosecution agreements (DPAs) in which the firm agrees to governance arrangements in order to avoid prosecution.<sup>29</sup> The firm's ability to get a DPA depends on its cooperation with the prosecution which, in turn, may require the firm to induce its agents to cooperate with investigators. Accordingly, firms seeking DPAs have strong incentives to deny agents advancement or indemnification of expenses and to waive the attorney-client privilege.<sup>30</sup> Employees may find themselves having to talk to corporate attorneys without the protection of an attorney-client privilege. Given the high defense costs discussed above, indemnification and advancement can mean the difference between a defendant's ability to mount a defense and having to plead guilty. These issues surfaced in the KPMG case, in which the government pressured the defendant accounting firm, which faced the possibility of following Arthur Andersen to extinction, to deny its employees advancement and indemnification.<sup>31</sup>

Fifth, prosecutors can unilaterally determine the shape and scope of the trial by threatening potential defense witnesses. By compiling a long list of unindicted co-conspirators, prosecutors serve notice on defense-friendly witnesses that they may become defendants who lack immunity from prosecution if they testify. The Enron case, for example, had approximately one hundred unindicted co-conspirators<sup>32</sup> who had good reason to keep silent at trial about their conversations with main defendants Ken Lay and Jeff Skilling. If defendants tried to exert similar leverage on prosecutors' witnesses, the government could charge them with a crime. This asymmetry exacerbates the problem.<sup>33</sup>

---

<sup>29</sup> See James R. Copland, *Regulation by Prosecution: The Problem with Treating Corporations as Criminals*, CIV. JUST. REP. No. 13 (Dec., 2010); Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14.

<sup>30</sup> With respect to privilege waivers, see Michael Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, SOC. SCI. RESEARCH NETWORK (Mar. 3, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1564270](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564270).

<sup>31</sup> See Silverglate, *supra* note 1 at 138-52; Ribstein, *A Question of Costs*, *supra* note 1, at 870-73; *United States v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007), *aff'd* *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) (The trial court ruled that the government's pressure violated defendants' Fifth and Sixth Amendment rights and dismissed several of the indictments).

<sup>32</sup> John R. Emshwiller, *Will Enron Probe Spawn Further Criminal Cases?—Flush with Conviction Victories, Prosecutors Have Possible Targets but May Be Set to Wind Down*, WALL ST. J., June 6, 2006, at C1.

<sup>33</sup> See Silverglate, *supra* note 1, at xli, xlii; Bruce H. Kobayashi & Larry E. Ribstein, *The Hypocrisy of the Milberg Indictment: The Need for a Coherent Framework on Paying for Cooperation in Litigation*, 2 J. BUS. & TECH. L. 369 (2007).

The courts have only limited ability to police illicit prosecutorial pressure on witnesses. In the Broadcom backdating case, particularly egregious prosecutorial conduct caused defendants to plead guilty to crimes they knew they had not committed, which resulted in a court in the Central District of California dismissing the case and even rejecting a guilty plea.<sup>34</sup> But such judicial discipline is rare. Even if interview transcripts show changes in witnesses' testimony, a court may see such changes as indicating only that the witnesses finally saw the light.<sup>35</sup>

### B. *Imperfect Incentives*

Prosecutors' substantial power might not be a concern if their incentives in exercising this power were perfectly aligned with the principal's (i.e., society's) interests. However, as with corporate and other agents, this is not the case for several reasons.

First, prosecutors stand to gain individual benefits that depend partly on the case's notoriety, even though prosecuting the case may not be in society's interests. Prosecutors who have handled such cases are valuable to prominent firms who want prominent hires and emblems of corporate integrity. Prosecutors' jobs therefore may become revolving doors into lucrative and prestigious careers, with their newly-minted firm jobs providing, in effect, contingent fees for public prosecutions. This is particularly relevant for U.S. Attorneys, short-term employees whose terms depend on which political party is in power. A study of the careers of 570 former U.S. Attorneys found that immediately upon leaving office 9.12% became federal judges, 7.9% became state judges or were appointed to positions in state or local government, 19.65% practiced in large firms, 39.12% joined small firms, 1.93% were elected to political office and 9.47% were appointed to another position in the federal government.<sup>36</sup> Another study showed that U.S. Attorneys tend to prosecute individuals with relatively high human capital as indicated by such factors as success in their non-criminal careers.<sup>37</sup> The defendants' wealth reflects notoriety and political salience and is correlated with the corporate nature of the crimes. Working on cases with these attributes makes prosecutors even more attractive to corporate litigation firms, often allowing them to move directly into corporate de-

---

<sup>34</sup> See Reporter's Transcript of Proceedings at 5199, *United States v. Ruehle*, No. SACR 08-00139-CJC (C.D. Cal. Dec. 15, 2009), available at <http://online.wsj.com/public/resources/documents/121509Broadcom.pdf>.

<sup>35</sup> See Peter Henning, *Another Claim of Prosecutorial Misconduct*, N.Y. TIMES DEALBOOK (Feb. 01, 2011 1:45AM), <http://dealbook.blogs.nytimes.com/2010/01/11/another-claim-of-prosecutorial-misconduct/>.

<sup>36</sup> See Boylan, *supra* note 9, at 383.

<sup>37</sup> See Glaeser et al., *supra* note 9, at 269.

fense.<sup>38</sup> Although this data focuses on U.S. Attorneys, who are most likely to use the revolving door, these prominent corporate crime cases affect staffers' careers as well.<sup>39</sup> For example, many Enron prosecutors found lucrative jobs in the private sector.<sup>40</sup> Moreover, U.S. Attorneys set their offices' policies and priorities.

Second, increasing the number of successful prosecutions can make the revolving door more lucrative, and thereby increase the incentive to bring prosecutions even if they are not in society's best interests.<sup>41</sup> Creating and expanding theories of criminal liability may increase the private sector's demand for former prosecutors who can defend firms from these charges and counsel them on how to avoid criminal liability.<sup>42</sup> In other words, prosecutors turn up the fire so they can sell extinguishers.

Third, prosecutors are subject to political pressures whether or not they aim for the private sector. This is true both of elected state prosecutors<sup>43</sup> and federal and state prosecutors appointed by elected politicians.<sup>44</sup> Congress can call federal prosecutors to account for failing to prosecute and has an incentive to do so as an easy response to public demand for action. These considerations encourage prosecutors to initiate investigations against defendants who have incurred popular wrath, such as Ted Stevens, Mike Milken, Jeff Skilling, Dennis Kozlowski, Ken Lay, and Conrad Black.<sup>45</sup> As

---

<sup>38</sup> To be sure, there are other explanations. The authors attribute the choice of defendants partly to a desire for skill accumulation because the cases will be more vigorously contested. They also recognize that focusing on these defendants may be an efficient use of prosecutors' time because these defendants tend to get longer sentences, reflecting greater deterrence value. *See id.*

<sup>39</sup> The focus on U.S. Attorneys is significant for the additional reason that federal prosecutors likely have greater resources than state or local prosecutors to pursue high-profile cases. Thus, below the federal level wealthier defendants may be escaping prosecution.

<sup>40</sup> *See* Carrie Johnson, *After Enron, Fighting Off the Job Offers*, WASH. POST, June 5, 2006, at D2.

<sup>41</sup> There is evidence that elected prosecutors tend to maximize conviction rates. *See* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 *passim* (2002); Rasmussen et al., *supra* note 9, at 74. It is not clear this would apply to federal prosecutors who are subject to less political discipline and resource constraints than state prosecutors.

<sup>42</sup> *See* Leigh Jones, *Trading Places Ex-Prosecutors Find 'SOX'-Related Switch a Challenge*, NAT'L L.J., Aug. 13, 2007, at col.1 (describing increased demand because of Sarbanes-Oxley for former federal prosecutors with experience in corporate-governance litigation); David Zaring, *The Southern District of New York Offers Riches*, THE CONGLOMERATE (Aug. 16, 2010), <http://www.theconglomerate.org/2010/08/-the-southern-district-of-new-york-offers-riches.html> (noting the high quality of resumes of lawyers in the US Attorney's Office in the Southern District of New York and speculating that "white collar [is] the straightest path to law firm style riches" because of "beefed up white collar enforcement . . .").

<sup>43</sup> *See supra* note 41.

<sup>44</sup> *See* Podgor, *supra* note 12 at 1573-77 (discussing investigations of politically motivated actions by federal prosecutors).

<sup>45</sup> *See* Ashby Jones, *More on Stevens-Gate: What Happened at the DOJ . . . And Introducing Henry Schuelke*, WALL ST. J.L. BLOG (Apr. 13, 2009 1:48PM), <http://blogs.wsj.com/law/2009/04/13/more-on-stevens-gate-what-happened-at-the-doj-and-introducing->

discussed above,<sup>46</sup> these investigations can lead to charges that may have little to do with the conduct that irked the public. For example, an illuminating New York Times story detailed how prosecutors set out to nab Ken Lay in response to popular demand for his scalp and then searched for a legal theory on which to base their prosecution.<sup>47</sup>

To be sure, defendants' notoriety at least partly reflects society's condemnation of the defendants' conduct, and therefore whether the cases should be brought. But the public's judgment may reflect heated press coverage<sup>48</sup> more than the considered judgment of legal and financial experts. For example, backdating, though vividly scandalized in Pulitzer Prize-winning articles in the Wall Street Journal, was in fact a murkier tale of unclear contracts, fuzzy norms, and irrational accounting rules.<sup>49</sup> Also, some corporate crime prosecutions, such as those of the Enron<sup>50</sup> and Bear Stearns hedge fund managers, involve a "bank run" scenario where the need for and accuracy of disclosures changes rapidly while the firm swiftly unravels.<sup>51</sup>

An indication of media skewing of prosecutorial incentives is what might be called the "corporate crime lottery" in which cases are more likely to be brought against unpopular executives of failing firms, such as Jeff Skilling of Enron Corporation, than against popular executives of successful firms, such as Michael Dell, Steve Jobs, and Warren Buffett. For example, Apple's popular chief executive Steve Jobs escaped punishment for conduct connected with backdating that was arguably similar to the conduct that sent Gregory Reyes of the more obscure Brocade Communications to jail.<sup>52</sup> The deterrence value of prosecutions seems unrelated to whether defendants are running failed or successful firms. Indeed, the "lottery" may weaken deterrence by creating a perception that the criminal laws are being used to punish failure rather than crimes.

---

henry-schuelke/ (noting that "competition with other U.S. attorney's offices may have pushed the unit to act in an overly aggressive manner" in the Stevens prosecution, and quoting a defense lawyer as saying, "I think what happens is that they get caught up in the competition and there's no experienced voice of reason who says we cannot do this, we should not do this, we must not do this.").

<sup>46</sup> See *supra* note 16 and accompanying text.

<sup>47</sup> See Alexei Barrionuevo & Kurt Eichenwald, *The Enron Case that Almost Wasn't*, N.Y. TIMES (June 4, 2006), <http://www.nytimes.com/2006/06/04/business/yourmoney/04enron.html>; see also Silverglate, *supra* note 3, at 122-24.

<sup>48</sup> See Silverglate, *supra* note 1, at 189-215 (discussing numerous examples of the media's role in creating an environment conducive to white collar prosecutions). For a general discussion of media influence on prosecutions, see Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

<sup>49</sup> See Jenkins, *supra* note 22, at A13.

<sup>50</sup> See Tom Kirkendall, *Absolutely Enronesque*, HOUSTON'S CLEAR THINKERS (Mar. 31, 2005, 5:07 AM), [http://blog.kir.com/archives/2005/03/absolutely\\_enro.asp](http://blog.kir.com/archives/2005/03/absolutely_enro.asp).

<sup>51</sup> See Larry E. Ribstein, *The Enronization of Bear*, IDEOBLOG, (June 16, 2008, 12:32 PM), <http://busmovie.typepad.com/ideoblog/2008/06/the-enronization.html>.

<sup>52</sup> See Holman W. Jenkins, *A Backdating Sentencing*, WALL ST. J., Dec. 19, 2007 at A20.

Skewed prosecutorial incentives are particularly important in corporate crime cases because they encourage prosecutors to bring and win especially difficult cases. Because of the problems discussed above of proving scienter and wrongfulness in corporate crime cases, the availability of solid evidence of criminal conduct may not keep pace with pressures on prosecutors to bring cases. This may motivate prosecutors to cut corners.<sup>53</sup>

### C. *Disciplining Prosecutorial Agents*

As discussed in Part I, corporate agents are subject to a wide variety of institutional and market disciplines. However, this subpart shows that similar monitoring, bonding, and other mechanisms are not as available or effective in the prosecutorial context as in the corporate agent context.

#### 1. Incentive Compensation

Designing incentive compensation for prosecutors presents significant challenges. Even in private law firms in which lawyers produce a clear financial output in the form of fees, there is controversy over whether billable hours or lockstep seniority-based compensation provides the best overall incentives.<sup>54</sup> The compensation design challenge is greater for prosecutors because there is no measure of the value of prosecutorial efforts. Obviously a simple metric such as number of prosecutions would skew incentives, in that it may induce prosecutors to ignore the social costs of misguided prosecutions. One author has proposed compensation based on convictions of charged crimes with deductions for findings of prosecutorial misconduct.<sup>55</sup> However, this could skew incentives toward, for example,

---

<sup>53</sup> See *supra* Section II.A.2 (illustrating some corner-cutting prosecutorial behavior).

<sup>54</sup> See generally Roger Bowles & Goran Skogh, *Reputation, Monitoring and the Organisation of the Law Firm*, in *ESSAYS IN LAW & ECONOMICS: CORPORATIONS, ACCIDENT PREVENTION & COMPENSATION FOR LOSSES* 33 (Michael Faure & Roger Van den Bergh eds., 1989) (analyzing various law firm incentive mechanisms); Ronald J. Gilson & Robert Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313 (1985) (explaining seniority-based compensation as a way to diversify risks and motivate lawyers to invest in building firm capital); Larry E. Ribstein, *The Death of Big Law*, 2010 *WIS. L. REV.* 749, 755-56 (2010) (discussing various compensation mechanisms); Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 *VA. L. REV.* 1707, 1718-19 (1998) (discussing various compensation mechanisms).

<sup>55</sup> Tracey L. Meares, *Rewards For Good Behavior: Influencing Prosecutorial Discretion & Conduct With Financial Incentives*, 64 *FORDHAM L. REV.* 851, 901-02 (1995).

undercharging defendants and over-caution.<sup>56</sup> On the other hand, tests that try to take more factors into account would be very costly to apply.<sup>57</sup>

## 2. Fiduciary Duties

Courts supervise agents via liability for agent self-dealing.<sup>58</sup> Courts can apply this measure with relative ease because it does not require a determination of how much the fiduciary has hurt the firm. Non-self-dealing misconduct can be disciplined in other ways, such as relying on market demand for the fiduciary's services to punish a fiduciary with a poor reputation.<sup>59</sup> However, there is no comparable self-dealing-based theory for disciplining prosecutors because their self-benefit from non-socially-regarding prosecutions or failures to prosecute is usually unclear except in the bribe situation. Even prosecutors who use the revolving door into private practice do not thereby signal prosecutorial disloyalty to the public interest. Courts and other agencies must find clear evidence of wrongdoing, which helps explain the failures to discipline errant prosecutors discussed below in this part.

## 3. Civil Liability

Prosecutors have absolute immunity in connection with prosecutions and qualified immunity when acting as investigators or administrators.<sup>60</sup> Prosecutors theoretically may be criminally liable for violating defendants' constitutional rights,<sup>61</sup> but one writer found only one conviction under the relevant statute, which was adopted in 1866.<sup>62</sup> This stark difference between the broad potential liability of corporate agents and non-existent liability of prosecutors might be due to the fact that prosecutors have weaker positive incentives than private sector agents and therefore are more likely to be deterred from socially valuable conduct by the risk of liability. What-

---

<sup>56</sup> Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 449 (2009).

<sup>57</sup> See *id.* at 447 (proposing a nuanced but complex prosecutorial compensation system).

<sup>58</sup> Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 215 (2005).

<sup>59</sup> *Id.* at 233.

<sup>60</sup> See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that state prosecutor was absolutely immune from civil suit for initiating and pursuing criminal prosecution within the scope of his duties); BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM*, 182-85 (2011) (discussing prosecutors' absolute immunity from suit); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 53-54 (2005).

<sup>61</sup> See 18 U.S.C. § 242 (West 2011).

<sup>62</sup> Johns, *supra* note 60, at 71.

ever the explanation, the absence of sanctions leaves errant prosecutors less constrained than corporate agents.

#### 4. Monitoring and Discipline

Prosecutors may be subject to several types of discipline apart from civil or criminal liability. First, prosecutors are subject to political discipline either by direct election or by political appointment. But political discipline may be less effective because much of the social costs of misguided prosecutions are imposed on a small number of criminal defendants. Voters may care about unfairness, particularly since they also face a risk of mistreatment.<sup>63</sup> This may be particularly true for marginally criminal white-collar prosecutions, which threaten even law-abiding people. On the other hand, because such white-collar prosecutions are concentrated against corporate executives, the middle class might be even further removed from these crimes than from workaday crimes such as drug possession. In other words, political discipline of prosecutorial over-reaching may be a function of social class.

Second, the grand jury is a potential constraint against frivolous criminal litigation. The grand jury protects defendants from having to incur the expense of defending against unfounded accusations.<sup>64</sup> However, this is only a rough screen given the ex parte nature of the proceeding and grand jurors' tendency to rely on prosecutors.<sup>65</sup>

Third, prosecutors are monitored by their superiors in the prosecutor's office, who may have incentives to protect the office's long-term reputation. However, there are several limitations on such administrative monitoring. High-level state and federal prosecutors are vulnerable to "revolving door" incentives and may be even more subject to political pressure for prosecutions and convictions than career staffers.<sup>66</sup> Civil service job protection also limits prosecutors' ability to discipline their subordinates, who may claim that the discipline is politically motivated.<sup>67</sup> Further, some pros-

---

<sup>63</sup> See Gordon & Huber, *supra* note 41, at 336 (noting that "citizens would like to avoid being unfairly singled out for punishment. At the same time, they would also like to live without fear of being victimized by the criminal acts of others.").

<sup>64</sup> See David K. Kessler, *Constructive Amendments 2* (Aug. 5, 2010) (Working Paper Series), available at <http://ssrn.com/abstract=1627445> (noting the function of grand jury in forcing a preliminary prosecutorial showing in order to protect against malicious or unfounded prosecutions).

<sup>65</sup> It has been said that a good prosecutor could indict a ham sandwich. Perhaps the main constraint provided by a grand jury is that only a good prosecutor can indict a ham sandwich.

<sup>66</sup> See *supra* text accompanying notes 36 and 39.

<sup>67</sup> For example, the George W. Bush Administration faced charges of political motivation in connection with its 2006 firings of several U.S. attorneys. See U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at

ecutorial misconduct can be hard to detect, such as failures to disclose exculpatory evidence to defendants. These factors help explain the almost total lack of internal discipline of prosecutors despite substantial indications of prosecutorial misconduct.<sup>68</sup>

Fourth, prosecutors are subject to potential discipline under attorney ethics rules. However, evidence of prosecutorial misconduct is hard to come by.<sup>69</sup> To be sure, “prosecutorial misconduct” may include simple mistakes that justify reversal but do not warrant severe sanctions. But the minimal frequency of internal and external discipline at least indicates that even serious mistakes are not punished.

Fifth, courts can punish misconduct by sanctioning or censoring prosecutors or by dismissing a case. Courts exercised these powers in recent corporate crime cases, including the Broadcom, Reyes, and KPMG cases discussed above. Again, however, such discipline is likely to be rare.<sup>70</sup> Many federal judges were themselves prosecutors<sup>71</sup> and therefore are likely to sympathize with their successors. Moreover, judges have the same difficulty evaluating prosecutors’ conduct as they do second-guessing the business judgment of corporate directors.

The deficiencies in the incentives of existing monitors of prosecutorial misconduct suggest potential gains from adding to the mix a public ombudsman, who would have better incentives. A public ombudsman positioned in prosecutors’ offices could be insulated from political pressures and might not be as susceptible as a prosecutor to “revolving door” motiva-

---

[www.justice.gov/oig/special/s0809a/final.pdf](http://www.justice.gov/oig/special/s0809a/final.pdf). The resulting publicity and investigation may have impeded even clearly non-politically motivated discipline of U.S. attorneys during this period.

<sup>68</sup> See Bibas, *supra* note 56, at 446 n.16 (citing 1999 study by the Chicago Tribune finding no evidence of public sanctions following 381 reversed convictions resulting from prosecutorial misconduct and 1998 study by the Pittsburgh Post-Gazette finding few prosecutors punished for failing to turn over exculpatory evidence); Brad Heath & Kevin McCoy, *Federal Prosecutors Likely to Keep Jobs after Cases Collapse*, USA TODAY (Dec. 10, 2010, 2:03 PM), [http://www.usatoday.com/news/washington/judicial/2010-12-08-prosecutor\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-12-08-prosecutor_N.htm). See also, Richman & Stuntz, *supra* note 9, at 610 (noting lack of discipline of U.S. attorneys by the Department of Justice).

<sup>69</sup> See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001) (finding that discipline of prosecutors is infrequent); THE CENT. FOR PUB. INTEGRITY, 2003 ANNUAL REPORT (2003), available at [www.publicintegrity.org/assets/pdf/2003\\_CPI\\_Annual\\_Report.pdf](http://www.publicintegrity.org/assets/pdf/2003_CPI_Annual_Report.pdf) (finding more than 2000 cases of prosecutorial misconduct since 1970 leading to appellate findings of harmful error but disciplinary action in only 44 cases and two disbarments); Brad Heath & Kevin McCoy, *States Can Discipline Federal Prosecutors, Rarely Do*, USA TODAY (Dec. 8, 2010, 11:04 PM), [http://www.usatoday.com/news/washington/judicial/2010-12-09-RW\\_prosecutorbar09\\_ST\\_N.htm](http://www.usatoday.com/news/washington/judicial/2010-12-09-RW_prosecutorbar09_ST_N.htm) (finding only six prosecutors disciplined by the states in search of American Bar Association records since 1997).

<sup>70</sup> See Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice”*, 13 CORNELL J.L. & PUB. POL’Y 167, 185-89 (2004) (noting that federal courts rarely impose discipline for federal prosecutorial conduct that violates internal Department of Justice guidelines).

<sup>71</sup> See *supra* text accompanying note 36 (noting that a significant percentage of U.S. attorneys become judges).



tions. An ombudsman embedded in the prosecutors' office would have access to critical institutional knowledge and the opportunity for timely intervention in case selection and management.

However, an additional monitor might not achieve the desired result. A lone representative of the public would face significant resistance from highly motivated prosecutors who ultimately control critical information. Also, powerful ombudsmen could cripple beneficial investigations because of their political ambitions or incomplete information.

A related possibility is to more clearly separate the functions of investigating possible crimes and prosecuting the claims that have been discovered. This could involve rejecting task forces like those organized in the wake of major events, of which the Enron task force is a notorious example. Integrating these functions may yield benefits such as leveraging specialized knowledge. However, these benefits may be offset by the tendencies of task forces to see the crimes they were commissioned to find and yield to political pressure or "revolving door" temptations. Referring the findings of the investigative body to a separate prosecutor would force review of the initial decision and therefore provide some check on any agency costs and behavioral biases of both offices.<sup>72</sup>

## 5. Market or Reputational Penalties

Prosecutors, like corporate agents, have incentives to act consistently with society's interests even without legal monitoring mechanisms. Prosecutors must be concerned about their reputations because they interact with defendants' lawyers and judges throughout their careers, whether in private or public practice. While prosecutors could advance their careers by aggressive behavior that wins cases, they might instead suffer professionally if the tactics backfire and they lose the case. In this respect, the revolving door from the prosecutor's office to a judgeship, elected office, or private practice<sup>73</sup> can act as a positive incentive.

While market discipline of prosecutorial conduct has an effect on prosecutors' behavior, the effect is almost certainly less than that for corporate agents. The key difference is that while citizens have only the "voice" or political method of objecting to prosecutors, shareholders have the "exit" option regarding corporate investments.<sup>74</sup> Shareholders have many invest-

---

<sup>72</sup> See Nuno Garoupa, Anthony I. Ogus & Andrew Sanders, *The Investigation and Prosecution of Regulatory Offences: Is There an Economic Case for Integration?*, 70 CAMBRIDGE L.J. (forthcoming 2011) (discussing the related issues in the analogous context of formal separation of these functions in Europe).

<sup>73</sup> See *supra* note 36 and accompanying text.

<sup>74</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

ment opportunities, and robust securities markets ensure that market prices swiftly reflect news of agents' cheating. However, investors and managers have less opportunity to avoid costs imposed by federal prosecutors.

### III. PROSECUTORIAL AGENCY COSTS AND CORPORATE CRIMINAL LIABILITY

Corporate criminal prosecutions face agency costs that are at least as great as, if not greater than, the agency costs found in the firms they target. Prosecutors hold great power and have incentives to misuse this power. They are also less disciplined by markets, institutions, and liability rules than are corporate agents. The result is misguided and mismanaged prosecutions that are costly both for taxpayers and firms. This Part examines some possible reforms that could address this problem.

#### A. *Increasing Constitutional Constraints on Prosecutors*

Prosecutors derive much of their power from the high costs that defendants must pay to fully utilize the adversary system. A possible response is to help the adversary system police prosecutors by reducing the asymmetry in prosecutors' and defendants' financial burdens. The KPMG case showed that the Fifth and Sixth Amendments and restrictions on prosecutors' power could protect against interfering with contracts for indemnification, insurance, and advancement by using them as negative factors in sentencing.<sup>75</sup> It is not clear, however, how far to take this approach.<sup>76</sup> It is impracticable to read into the Sixth Amendment a right not only to counsel but also to a defense that can match the government's resources.

Even assuming the practicality of adjusting the balance of power between prosecutors and defendants, the ideal balance is still unclear. The government often needs defendants' cooperation in corporate criminal cases in order to prove liability. These cases turn on facts that are often uniquely within defendants' control, particularly facts regarding mens rea. If criminal prosecutions of corporate agents benefit society by deterring corporate misconduct, then procedural rules and constitutional rights should not unduly undermine their effectiveness. However, as discussed below, these social benefits must be balanced against the prosecutorial agency costs they entail.

---

<sup>75</sup> See *supra* text accompanying note 31.

<sup>76</sup> See generally Ribstein, *supra* note 1.

### B. *Changing Prosecutors' Incentives*

The revolving door and the politics of corporate crime arguably motivate prosecutors to cut ethical corners in order to bring and win prosecutions of high-profile corporate agents. One way to address prosecutorial agency costs is to weaken these pressures and thereby encourage prosecutors to weigh more heavily the costs of prosecutorial misconduct.

Blocking prosecutors' routes into lucrative law firm jobs is one possible approach. Ex-prosecutors might be barred from transitioning into criminal defense work for a certain period after leaving the government, analogous to private sector non-compete agreements.<sup>77</sup> This would at least decrease the present value of revolving-door benefits from prosecutorial decisions. It would also encourage prosecutors to stay on the job and give the government the benefit of their guidance, continuity, and long-term concern for the office's reputation.

However, the costs of stopping the revolving door may outweigh the benefits. Barring prosecutors from private practice would make it harder to recruit competent attorneys willing to work for government wages, thereby reducing the quality of the prosecutorial candidate pool. Prosecutors who cannot exit into the private sector may be more receptive to political pressures which, as we have seen, can be just as socially costly as market pressures. Moreover, the revolving door can have positive incentive effects in subjecting prosecutors to the discipline of public opinion.

### C. *Changing Corporate Liability Rules*

The best way to fix prosecutorial agency costs may be to change the nature of their cases themselves by reducing the criminalization of corporate conduct, and particularly of corporate agency costs. Rather than attempting to resolve the extensive debate on the efficiency of imposing criminal liability on firms and their agents, lawmakers should include prosecutorial agency costs in policymaking decisions. The following are some possible strategies.

#### 1. Reducing Agent Liability and Penalties

The inherent nature of corporate agents' crimes encourages prosecutorial abuse. There is only a vague line between criminal and non-criminal

---

<sup>77</sup> Ethical rules restrict non-competition agreements in private law practice. See MODEL RULES OF PROF'L CONDUCT R. 5.6 (2004). However, public interest concerns with prosecutorial incentives arguably outweigh the arguments for ensuring client choice of counsel and commodifying law practice that support the application of this rule in private practice.

conduct in this context, partly because there is much less consensus here than with other areas of criminal law on the norms that underlie criminal liability. Moreover, the public does not always appreciate the economic and business considerations underlying corporate agents' conduct as well as it appreciates the considerations underlying other areas of the criminal law. Laymen understand what is wrong with rape or murder better than they do the intricacies of the Generally Accepted Accounting Principles. The practical difficulty of proving exactly what agents did wrong further complicates liability in this context.

These problems pose challenges for prosecuting corporate agents. So far the law's response has been to give prosecutors the tools necessary to prosecute these difficult cases, including broad liability standards. Such liability, however, increases both prosecutors' discretion and the potential for error.

An alternative to giving prosecutors broad liability standards is to change the standards for establishing liability in cases involving corporate agents to address the factors that contribute to prosecutorial agency costs. This may include higher mens rea standards<sup>78</sup> or prosecutorial reliance on clear rules rather than on vague conduct standards such as honest services mail fraud.<sup>79</sup> Such changes might unacceptably reduce deterrence. The following discussion makes a more limited point that the standards of corporate agent liability should take into account the prosecutorial agency costs in connection with prosecuting this liability.

Prosecutorial agency costs may justify reducing the penalties for corporate agent misconduct. Draconian sentences like those given to Jamie Olis<sup>80</sup> help prosecutors pressure defendants into accepting guilty pleas, even in some cases for crimes they did not commit.<sup>81</sup> Sentences based on supposed damage caused collectively by corporate actors may not even approximate individual defendants' culpability. As with liability standards, policymakers should take prosecutorial agency costs into consideration in deciding the appropriate penalty.

The law also could reduce prosecutorial pressure by clarifying the enforceability of agents' contracts for indemnification and advancement.<sup>82</sup>

---

<sup>78</sup> See *supra* text accompanying note 15.

<sup>79</sup> See 18 U.S.C.A. § 1346 (West 2011).

<sup>80</sup> See *United States v. Olis*, No. H-03-217-01, 2006 WL 2716048, at \*1 (S.D. Tex. Sept. 22, 2006) (opinion on resentencing).

<sup>81</sup> See *United States v. Nicholas*, No. SACR 08-00139-CJC, SACR 08-00140-CJC, 2009 U.S. Dist. LEXIS 117895, at \*2 (C.D. Cal. Dec. 15, 2009) (dismissing sentence with prejudice after a finding of not guilty).

<sup>82</sup> See Wallace P. Mullin & Christopher M. Snyder, *Should Firms Be Allowed to Indemnify Their Employees for Sanctions?*, 26 J.L. ECON. & ORG. 30, 40 (2010).

This would fill the existing gap left by loose constitutional protection.<sup>83</sup> However, this approach is unlikely to be very effective on its own. Firms may have good reasons not to fully finance their agents' criminal defense and even stronger reasons than the general public to ensure that their agents are prosecuted for misconduct. Moreover, as long as firms are subject to prosecution they will have an incentive to cooperate with government prosecutions of their agents. No matter how explicit the policy against courts' taking this type of cooperation into account in charging and sentencing firms, the firm's cooperation can influence prosecutors' and courts' decisions. This influence suggests that enforcement officials may need to take the more drastic step discussed in the next section.

## 2. Reducing the Scope of Corporate Agent Criminal Liability

Another potential approach to mitigating prosecutorial agency costs is to reduce the scope of corporate agents' criminal liability for acts committed in the course of their employment.<sup>84</sup> Firms arguably have sufficient incentive, power, and information to properly allocate responsibility among their agents for harms for which corporations are responsible. Moreover, there are many problems associated with fixing criminal responsibility on corporate agents. There may be some situations in which, despite these problems, criminal liability of agents is appropriate. However, determining when to impose such liability should take into account the agency costs involved in prosecuting the offenses.

It is important to keep in mind that agents' criminal liability is only one of several mechanisms that constrain agency costs in firms.<sup>85</sup> For example, third parties can sue corporate agents for torts they commit, and shareholders can sue corporate agents derivatively through the corporation and directly under state and federal fraud laws. Agents' criminal liability not only fails to compensate potential plaintiffs; it might even complicate the pursuit of civil liability. Even if agents' criminal liability deters wrongdoing, it may also deter socially valuable risk-taking. Again, the question for present purposes is not whether criminalizing agency costs is overall good policy, but what role prosecutorial agency costs should play in this policy decision. The availability of other sanctions indicates that criminal liability is a close call in this context, and therefore that prosecutorial agency costs may matter at the margin.

---

<sup>83</sup> See, e.g., *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd* 541 F.3d 130 (2d Cir. 2008) (ruling that the government's pressure violated defendants' Fifth and Sixth Amendment rights).

<sup>84</sup> For a discussion of corporate liability, see *infra* Part III.C.3.

<sup>85</sup> See *supra* Part I.B.

Finally, it is worth noting that entity-only liability is currently the law's approach to prosecutorial agency costs. Prosecutors face little individual responsibility for misconduct.<sup>86</sup> Prosecutors' offices may face supervisory liability for prosecutorial misconduct, but only under limited circumstances.<sup>87</sup>

### 3. Reducing or Eliminating Corporate Criminal Liability

If agents can be criminally prosecuted, prosecutorial agency costs support reducing the scope of corporate criminal liability.<sup>88</sup> Prosecutors can pressure potentially liable corporations to cut their employees loose and make them more vulnerable to prosecution in exchange for lower penalties or deferred prosecution agreements.<sup>89</sup>

Reducing corporate criminal liability would not be enough in itself to protect agents from cost-based pressures to plea bargain. As discussed above, corporations have incentives apart from plea bargaining not to fund agents' defense costs. Moreover, an inherent problem with corporate agent prosecutions is that the corporate context magnifies the scale of the agent's conduct, prosecutors' incentives to prosecute it and the costs of defense. Thus, the resource asymmetry between the government and criminal defendants is likely to remain even if the government cannot pressure corporations into supporting their employees. Nevertheless, reducing corporate criminal liability could significantly reduce prosecutors' leverage and the agency costs that accompany this power.

## CONCLUSION

The agency costs associated with prosecution of corporate crime are at least as consequential as those related to the crimes being prosecuted. This matters for at least two reasons. First, combining analyses of the two types of agency costs sheds light on how to appropriately constrain excessive or misguided corporate prosecutions. Second, prosecutorial agency costs bear on the extent to which the conduct of corporate agents should be criminalized at all given the weak constraints on prosecutorial conduct in enforcing

---

<sup>86</sup> See *supra* Part II.C.

<sup>87</sup> See *Connick v. Thompson*, 131 S. Ct. 1350 (March 29, 2011) (holding against office's liability for failing to disclose exonerating evidence in absence of finding of policy of deliberate indifference to defendants' constitutional rights as shown by a pattern of misconduct).

<sup>88</sup> See Copland, *supra* note 29, at 10-11 (arguing that corporations should be held criminally liable only for the most serious and intentional crimes and only where specifically provided by statute). The focus of this discussion is not on the precise scope of corporate criminal liability but on how prosecutorial agency costs bear on the scope of criminal liability.

<sup>89</sup> See *id.* at 1, 8.

the criminal law. The criminal laws may provide significant deterrence of corporate agents' misconduct that other mechanisms cannot fully supply. However, we should not assume that it is socially valuable to use the criminal laws to ensure totally loyal corporate agents unless we are ready to demand similar perfection from our prosecutors.





OVERCRIMINALIZATION 2.0:  
THE SYMBIOTIC RELATIONSHIP BETWEEN PLEA BARGAINING  
AND OVERCRIMINALIZATION

*Lucian E. Dervan\**

In discussing imperfections in the adversarial system, Professor Ribstein notes in his article entitled *Agents Prosecuting Agents*, that “prosecutors can avoid the need to test their theories at trial by using significant leverage to virtually force even innocent, or at least questionably guilty, defendants to plead guilty.”<sup>1</sup> If this is true, then there is an enormous problem with plea bargaining, particularly given that over 95% of defendants in the federal criminal justice system succumb to the power of bargained justice.<sup>2</sup> As such, while Professor Ribstein pays tribute to plea bargaining, this piece provides a more detailed analysis of modern-day plea bargaining and its role in spurring the rise of overcriminalization. In fact, this article argues that a symbiotic relationship exists between plea bargaining and overcriminalization because these legal phenomena do not merely occupy the same space in our justice system, but also rely on each other for their very existence.

To illustrate the co-dependent nature of plea bargaining and overcriminalization, consider what it would mean if there were no plea bargaining. Novel legal theories and overly-broad statutes would no longer be tools merely for posturing during charge and sentence bargaining, but would have to be defended and affirmed both morally and legally at trial. Further, the significant costs of prosecuting individuals with creative, tenuous, and technical charges would not be an abstract possibility used in determining how great of an incentive to offer a defendant in return for pleading guilty. Instead, these costs would be a real consideration in determining whether justice is being served by bringing a prosecution at all.

Similarly, consider the significant ramifications that would follow should there no longer be overcriminalization. The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the

---

\* Assistant Professor of Law, Southern Illinois University School of Law, and former member of the King & Spalding LLP Special Matters and Government Investigations Team. Special thanks to the Professors Ellen Podgor and Jeffrey Parker, the *Journal of Law, Economics & Policy*, the Law & Economics Center at George Mason University, the National Association of Criminal Defense Lawyers, and the Foundation for Criminal Justice. Thanks also to my research assistant, Elizabeth Boratto.

<sup>1</sup> See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

<sup>2</sup> U.S. SENTENCING COMM'N, 2009 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2010), available at <http://ftp.uscc.gov/ANNRPT/2009/FigC.pdf>.

invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.

As these hypothetical considerations demonstrate, plea bargaining and overcriminalization perpetuate each other, as plea bargaining shields overcriminalization from scrutiny and overcriminalization creates the incentives that make plea bargaining so pervasive. For example, take the novel trend toward deputizing corporate America as agents of the government, as illustrated in the case of Computer Associates.<sup>3</sup>

In 2002, the Department of Justice and the Securities and Exchange Commission began a joint investigation regarding the accounting practices of Computer Associates, an Islandia, New York-based manufacturer of computer software.<sup>4</sup> Almost immediately, the government requested that Computer Associates perform an internal investigation.<sup>5</sup> As has been noted by numerous commentators, such internal investigations provide invaluable assistance to the government, in part because corporate counsel can more easily acquire confidential materials and gain unfettered access to employees.<sup>6</sup> Complying with the government's request, Computer Associates hired an outside law firm.<sup>7</sup> What happened next was both typical and atypical:

Shortly after being retained in February 2002, the Company's Law Firm met with the defendant Sanjay Kumar [former CEO and chairman of the board] and other Computer Associates executives [including Stephen Richards, former head of sales,] in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, Kumar and others did not disclose, falsely denied and otherwise concealed the existence of the 35-day month [accounting] practice. Moreover, Kumar and others concocted and presented to the company's law firm an assortment of false justifications,

---

<sup>3</sup> See *United States v. Kumar*, 617 F.3d 612, 616-19 (2d Cir. 2010); see also *United States v. Kumar*, 2006 WL 6589865 (E.D.N.Y. Feb. 21, 2006); *Indictment, United States v. Kumar* 30-32 (E.D.N.Y. Sept. 22, 2004), available at <http://www.justice.gov/archive/dag/cftf/chargingdocs/compassocs.pdf>.

<sup>4</sup> *Kumar*, 617 F.3d at 617; see also Robert G. Morvillo & Robert J. Anello, *Beyond 'Upjohn': Necessary Warnings in Internal Investigations*, 224 N.Y.L.J. 3 (Oct. 4, 2005).

<sup>5</sup> *Kumar*, 617 F.3d at 617.

<sup>6</sup> See, e.g., Morvillo & Anello, *supra* note 4 ("Corporate internal investigations have become a potent tool for prosecutors in gathering evidence against corporate employees suspected of wrongdoing."). Though outside the scope of this article, another phenomenon leading to the growth of overcriminalization in white collar criminal cases is the lack of aggressive defense strategies. Where the government can secure convictions and concessions with mere threats, they have the ability to launch more investigations with wider reaches using the same resources. See, e.g., Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1 (quoting a Washington, D.C.-based defense attorney as saying, "An internal investigation has to be an absolute search for the truth and an absolute capitulation to the government.").

<sup>7</sup> Morvillo & Anello, *supra* note 4.

the purpose of which was to support their false denials of the 35-day month practice. Kumar and others knew, and in fact intended, that the company's law firm would present these false justifications to the United States Attorney's Office, the SEC and the FBI so as to obstruct and impeded (sic) the government investigations.

For example, during a meeting with attorneys from the company's law firm, the defendant Sanjay Kumar and Ira Zar discussed the fact that former Computer Associates salespeople had accused Computer Associates of engaging in the 35-day month practice. Kumar falsely denied that Computer Associates had engaged in such a practice and suggested to the attorneys from the company's law firm that because quarterly commissions paid to Computer Associates salespeople regularly included commissions on license agreements not finalized until after end of quarter, the salespeople might assume, incorrectly, that revenue associated with those agreements was recognized by Computer Associates within the quarter. Kumar knew that this explanation was false and intended that the company's law firm would present this false explanation to the United States Attorney's Office, the SEC and the FBI as part of an effort to persuade those entities that the accusations of the former salespeople were unfounded and that the 35-day month practice never existed.<sup>8</sup>

The interviewing of employees by private counsel as part of an internal investigation is common practice and few would be surprised to learn that employees occasionally lie during these meetings. Further, information gathered during internal investigations is often passed along to the government in an effort to cooperate.<sup>9</sup> What was uncommon in the Computer Associates situation, however, was the government's response to the employees' actions. Along with the traditional host of criminal charges related to the accounting practices under investigation, the government indicted Kumar and others with obstruction of justice for lying to Computer Associates' private outside counsel.<sup>10</sup> According to the government, the defendants "did knowingly, intentionally and corruptly obstruct, influence and impede official proceedings, to wit: the Government Investigations," in violation of 18 U.S.C. § 1512(c)(2).<sup>11</sup>

This novel and creative use of the obstruction of justice laws, which had recently been amended after the collapse of Enron and the passage of Sarbanes-Oxley, was ill-received by many members of the legal establishment.<sup>12</sup> Echoing the unease expressed by the bar, Kumar and his codefend-

---

<sup>8</sup> Indictment, *supra* note 3.

<sup>9</sup> Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution: DOJ Views False Statements to Private Attorney Investigators as a Form of Obstruction of Justice*, 28 NAT'L L.J. S1 (July 24, 2006) ("[I]nternal investigations—and the practice of sharing information gathered during those investigations with federal regulators and prosecutors—have become standard practice . . .").

<sup>10</sup> Indictment, *supra* note 3.

<sup>11</sup> *Id.* at 38.

<sup>12</sup> As examples, consider the following excerpts from news articles regarding the case:

Defense lawyers and civil libertarians are expressing alarm at the government's aggressive use of obstruction of justice laws in its investigation of accounting improprieties at Computer Associates . . . .

. . . . The Computer Associate executives were never accused of lying directly to federal investigators or a grand jury. Their guilty pleas were based on the theory that in lying to Wachtell

ants challenged the validity of the government's creative charging decision and filed a motion to dismiss.<sup>13</sup> The district court responded by denying the defendants' motion without specifically addressing their concerns about the government's interference with the attorney–client privilege.<sup>14</sup> The stage was thus set for this important issue to make its way to the U.S. Court of Appeals for the Second Circuit (and, perhaps, eventually the U.S. Supreme Court) for guidance on the limits of prosecutorial power to manipulate the relationships among a corporation, its employees, and its private counsel.

Unfortunately, despite the grave concerns expressed from various corners of the legal establishment about the obstruction of justice charges in the Computer Associates case, the appellate courts never had the opportunity to scrutinize the validity of this novel and heavily criticized expansion of criminal law. The government's new legal theory went untested in the Computer Associates case due to the symbiotic relationship between plea bargaining and overcriminalization. Three of the five defendants in the Computer Associates case pleaded guilty immediately, while Kumar and Stephens gave in to the pressures of plea bargaining two months after filing their unsuccessful motion to dismiss before the district court.<sup>15</sup> As might be expected in today's enforcement environment, not even the corporation challenged the government in the matter. Computer Associates entered into a deferred prosecution agreement that brought the government's investigation to an end.<sup>16</sup> Once again, overcriminalization created a situation where the defendants could be charged with obstruction of justice and presented

---

[the law firm representing Computer Associates] they had misled federal officials, because Wachtell passed their lies to the government.

Berenson, *supra* note 6.

While the legal theory of obstruction in these cases may be unremarkable, the government's decision to found these obstruction charges on statements to lawyers is notable as a further example of government actions that are changing the role of counsel for the corporation.

Audrey Strauss, *Company Counsel as Agents of Obstruction*, CORP. COUNS. (July 1, 2004).

The possibility that lying to an attorney, hired by a defendant's employer and acting in a purely private capacity, could lead to criminal charges contributed to growing concern within the criminal defense bar that the government was effectively transforming company lawyers into an arm of the state.

Harkness & LaVerne, *supra* note 9.

<sup>13</sup> See *United States v. Kumar*, 2006 WL 6589865, at \*1 (E.D.N.Y. Feb. 21, 2006).

<sup>14</sup> See *id.* at \*5. The court noted, "An objective reading of the remarks of the Senators and Representatives compels the conclusion that what they plainly sought to eliminate was corporate criminality in all of its guises which, in the final analysis, had the effect of obstructing, influencing or, impeding justice being pursued in an 'official proceeding' . . ." *Id.* at \*4.

<sup>15</sup> *United States v. Kumar*, 617 F.3d 612, 618 (2d Cir. 2010).

<sup>16</sup> *Kumar*, 617 F.3d at 617.

with significant incentives to plead guilty, while plea bargaining ensured these novel legal theories would go untested.

Given the symbiotic existence of plea bargaining and overcriminalization, perhaps the answer to overcriminalization does not lie solely in changing imperfect prosecutorial incentives or changing the nature of corporate liability—it may also lie in changing the game itself.<sup>17</sup> Perhaps the time has come to reexamine the role of plea bargaining in our criminal justice system.

While the right to plead guilty dates back to English common law, the evolution of plea bargaining into a force that consumes over 95% of defendants in the American criminal justice system mainly took place in the nineteenth and twentieth centuries.<sup>18</sup> In particular, appellate courts after the Civil War witnessed an influx of appeals involving “bargains” between defendants and prosecutors.<sup>19</sup> While courts uniformly rejected these early attempts at bargained justice, deals escaping judicial review continued to be struck by defendants and prosecutors.<sup>20</sup>

By the turn of the twentieth century, plea bargaining was on the rise as overcriminalization flourished and courts became weighed down with ever-growing dockets.<sup>21</sup> According to one observer, over half of the defendants in at least one major urban criminal justice system in 1912 were charged with crimes that had not existed a quarter century before.<sup>22</sup> The challenges presented by the growing number of prosecutions in the early twentieth

---

<sup>17</sup> See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011) (proposing to address overcriminalization in the context of corporate liability by changing imperfect incentives and the nature of corporate liability itself).

<sup>18</sup> See Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, A Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 478 (2007) (discussing the rise of plea bargaining in the nineteenth and twentieth centuries); Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978) (“[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.”); see also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1978); Lynn M. Mather, *Comments on the History of Plea Bargaining*, 13 LAW & SOC'Y REV. 281 (1978); John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC'Y REV. 287 (1978).

<sup>19</sup> See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19 (1979) (“It was only after the Civil War that cases of plea bargaining began to appear in American appellate court reports.”).

<sup>20</sup> See *id.* at 19-22. In particular, plea bargaining appears to have grown in prominence because judges and prosecutors began accepting bribes from defendants in return for “plea agreements” that guaranteed reduced sentences. According to Professor Albert Alschuler, “The gap between these judicial denunciations of plea bargaining [in the late nineteenth century] and the practice of many urban courts at the turn of the century and thereafter was apparently extreme. In these courts, striking political corruption apparently contributed to a flourishing practice of plea bargaining.” *Id.* at 24.

<sup>21</sup> *Id.* at 5, 19, 27.

<sup>22</sup> *Id.* at 32.

century accelerated with the passage of the Eighteenth Amendment and the beginning of the Prohibition Era.<sup>23</sup> To cope with the strain on the courts, the symbiotic relationship between overcriminalization and plea bargaining was born:

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.<sup>24</sup>

In return for agreeing not to challenge the government's legal assertions and for assisting in lessening the strain created by overcriminalization, defendants were permitted to plead guilty to reduced charges and in return for lighter sentences.<sup>25</sup> The strategy of using plea bargaining to move cases through the system was effective, as the number of defendants relieving the government of its burden at trial swelled. Between the early 1900s and 1916, the number of federal cases concluding with a guilty plea rose sharply from 50% to 72%.<sup>26</sup> By 1925, the number had reached 90%.<sup>27</sup>

By 1967, the relationship between plea bargaining and overcriminalization had so solidified that even the American Bar Association (ABA) proclaimed the benefits of bargained justice for a system that remained unable to grapple with the continued growth of dockets and the criminal code.<sup>28</sup> The ABA stated:

[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreo-

---

<sup>23</sup> Alschuler, *supra* note 19, at 5, 27; *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 8 (2003).

<sup>24</sup> Alschuler, *supra* note 19, at 27 (citing Nat'l Comm'n On Law Observance & Enforcement, Report On The Enforcement Of The Prohibition Laws Of The United States 56 (1931)).

<sup>25</sup> *Id.* at 29; *see also* Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN ST. L. REV. 1155, 1156-61 (2005) (discussing the relationship between broadening legal rules and plea bargaining); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20 (2001) (discussing the influence of broader laws on the rate of plea bargaining); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.").

<sup>26</sup> Alschuler, *supra* note 19, at 27.

<sup>27</sup> *Id.*

<sup>28</sup> AM. BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Approved Draft, 1968).

ver, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocence.<sup>29</sup>

Interestingly, although plea bargaining had gained widespread approval by the 1960s, the U.S. Supreme Court had yet to rule on the constitutionality of bargained justice. Finally, in 1970, the Court took up *Brady v. United States*,<sup>30</sup> a case decided in the shadows of a criminal justice system that had grown reliant on a force that led 90% of defendants to waive their right to trial and confess their guilt in court.<sup>31</sup>

In *Brady*, the defendant was charged under a federal kidnapping statute that allowed for the death penalty if a defendant was convicted by a jury.<sup>32</sup> This meant that defendants who pleaded guilty could avoid the capital sanction by avoiding a jury verdict altogether.<sup>33</sup> According to *Brady*, this statutory incentive led him to plead guilty involuntarily for fear that he might otherwise be put to death.<sup>34</sup> The *Brady* Court, however, concluded that it is permissible for a criminal defendant to plead guilty in exchange for the probability of a lesser punishment,<sup>35</sup> a ruling likely necessitated by the reality that the criminal justice system would collapse if plea bargaining was invalidated.

While the *Brady* decision signaled the Court's acceptance of plea bargaining, it contained an important caveat regarding how far the Court would permit prosecutors to venture in attempting to induce guilty pleas. In *Brady's* concluding paragraphs, the Court stated that plea bargaining was a tool for use only in cases where the evidence was overwhelming and the defendant, unlikely to succeed at trial, might benefit from the opportunity to bargain for a reduced sentence,<sup>36</sup> a stance strikingly similar to the ABA's at the time.<sup>37</sup> According to the Court, plea bargaining was not to be used to overwhelm defendants and force them to plead guilty where guilt was uncertain:

---

<sup>29</sup> *Id.*

<sup>30</sup> See *Brady v. United States*, 397 U.S. 742 (1970).

<sup>31</sup> Diana Bortek, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1439 n.43 (2004) (citing Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U.L. Q. 1, 1 (2002)) (noting that since the 1960s the plea bargaining rate has been around ninety percent); see also AM. BAR ASS'N, *supra* note 28, at 1-2 ("The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed of this way."). Today, pleas of guilty account for over 95% of all federal cases. See U.S. SENTENCING COMM'N, *supra* note 2.

<sup>32</sup> *Brady*, 397 U.S. at 743.

<sup>33</sup> See *id.*

<sup>34</sup> *Id.* at 743-44.

<sup>35</sup> *Id.* at 747, 751.

<sup>36</sup> *Id.* at 752.

<sup>37</sup> AM. BAR ASS'N, *supra* note 28, at 2.

For a Defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are *conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*<sup>38</sup>

According to the Court, if judges, prosecutors, and defense counsel failed to observe these constitutional limitations, the Court would be forced to reconsider its approval of the plea bargaining system altogether.<sup>39</sup>

This is not to say that guilty plea convictions hold no hazard for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.<sup>40</sup>

Unfortunately, evidence from the last forty years shows that *Brady's* attempt to limit plea bargaining has not been successful. For example, as Professor Ribstein noted, today even innocent defendants can be persuaded by the staggering incentives to confess one's guilt in return for a bargain.<sup>41</sup>

---

<sup>38</sup> *Brady*, 397 U.S. at 752 (emphasis added).

<sup>39</sup> *Id.* at 758.

<sup>40</sup> *Id.* at 757-58. The sentiment that innocent defendants should not be encouraged to plead guilty has been echoed by academics. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003) ("Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158 (2005) (supporting Bibas' statements regarding innocent defendants and plea bargaining).

<sup>41</sup> See Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 295 (1975) ("On the basis of the analysis that follows, I conclude that the pressure on defendants to plead guilty in the federal courts has induced a high rate of conviction by 'consent' in cases in which no conviction would have been obtained if there had been a contest."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949-51 (1992) (discussing plea bargaining's innocence problem); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 39-46 (1984) (discussing innocent defendants and plea bargaining); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1343-44 (1997) ("[T]he results of our research suggest that some defendants who perhaps were innocent, and a larger group who probably would have been acquitted had the case gone to trial, were nonetheless induced to plead guilty."); see also Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("Plea bargaining has an innocence problem."); Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2295-96 (2006) (arguing a partial ban on plea bargaining would assist in preventing innocent defendants



Importantly, this failure of the *Brady* limitation is due in part to the fact that overcriminalization, the phenomenon that initially created swelling dockets and the need for plea bargaining, makes creating the incentives to plead guilty easy by propagating a myriad of broad statutes from which staggering sentencing differentials can be created. All the while, plea bargains prevent these incentives, sentencing differentials, and, in fact, overcriminalization itself, from being reviewed.<sup>42</sup>

Plea bargaining's drift into constitutionally impermissible territory under *Brady*'s express language indicates the existence of both a problem and an opportunity. The problem is that the utilization of large sentencing differentials based, at least in part, on novel legal theories and overly-broad statutes, results in increasingly more defendants pleading guilty. Despite the ever-growing number of Americans captured by the criminal justice system through an increasingly wide application of novel legal theories and overly-broad statutes, these theories and statutes are seldom tested. No one is left to challenge their application—everyone has pleaded guilty instead.

The opportunity is to challenge plea bargaining and reject arguments in favor of limitless incentives that may be offered in exchange for pleading guilty. This endeavor is not without support; *Brady* itself is the guide. By focusing on changing the entire game, it may be possible to restore justice to a system mired in posturing and negotiation about charges and assertions that will never be challenged in court. Such a challenge may also slow or even reverse the subjugation of Americans to the costs, both social and moral, of overcriminalization—plea bargaining's unfortunate mutualistic symbiont.

The great difficulty lies in bringing the problem to the forefront so that it can be examined anew. Who among those offered the types of sentencing differentials created through the use of novel legal theories and overly broad statutes will reject the incentives and challenge the system as a whole? Will it be someone like Lea Fastow?

From 1991 to 1997, Lea Fastow, the wife of Enron Chief Financial Officer Andrew Fastow, served as a Director of Enron and its Assistant Treasurer of Corporate Finance.<sup>43</sup> Although Ms. Fastow was a stay-at-home mother raising two small children in 2001, federal investigators determined that she had known of her husband's fraudulent financial dealings and had

---

from being forced to plead guilty by forcing asset allocation by prosecutors towards only strong cases); Leipold, *supra* note 40, at 1154 ("Yet we know that sometimes innocent people plead guilty . . .").

<sup>42</sup> See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78 (2010) ("The pronounced gap between those risking trial and those securing pleas is what raises concerns here. Some refer to this as a 'trial penalty' while others value the cooperation and support the vastly reduced sentences.").

<sup>43</sup> Michelle S. Jacobs, *Loyalty's Reward—A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 856 (2006).

even assisted him in perpetrating the frauds.<sup>44</sup> In response, the government, which had already indicted her husband, indicted her under a six-count indictment that included charges of conspiracy to commit wire fraud, conspiracy to defraud the United States, money laundering conspiracy, aiding and abetting, and filing a false tax return.<sup>45</sup>

Based on the indictment's allegations, Ms. Fastow faced a possible ten-year prison sentence, but the government was more interested in persuading her to cooperate.<sup>46</sup> As a result, the government offered her a deal.<sup>47</sup> In return for pleading guilty, the government would charge her with a single count of filing a false tax return, which carried a recommended sentence of five months in prison.<sup>48</sup> The deal also included an agreement that Ms. Fastow and her husband, who also intended to plead guilty in return for leniency, would not have to serve their prison sentences simultaneously, thus ensuring their children would always have one parent at home.<sup>49</sup> As the lead prosecutor in the case stated, "The Fastows' children can be taken into account in deciding when Andrew Fastow will begin serving his sen-

---

<sup>44</sup> *Id.* at 856-57.

During the time in question, Andrew Fastow and Michael Kopper created several Special Purpose Entities (SPEs) to hold off-balance sheet treatment of assets held by Enron. . . . Ms. Fastow assisted with concealing the fraudulent nature of two of the SPEs. In both cases, Ms. Fastow accepted "gifts" in her name and in the names of her children, knowing that the gifts were kickbacks. In another instance, the Fastows were attempting to hide the fact that Ms. Fastow's father was used as an "independent" third party of RADR [one of the two SPEs]. When the Fastows realized that the father's ownership would trigger a reporting requirement, they had him pull out of the deal. Ms. Fastow convinced her father to file a false tax return in an effort to continue hiding their involvement in the SPE.

*Id.*; see also Mary Flood, *Lea Fastow in Plea-Bargain Talks; Former Enron CFO's Wife Could Get 5-month Term but Deal Faces Hurdles*, HOUS. CHRON., Nov. 7, 2003, at A1.

<sup>45</sup> Indictment, United States v. Fastow (S.D.T.X. 2003), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/enron/usleafstw43003ind.pdf>.

<sup>46</sup> The ten year sentence is calculated using the 2002 Sentencing Guidelines for fraud. Beginning with a base offense level of six points, Fastow would have received twenty points for a \$17 million loss, and four points for an offense involving more than fifty people. A defendant with no previous criminal history and thirty points has a sentencing range between 97 to 121 months. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2002).

<sup>47</sup> Flood, *supra* note 44, at A1.

<sup>48</sup> See Bruce Zucker, *Settling Federal Criminal Cases in the Post-Enron Era: The Role of the Court and Probation Office in Plea Bargaining Federal White Collar Cases*, 6 FL. COASTAL L. REV. 1, 3-4 (2004).

<sup>49</sup> See Jacobs, *supra* note 43, at 859.

During the renegotiation of the second plea, it was widely reported that Ms. Fastow was interested in a plea that would allow her children to stay at home with one parent while the other was incarcerated, rather than running the risk that both parents would be incarcerated at the same time. The government apparently acquiesced to this request.

*Id.*

tence. There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time.”<sup>50</sup>

For Lea Fastow, the reality of her situation removed any free will she might have had to weigh her options.<sup>51</sup> With two small children at home and the prospect of simultaneous prison sentences for her and her husband, the decision to accept the offer was made for her.<sup>52</sup> As one family friend stated, “It’s a matter of willing to risk less when it’s for her children than she would risk if it were just for herself.”<sup>53</sup> As such, she succumbed to the pressure to confess her guilt and accepted the deal.<sup>54</sup>

Though the judge in the case would force the government to revise its offer because he believed five months was too lenient, Lea Fastow would eventually plead guilty to a misdemeanor tax charge and serve one year in prison.<sup>55</sup> The agreement to confess her guilt in return for a promise of leniency lessened her sentence by nine years and ensured that her children would not be without a parent.<sup>56</sup> As promised, Andrew Fastow was not required to report to prison for his offenses until after his wife was released.<sup>57</sup> As has become all too familiar today, Lea Fastow did not challenge the use of sentencing differentials and bargaining incentives. She did not ask the Supreme Court to examine modern-day plea bargaining against the standards established in *Brady* forty years ago. Just as is true of so many other defendants, she pleaded guilty instead.

And so we wait.

---

<sup>50</sup> Mary Flood & Clifford Pugh, *Lea Fastow Expresses “Regret” at Sentencing; Wife of ex-Enron CFO Faces Year in Prison*, HOUS. CHRON., May 7, 2004, at A19.

<sup>51</sup> See *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (“[T]he question in each case is whether the defendant’s will was overborne at the time he confessed. If so, the confession cannot be deemed ‘the product of a rational intellect and a free will.’”) (internal citations removed).

<sup>52</sup> See Greg Farrell & Jayne O’Donnell, *Plea Deals Appear Close for Fastows*, USA TODAY, Jan. 8, 2004, at 1B (“One of the reasons that Lea Fastow wants to limit her jail time to five months is that she and her husband have two young children, and they’re trying to structure their pleas so they’re not both in jail at the same time.”).

<sup>53</sup> Flood, *supra* note 44, at A1 (“A family friend said Lea Fastow is willing to consider pleading guilty and forgoing a chance to tell her side to a jury because it would be better for her two small children and could ensure they would not be without a parent at home.”).

<sup>54</sup> See Mary Flood, *Fastows to Plead Guilty Today; Feds Now Focus on Skilling, Lay*, HOUS. CHRON., Jan. 14, 2004, at A1 (“The plea bargains for the Fastows, who said they wanted to be sure their two children are not left parentless, have been in limbo for more than a week.”).

<sup>55</sup> Flood & Pugh, *supra* note 50.

<sup>56</sup> See Mary Flood, *Lea Fastow Begins Prison Sentence; Ex-Enron CFO’s Wife Arrives Early to Start 1-year Term*, HOUS. CHRON., July 13, 2004, at A1; Farrell & O’Donnell, *supra* note 52, at 1B (“U.S. District Judge David Hittner told Lea Fastow Wednesday that he refused to be locked in to the five-month prison sentence that her lawyers had negotiated with prosecutors.”).

<sup>57</sup> See Flood, *Lea Fastow Begins Prison Sentence*, *supra* note 56.



CRIMINAL LAW'S UNFORTUNATE TRIUMPH OVER  
ADMINISTRATIVE LAW

*Darryl K. Brown\**

INTRODUCTION

Few topics find more unanimity across the ideological spectrum of criminal law scholars and Washington policy advocates interested in the criminal law than the conclusion that the United States suffers from too much criminal law—although the sentiment seems to be shared by a much smaller portion of legislators, prosecutors and—most worrisomely or tellingly—the public. Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes. The broad coalition that has emerged against excessive criminal law is both impressive and somewhat unlikely.

In part, that breadth of agreement is possible because of differences in emphasis. The groups that have done the most to document in detail the expansion of *federal* criminal law, and to develop arguments that federal crimes constitute excessive and inappropriate use of the criminal label and criminal punishment, are at the conservative end of the political spectrum. The Federalist Society, the Heritage Foundation and, from a libertarian perspective, the Cato Institute have been leading voices on this issue, along with the National Association of Criminal Defense Lawyers.<sup>1</sup> In the legal academy, criminal justice scholars—who probably make up a broader range of political views but certainly include left-of-center perspectives—have taken up overcriminalization as well, though sometimes with a different emphasis, with more attention to state criminal law and to the magnitude of

---

\* O.M. Vickers Professor of Law, University of Virginia School of Law.

<sup>1</sup> See, e.g., *Overcriminalization and the Need for Legislative Reform*, Testimony before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. 2 (2009), available at <http://judiciary.house.gov/hearings/pdf/Thornburgh090722.pdf> (noting interest in overcriminalization from “Heritage Foundation, Washington Legal Foundation, the National Association of Criminal Defense Lawyers, the ABA, the Cato Institute, the Federalist Society and the ACLU”); JOHN S. BAKER JR., MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION, 3 (The Federalist Society for Law and Public Policy Studies 2004); TIMOTHY LYNCH, IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE THE CLASSIC ARTICLE “THE AIMS OF THE CRIMINAL LAW” (Timothy Lynch ed., Cato Inst. 2009); BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 26-27, available at [http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/\\$FILE/WithoutIntentReport.pdf](http://www.nacdl.org/public.nsf/WhiteCollar/WithoutIntent/$FILE/WithoutIntentReport.pdf); TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW (1998); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM, June 16, 2008, at 7-8.

criminal *punishment* in addition to the content of offenses.<sup>2</sup> Arguments regarding excessive punishment, and excessive drug crimes in particular, likewise have garnered much attention from policy centers probably more on the left of the spectrum, such as the Sentencing Project and the Drug Policy Alliance.

Despite these variations on a core basic claim, nearly all agree: American criminal law is in some important respects too expansive according to two sorts of criteria: the kinds of conduct and harm that government ought properly to treat as criminal, and the requirements of crime definitions governments should use even when they address some activity that properly can be criminalized—meaning, most importantly, that crimes should nearly always include a *mens rea* requirement to avoid strict liability. We could also describe these two grounds for complaint as based on the *content*, *scope* or *subject* of criminal law, on the one hand, and the *form* of criminal law on the other.

In one respect, this broad agreement should not be surprising. Overcriminalization is a common problem even in other democracies (hold aside authoritarian states). Perhaps it is a tendency of contemporary industrialized states. In the United Kingdom, for instance, there is a broad scholarly and policy literature on the breadth of criminal law and the tremendous growth of strict liability crimes, perhaps more so than in American federal law.<sup>3</sup>

In another respect, however, the fairly broad agreement on the excessive reach of substantive criminal law might seem unexpected, not only because it is somewhat unusual to have such agreement on such a significant feature of government policy with a history of high political salience, but also because contemporary criminal law is not a drastic departure from the long-standing tradition of American criminal law. American jurisdictions have always expansively employed criminal law in the regulation of both private and commercial life. Why concern has grown in recent years, and not consistently through history, calls for explanation.<sup>4</sup>

A broad consensus of opinion could signal real promise for influencing the political and public debate and for achieving some reforms of the congressional (and state legislative) tendency to criminalize too much and in unprincipled ways. That broad unanimity, however, may obscure important disagreements that hold a potential to undermine the effectiveness

---

<sup>2</sup> Darryl Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 227 (2007); Julie O'Sullivan, *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); see generally DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008) (defending the theory that the penal sanctions should have limits).

<sup>3</sup> See Andrew Ashworth, *Is Criminal Law a Lost Cause?*, 16 L.Q. REV. 225, 227 (2000).

<sup>4</sup> See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 157, 158 (Nov. 1967) (the concern is not of entirely recent vintage; this article provides a classic account from a generation earlier).

of a *de facto* coalition. Differences are notable not only in what parts of criminal law various observers point to as excessive, but also in the reasons for that judgment and the remedies for it. In order to focus my topic here within the broad topic of overcriminalization in this article, I will limit my discussion primarily to arguments about excessive expansion of *federal* criminal law in regulatory settings, and thus I give no attention to the 900-pound gorillas of federal and state criminal law, drug offenses and mandatory sentencing statutes.

Federal criminal law, especially in regulatory contexts, raises distinct claims about overcriminalization. The standard claim assesses criminal law to be excessive simply as *criminal* law, because it exceeds normative boundaries that should restrict criminal law with regard to both subject matter (such as criminalizing only conduct that is sufficiently harmful or risk-creating conduct) and to form (such as mental state requirements). On that view, judging criminal law according to terms of what criminal law ought to be, civil or administrative regulation is unproblematic when governing the same activities. What distinguishes civil from criminal law analytically, is the need for reasons that justify criminal law's graver coercive and judgmental force. Hence, the claim is *over-criminalization* and not, say, *over-regulation* or *over-legalization*.

Federal criminal law, however, raises in some minds another basis for the overcriminalization complaint: some statutes may exceed the proper role and reach of *federal* power. In state law, wide-ranging criminalization is less disputed on the ground that it exceeds a government's authority, due to the traditional breadth of state police power.<sup>5</sup> But for those with a strongly limited view of federal power—a view that has been an influential part of American political dialogue since the Founding Era—some federal statutes are unjustified not only because they are *criminal* law, but because they are *federal* law. Exceeding the proper bounds of *criminal* law may not be the problem; on this view, exceeding the bounds of appropriate *federal* authority is. On this view, federal *civil* regulation of the same activity is likely to be equally problematic.<sup>6</sup> Thus, some crimes are acceptable as state

---

<sup>5</sup> See generally ROBERT NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (providing an account of the traditional understanding of broad police powers to govern economic relations, morals and social order).

<sup>6</sup> For representative judicial statements of limited federal power, see *New York v. United States*, 505 U.S. 144, 155 (1992) (“[N]o one disputes the proposition that ‘[t]he Constitution created a Federal Government of limited powers’ . . .”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457, (1991)); *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937); cf. *Chisholm v. Georgia*, 2 U.S. 419, 435 (1793) (“Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them . . .”). For prominent arguments that the contemporary reach of federal regulatory authority exceeds Congress's limited power, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 317-18, 348-53 (2004); United

law, because they are within a state's police power and accord with norms of criminal law's proper scope and form, but not as federal law.

Of these two forms of criminal law criticism, the first probably takes a more frequent or prominent role than the second with respect to federal criminal law. Recent reports on overcriminalization from the Heritage Foundation and the Federalist Society, for example—groups generally skeptical of many, but not all, claims for expansive federal power—highlight some inappropriate offenses by noting their strict liability form or the seemingly trivial harm that they address.<sup>7</sup> Those complaints about form and scope are grounded in criminal law theory rather than in an account of federal authority.<sup>8</sup>

Insisting on distinct boundaries for criminal law compared to civil has several advantages, not least of which is that it offers some comparatively simple, discrete solutions that could improve a broad swath of criminal statutes with minimal legislative effort, at least compared to whole code revision. But a focus on criminal law norms also severs overcriminalization arguments from more politically contentious arguments of the parameters of federal power. Current debates about limits of federal power are serious; they are plainly salient in contemporary political debate and judicial thought, arguably to a degree that was not true in the first half century of the post-New Deal understanding of federal power. But for that reason, the stakes in that debate are necessarily higher, and the chances of achieving restraints on criminal statutes diminish if more is at stake. Below, I develop an argument that a focus on the harms of excessive *criminal* law, rather than a focus on federal power—or with regard to states, the general police power—is a more promising approach to reform. There is much more consensus on criminal law arguments than wider-ranging government-power arguments. Reforms based on commitments that do not affect the parameters of non-criminal regulatory law, leave lawmakers with civil and administrative options for addressing social risks and harms once reform succeeds in reducing inappropriate—and sometimes ineffective—criminal provisions that currently address those topics. Criminal law has been wrongly, yet pervasively extended to regulatory tasks for which civil law mechanisms are fully adequate. Reforming expansive criminal statutes with remedies that hold aside questions of the legitimate scope and form of the administra-

---

States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1388 (1987).

<sup>7</sup> WALSH & JOSLYN, *supra* note 1, at 14-15; BAKER, *supra* note 1, at 17-31.

<sup>8</sup> On the other hand, the concern with the federal nature of federal criminal law is expressed in other criticisms. See, e.g., TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, *supra* note 1. Timothy Lynch, *A Smooth Transition: Crime, Federalism and the GOP*, in *THE REPUBLICAN REVOLUTION TEN YEARS LATER* 213 (2004). Further, one might infer that exclusive attention in studies to federal criminal law, but with scant attention to federal drug crimes, mandatory sentencing or other issues outside regulatory contexts, implies a concern with the sovereign that is doing the criminalizing in addition to the specific topics of the criminalization.



tive state improves the odds of achieving those reforms, because they leave policymakers with civil law tools to address regulatory goals in a wide range of contemporary risk-creating activities without criminal law. The goal of reversing legislators' two-centuries-long tendency to adopt criminal law for ordinary regulatory goals in commercial and social life is formidable enough. Bracketing the more contentious arguments about federal power, as the Heritage–NACDL report does more effectively than, the Federalist Society reports, removes the much farther-reaching implications of that debate from the project of achieving moderately scaled but immensely valuable federal criminal law reform.

#### I. HISTORICAL REFERENCE POINTS FOR EXPANSIVE CRIMINAL LAW

State and federal codes contain many more criminal statutes than ever before. But it is almost surely inaccurate to conclude that American statutes criminalize a much broader range of private, public and commercial activities, or a larger proportion of those activities, than ever before. A quick look back at state criminal codes of the early nineteenth century reveals a collection of statutes that were immensely more intrusive into private and family life, and non-commercial public behavior (analogous to today's "public order" offenses), than exists now. With no meaningful vagueness doctrine in that era, the broad reach of these statutes that mattered to everyday decisions of how to live one's life was uncertain. The story regarding criminal regulation of economic and commercial activity and property usage was much the same. Specific offenses defined particulars such as the time and location at which goods could be sold plus prohibitions on resale of goods (particularly, engrossing and regrating)—regulations aimed at monopoly and price-fixing strategies—as well as weights, measures and purity. Criminally enforced regulations defined the materials permissible for building structures in cities, the proximity of buildings to roads, and limits on sizes of private wharfs. The broad reach of public nuisance law, also criminally enforced, defined parameters for such essential commercial practices as damming streams, releasing noxious fumes from coal burning or tanneries, and other restrictions on private land use.<sup>9</sup> Labor was regulated in part by criminalizing the status of being un-

---

<sup>9</sup> See generally NOVAK, *supra* note 5 (history of state and local commercial regulation in the first half of the nineteenth century); JOHN A.G. DAVIS, A TREATISE ON CRIMINAL LAW 309-12 (1838) (describing criminal nuisance doctrine in early nineteenth century that covered commercial activity and environmental damage such as "damming up a stream" and "rendering the air . . . impure and noxious.").

employed under general crimes of vagrancy, and by widespread prohibitions on Sunday work.<sup>10</sup>

Historians have well documented much of this early tradition of regulatory practice, which occurred mostly through state and local governments through most of the nineteenth century. Two points are notable for present purposes. One is the long-standing use of *criminal* law for a wide range of *malum prohibitum* regulatory goals.<sup>11</sup> Wide-ranging regulation was largely uncontroversial, at least to government's power; debates on the wisdom of particular regulations evolved over time. But pre-modern governments had little legal or institutional infrastructure for civil sanctions beyond common law actions and little regulatory capacity by bodies resembling administrative agencies. As a result, the use of criminal law for market and property regulation, already familiar by the time Blackstone described it in the fourth volume of his 1789 *Commentaries*, expanded to become a primary means to enforce commercial and public safety, as well as private morality, regulation. When the Supreme Court in *Morissette v. United States* surveyed the history of "public welfare" criminal statutes that lacked the mental state requirement that is ubiquitous in common law crimes, in 1952 it found a century-long tradition of such offenses, which came on top of the common law crimes Blackstone described.<sup>12</sup>

The second point is implicit in the first: there were few who understood criminal law in the early nineteenth century as properly bound by normative limits that would delegitimize its expansive reach into either moral or commercial regulation; such a limit on criminal law's scope had no substantial advocates, even when arguments against limited *government* were gaining acceptance and sophistication. The unquestioned state police power to regulate for the public good foreclosed any question of whether government, as opposed to the *federal* government, could regulate nearly any subject. The absence of a criminal law theory that would limit punishment's use for regulatory purposes meant that there was little dispute about the use of *criminal law* to regulate.

In light of that long tradition of criminal law as a dominant regulatory form, it is less surprising to find contemporary regulation that incorporates criminal law into administrative law's regulatory frameworks. On the other hand, criticism of regulatory crimes is a comparatively recent development. One might trace its roots back at least 140 years, if we take John Stuart

---

<sup>10</sup> See GWENDOLYN MINK & ALICE O'CONNOR, POVERTY IN THE UNITED STATES AN ENCYCLOPEDIA OF HISTORY, POLITICS AND POLICY 755 (2004); Sara S. Beale, *From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 749 n.5.

<sup>11</sup> It bears noting that the moral assessment of conduct changes over time, so that some offenses that are clearly viewed as *malum prohibitum* regulations now carried substantial moral implications in earlier eras. Blackstone described the price-fixing offenses of engrossing and regrating in strong moral terms. 4 WILLIAM BLACKSTONE, COMMENTARIES \*158-59.

<sup>12</sup> *Morissette v. United States*, 342 U.S. 246 (1952).

Mill's 1869 *On Liberty* to signal a shift toward the view that criminal law should be more constrained than it traditionally had been. Mill's central idea that criminal law should be limited only to activities that cause harm, however, is not a principle well suited to restrain regulatory offenses. Mill primarily targeted crimes of private moral conduct. The harm principle, in fact, works rather well to *justify* many regulatory offenses. Mill gave little attention to commercial regulation crimes, but his views were not always unfavorable. He endorsed prohibition of facilities used for gambling, for example; even Mill refused to criminalize gambling itself. Further, in the same era, nineteenth century common law courts began to develop and require proof of mental state requirements, rather than strict liability that are familiar to modern observers.<sup>13</sup> Those developments—with others, including Kant's earlier nineteenth century writings that developed the view that criminal law should be reserved for the morally culpable—became the groundwork for a range of twentieth century views to limit criminal law by some combination of specifying limits on its instrumental purposes and according to the offender's moral blameworthiness. But those shifting views, adopted mostly among scholars and—to varying degrees—courts, rather than legislators and the public, had limited influence on changing the tradition of criminal law to regulate a wide range of commercial activity.

That is surprising for several reasons. One is that restrictions on criminal law are consistent with an enduring tradition that embraces the broader principle of limited government power that Mill placed his views on criminal law within, particularly as a means to protect individual liberty. *That* tradition continues to have substantial rhetorical force in popular and political debates, even if its success in influencing decisions on particular choices of government programs is uneven and contested. Yet a commitment to a limited role for criminal law as part of that broader skepticism of government power has never developed the same political resonance or salience. Another reason is that dramatic shifts occurred with regard to other established exercises of government power from the nineteenth century to the twentieth, such as First Amendment doctrine, which developed into powerful limits on criminalization of speech, expressive conduct and association. Criminalization of private, consensual behavior also lost such favor in the later twentieth century that legislatures led the repeal of long-standing offenses in criminal codes.<sup>14</sup> Why not then, also a shift toward a more constrained role elsewhere for criminal law in popular thinking or policymaking?

---

<sup>13</sup> *Regina v. Faulkner*, [1877] App. Cas. 13 is a standard example of the turning point in common law interpretations of "malice" from a broad meaning of "wickedness" to a more specific mental state requirement of intentional wrongdoing and negligence as to harmful consequences.

<sup>14</sup> We have seen dramatic reassessments in the other direction as well, such as the Founding generation's disapproval (at least among Jeffersonian Republicans) of a standing Army. See, e.g., Andrew J. Polsky & William D. Adler, *The State in Blue Uniform*, 40 *POLITY* 348 (2008).

A final reason for surprise is practical. A familiar account is that federal criminal law grew as the administrative state grew, because both depended on an expanded conception of federal authority, particularly under the Commerce Clause, that became widely accepted in the 1930s.<sup>15</sup> That makes sense to the degree that both trends required the same constitutional and ideological foundation. Holding aside that the fact that federal criminal law and its enforcement infrastructure began significant growth a quarter-century earlier, that growth of criminal law with civil regulation was not inevitable, and *ex ante*, one might not even predict it. The modern administrative state and wide-ranging civil regulation, at the state as well as federal levels, could have been a means to *displace* much criminal law regulation of the same activities. One might expect that nineteenth century criminal punishments targeting price-fixing and market monopoly activities—or limits on permissible building materials, or extension of wharfs into navigable waters—might have been displaced with the advent of effective civil-regulatory sanctions. The regulatory state provided non-criminal alternatives to criminally enforced regulation. Yet instead of civil sanctions and administrative remedies replacing criminal ones, criminal law continues to duplicate and supplement administrative law so pervasively in regulatory regimes, that criminal offenses accompany civil ones, and willful violations of civil regulation are routinely and innumerably defined as crimes.<sup>16</sup>

## II. IDEAS OF GOVERNMENT LEGITIMACY AND THE ‘MYTH OF THE WEAK STATE’

### A. *Commitment to, and Understanding of, Limited Federal Power*

To understand why criminal law did not follow such a path and contract—especially for regulatory crimes—as the federal government grew and the administrative state developed, consider a familiar ideological disposition in American politics and culture that has long inclined American, especially federal, policy against bureaucratic administration and yet, perversely, helps explain why American policy makers have long reached for criminalization in place of other forms of regulation. Criminal law thrives both *because* of skepticism about federal power and because of criminal law’s special status as a form of government authority, which carves out for it an exception to the broader general skepticism of government, including federal, power. In significant part, I suggest, federal criminal law is so ex-

---

<sup>15</sup> Timothy Lynch offers a brief account of this standard story. *See generally* LYNCH, *supra* note 1; Lynch, *supra* note 8.

<sup>16</sup> *See, e.g.*, Carbon Capture and Storage Early Deployment Act, H.R. 1689, 111th Cong. (1st Sess. 2009).

pansive *because* ideological support for the federal regulatory state is comparatively thin.

In popular debate and classic political theory, the federal government is understood as one of limited powers.<sup>17</sup> The U.S. Constitution enumerates powers of the federal government and reserves un-enumerated powers to state governments. That structure for federal power arose from, and continues to sustain, a significant political sentiment skeptical of, or resistant to, national authority and bureaucracy, at least in the abstract and in some specific forms.<sup>18</sup> Although states' sovereignty is significantly limited as well by the Constitution, the limited nature of *state* power has resulted in much less resonance in political debate.<sup>19</sup> The federal government's powers stand in contrast to the general police power retained by the states, which is the traditional source of authority for criminal law.<sup>20</sup>

Long-standing American skepticism of national government power resulted in a distinctive form of institutional arrangements and policies that, in historical and political science scholarship, is captured in the long-standing description of American government as a "weak state." Compared especially to European national governments, American government has a long-standing history of weaker central government bureaucracy, and more governance occurs through state and local institutions that generally are under less direct control of national authority than their provincial counterparts in European states.

The characterization of federal governance as a weak state has been challenged in recent decades by a generation of political science and histor-

---

<sup>17</sup> By classical political theory, I especially mean the Federalist Papers. *See, e.g.*, THE FEDERALIST NO. 45 (James Madison) ("The powers delegated to the federal government by the proposed Constitution are few and defined. Those which are to remain in the State governments are numerous and indefinite.").

<sup>18</sup> *See, e.g.*, Lynch, *supra* note 1; Lynch, *supra* note 8 (emphasizing 10th Amendment and the limited nature of federal power).

<sup>19</sup> Implicit limitations include the dormant Commerce Clause restriction of state regulation of commerce as well as limits on states' power to impede travel across state borders. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-31, 638 (1969); Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 37 (1868). For express limitations, see U.S. CONST. art. I, § 10 (limitation on states' ability to issue currency, enter treaties, tax imports and exports, and engage in war).

<sup>20</sup> *See, e.g.*, United States v. Lopez, 514 U.S. 549, 566-67 (1995) (Congressional power under the Commerce Clause does not create "plenary" or "general" police power); *Id.* at 584 (Thomas, J., concurring) ("The Federal government has nothing approaching a police power."); United States v. Dewitt, 9 U.S. 41, 44 (1869) (holding Congress's power under the Commerce Clause does not include the power to enact "a regulation of police"). *But see* United States v. Lopez, 514 U.S. 549, 604-05 (1995) (Souter, J., dissenting) ("[I]t was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level," citing 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 729-730 (rev. ed. 1935)). An excellent account of the original understanding of police power and its evolution in the United States is MARKUS DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT, (2005).

ical scholarship.<sup>21</sup> This work, in a variety of ways, disputes the weak-state characterization. One argument challenges the equation of a strong state with the Weberian model of strong centralized bureaucracies familiar in Europe. American federal authority and policymaking have been substantial since the early nineteenth century in a range of settings—from settlement of the West to regulation of trade and markets—but that power was most often not exercised by direct regulation or coercive command, which was true of much U.S. *state* authority.<sup>22</sup> Instead, it commonly took the form of delegation or cooperation with state governments and private associations, or less conspicuous policies to incentivize and subsidize local government or private activities with tax incentives or federal grants and the expansion of the corporate form to limit private liability. Endeavors typically understood as primarily private action, in fact often depended on costly exercises of direct federal power. Western settlement and commercial expansion is an example. The federal government directly acquired western land, secured market access through critical transportation routes and ports, deployed the federal Army to suppress Indian resistance, and later managed commercial timber in national forests in cooperation with private firms.<sup>23</sup>

For present purposes, the point to note is that this long-standing ideological disfavor of centralized national government and the emphasis on the limited nature of federal power endures. Moreover, it has the effect of engendering popular and historical understandings that obscure the critical role of federal support for, or regulation of, private activities that could not have occurred to the same degree without the federal role.<sup>24</sup> This ideologi-

---

<sup>21</sup> See, e.g., STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982); BRIAN BALOGH, *GOVERNMENT OUT OF SIGHT* (2009); William Novak, *The Myth of the 'Weak' American State*, 113 AM. HISTORICAL REV. 752 (2008); Elisabeth Clemens, *Lineages of the Rube Goldberg State: Building and Blurring Public Programs*, in *RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE* (Ian Shapiro, et al. eds., 2006).

<sup>22</sup> See BALOGH, *supra* note 21 at 45-53. By the time Jefferson's presidency began in 1801, the Federalist view of a directly energetic federal government had lost to the republican vision that disfavored an "active," "energetic or "consolidated" federal government (and even a standing army) that resembled European states and that set in motion the continuing American tradition of such disapproval.

<sup>23</sup> *Id.*

<sup>24</sup> Brian Balogh emphasizes the American tendency to reinterpret national or personal achievements as achievements of private markets and individual initiative and to downplay or forget critical governmental roles in making those achievements possible. His examples range from private pensions and private health insurance, which are encouraged by regulatory interventions and subsidies through tax and labor policy rather than simple private-market purchases, to development of the western states, where the federal government provided essential security against American Indians and later actively managed vast national forests in association with lumber interests and vast pasture lands in cooperation with rancher organizations. See BALOGH, *supra* note 21. For a more general account of government involvement in economic development across nations, see RAGHURAM G. RAJAN, *FAULT LINES* 46-66 (2009) (employing "managed capitalism" as a label for substantial government assistance to industries, commonly employed by developing countries).

cal disposition shaped the *forms* of federal governance, but it did not prevent substantial exercises of authority that can fairly be described, even before the 1930s, as a weak or minimalist state. Yet, it nonetheless sustains a widely held skepticism of direct regulatory intervention particularly with regard to the federal administrative state, and especially of economic and commercial activity. This account deepens the explanation for the familiar claim that Americans have long been ideologically conservative but “operationally” liberal. Conservative here is defined by a commitment to a relatively smaller state engaged in minimal regulation of markets and private commercial activities, while liberalism denotes easier approval of many federal policies involving such intervention.<sup>25</sup>

### B. *The Role and Legitimacy of Criminal Law in Weak-State Ideology*

The puzzle here is why federal criminal law has not been subject to the same skepticism and disfavor. How does disfavor of government power not produce a weak *criminal* law infrastructure compared to European states? It may well be, instead, that generic disfavor of government power instead *leads to* excessive use of criminal law as regulation. The claim seems perverse; criminal law is a distinctly forceful, coercive and censoring state power that should be met with grave suspicion in a state that gives priority to individual freedom from government power.<sup>26</sup> Yet there are reasons to suspect that the enduring commitment to a limited federal government championed by some of the Founders,<sup>27</sup> later supported by Mill’s classical liberal account, and resonant in contemporary American politics, plays a role in the federal government’s enduring practice of regulating through criminal law.

The first reason points to the special status of criminal law as a power of any government. Even advocates of limited government—at any level,

---

<sup>25</sup> See ALBERT CANTRIL & SUSAN DAVIS CANTRIL, *READING MIXED SIGNALS: AMBIVALENCE IN PUBLIC OPINION ABOUT GOVERNMENT* (1999); LLOYD A. FREE & HADLEY CANTRIL, *THE POLITICAL BELIEFS OF AMERICANS: A STUDY OF PUBLIC OPINION* (1967); Christopher Ellis & James A. Stimson, *Pathways to Ideology in American Politics: The Operational-Symbolic “Paradox” Revisited* (2007) (unpublished manuscript *available at* <http://www.unc.edu/~jstimson/Pathways.pdf>); Christopher Ellis & James A. Stimson, *On Symbolic Conservatism in America* (Sept. 1, 2007) (unpublished manuscript *available at* <http://www.unc.edu/~jstimson/apsa07F.pdf>). Recognition of the contrast goes back much earlier. See also Albert Shaw, *The American State and the American Man*, 51 *CONTEMP. REV.* 695 (1887).

<sup>26</sup> Cf. Nicola Lacey, *Legal Constructions of Crime*, in *OXFORD HANDBOOK OF CRIMINOLOGY* 179, 193 (Mike Maguire et al., eds.) (2002) (discussing the challenge of legitimacy for criminal law in liberal states).

<sup>27</sup> The implied exceptions are Federalists such as Washington, Adams and especially Hamilton, who championed a strong federal government, and Republicans such as Madison who endorsed certain forms of strong federal power as a limitation on state legislation that he distrusted. See generally GORDON S. WOOD, *REVOLUTIONARY CHARACTERS* (2006).

state or national—endorse and defend *some* core functions of government, and criminal law always makes that list. Ensuring safety, security and social order is a government’s first task,<sup>28</sup> and criminal law is, or is perceived as, essential for those goals.<sup>29</sup>

While even strong libertarian accounts concede a need for some forms of regulation, a disposition toward limited government power, and skepticism of the efficacy of policy interventions, result in criminal law’s counterparts, such as civil regulation and spending on specific policy programs holding an ideologically weaker, more disfavored position. Civil regulation, especially at the federal level, does not enjoy a quite the same legitimacy status as criminal law. I mean this only as a political and policy claim, not as a matter of legal doctrine. Federal regulation, whether civil or criminal, is largely grounded in the Commerce Clause, and judicial review treats criminal and civil statutes equivalently under that doctrine. If that is so, then criminal law gains a subtle advantage over civil regulation and other policies targeted to harm or risk reduction outside the undisputed core of what counts as “commerce,”<sup>30</sup> despite the fact that the civil-criminal distinction does not matter in Commerce Clause doctrine, or that civil and criminal sanctions are often alternative means to address the same problems.<sup>31</sup> And this legitimacy gap has endured in political discourse despite several decades of the modern administrative state, when criminal law has expanded right along with civil regulation.<sup>32</sup>

Despite a general disposition among a significant segment of Americans for limited government as a presumptive ideal or constitutional mandate, and a more particular skepticism of federal civil regulation, American policy makers and the public nonetheless continuously find a range of specific topics they conclude requires government action: protection of even

---

<sup>28</sup> See, e.g., ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

<sup>29</sup> Interestingly, a standing federal army was not thought to be essential, or even desirable, by many Founders—a view unimaginable now. This was a key commitment of the Jeffersonian Republican Party that contrasted with the Federalists’ (notably Hamilton’s) support for federal standing army and navy. To be sure, even the Jeffersonians endorsed the constitutional grant of power to the federal government to *raise* armies, and they did not object to state militias, arguing for a period the infeasible view that state militias could serve the role of a federal military. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC 1789-1815*, 196-97, 267, 292 (2009). Yet the Founding generation voiced no complaint on the expansive scope of criminal law that regulated private morals, social behavior and commercial or market activity as noted above.

<sup>30</sup> For an overview of disputes about the meaning of “commerce” in the U.S. Constitution, see Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010).

<sup>31</sup> This is not to say civil and criminal regulations are always fully interchangeable. Most notably, criminal law has a distinct ability to express condemnation for blameworthy conduct that civil sanctions do not.

<sup>32</sup> Exceptions in legal academia are scholars such as Timothy Lynch and Randy Barnett who (among others) argue for a narrow understanding of federal authority for both civil and criminal law.



small harms to public lands,<sup>33</sup> duplication of copyrighted material, a wide range of commercial practices (pricing practices, marketing or health care fraud, trademark and other intellectual property infringement, monopolization),<sup>34</sup> information disclosure to capital markets, environmental protections, and individuals' choices to engage in risky personal behavior such as recreational drug use. These are plausible examples of American policy's tendency to manifest its operational liberalism even in a context of philosophical conservatism. They exceed at least some narrow visions of limited government—or weak state—authority, especially federal authority.

Further, all these activities are regulated by criminal offenses and are commonly cited as examples of overcriminalization. We might take policymakers then, to rely on criminal law's legitimacy in order to buttress justifications for regulatory policies that otherwise might be more contested and contentious. Criminal law may serve to help legitimize accompanying civil regulation as well, on the view that the subject of regulation is sufficiently wrongful and injurious as to merit *criminal* sanction. American policy may turn to criminal law too often then, because of an enduring ideological reluctance to employ lesser, civil forms of government regulation. Skepticism of the lesser power perversely encourages resort to the greater power.

While grounded in well-developed historical and political-scientific accounts, I concede this speculative story is hardly incontrovertible. One could tell a story instead of an enduring American moralism that leads policymakers to more readily impose criminal law's censorious judgments of blameworthiness on modest regulatory violations, or an American affinity for harsh punitive sanctions over other remedies and policy options.<sup>35</sup>

---

<sup>33</sup> See 16 U.S.C. §§ 4302(1), 4302(5), 4306(a)(1), 4306(b) (2006) (offense to disturb a cave on federal land).

<sup>34</sup> Examples are seemingly infinite. See 18 U.S.C. §§ 24(a), 669, 1035, 1347, 1518 (2006) (federal health care fraud offenses); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL §§ 9-42.000, -43.000, -44.000 (1997) (describing considerations in choosing between civil and criminal remedies); 18 U.S.C. §§ 1831-1837 (2006); see also U.S. ATTORNEYS' MANUAL § 9-59.100 (1997) (describing civil and criminal remedies for economic espionage); 29 U.S.C. § 216 (2006) (criminal and civil penalties for violations of fair labor standards); 30 U.S.C. § 801 (2006) (the Mine Safety and Health Act provides for enforcement by civil and criminal penalties, 30 U.S.C. § 820, and by other civil and administrative enforcement methods); 45 U.S.C. § 152 (2006) (civil and criminal penalties for violations of Railway Labor Act); 7 U.S.C. § 195 (2006) (defining felony offense for deceptive pricing practices among firms in certain markets); 7 U.S.C. §§ 192, 193 (2006) (defining prohibitions and civil liability); 18 U.S.C. § 2320 (2006), and 15 U.S.C. § 1501 (2006) (criminal and civil remedies for trademark counterfeiting); GENERAL ACCOUNTING OFFICE, INTELLECTUAL PROPERTY: FEDERAL ENFORCEMENT HAS GENERALLY INCREASED, BUT ASSESSING PERFORMANCE COULD STRENGTHEN LAW ENFORCEMENT EFFORTS, app. II (2008), available at <http://www.gao.gov/new.items/d08157.pdf> (noting felony statutes and civil sanctions governing a wide range of intellectual property infringements).

<sup>35</sup> For an account of the Americans' distinct preference for harsher penal sanctions over European states, see JAMES Q. WHITMAN, HARSH JUSTICE 14-15 (2005) (suggesting the American predilection derives from tension between autonomy and state governments).

Those stories are not mutually exclusive with this one, but taking them as dominant explanations leaves a less obvious route for reducing America's pervasive federal regulatory crimes. If the legitimacy story is persuasive, by contrast, two avenues for reform and contraction of criminal law present themselves. The first focuses on strengthening the limits of criminal law as criminal law, and options for that strategy are surveyed in the next Part. The second option, developed in Part IV, focuses on federal power and suggests an approach to overcriminalization that engages the enduring debate over federal power: reaffirming the post-New Deal account of federal regulatory power ensures that policy makers have a range of non-criminal powers and policy tools with which to address the wide range of risks and harms that regulatory crimes now target. A contraction of criminal regulatory law could then be accompanied by adjustments in civil mechanisms as needed for routine regulatory endeavors. That would leave perennial debates over the prudence of specific regulations, and periodic ones over state or federal authority as the proper location for those regimes, to be fought on their own terms.

### III. A SURVEY OF POSSIBLE SOLUTIONS GROUNDED IN CRIMINAL LAW THEORY

The sprawling, internally contradictory, substantively excessive, federal criminal code has been in need of an overhaul for decades, but Congress's last best effort at comprehensive revision ended without success in the 1970s.<sup>36</sup> Legislative projects of that breadth are always difficult to accomplish, and criminal law reform has a smaller natural constituency than other broad policy projects. But even putting hopes for such wholesale reform aside, several simpler, smaller-scale strategies exist for substantially improving federal criminal law. Scholars and policy advocates already have developed a set of plausible options for redressing the problem of state and federal legislatures simply supplying too much ill-conceived criminal law. Several remedial measures would go a long way toward restraining the excessive reach of the criminal statutes now on the books as well as reducing the prospect of future enactment of poorly drafted, overly expansive or redundant offenses. What follows is a brief canvassing of most of those ideas coupled with some brief assessment of each.

---

<sup>36</sup> For an account of the National Commission on Reform Federal Criminal Laws (Brown Commission), see Louis Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 1977 DUKE L.J. 171, 175-88 (describing the Commission's work and some problems it encountered).

A. *Culpability Terms, Lenity, and Priority for Specific Offenses*

1. Presumption for Culpability Requirements

One of the most worrisome forms of excessive criminal liability, especially in federal law, is strict liability. As recent studies have documented in considerable detail,<sup>37</sup> Congress has enacted, and continues to propose, criminal statutes that lack any culpability term. The tradition of strict liability for the class of “public welfare offenses” into which most regulatory crimes fall well-established, and is distinct from common law crimes, for which *mens rea* is presumed.<sup>38</sup> Many, but hardly all, prominent descriptions of that category of offenses by the Supreme Court emphasize the comparatively light punishments such crimes carry, which imply that strict liability offenses are appropriate, and presumed to be intended by Congress, only with regard misdemeanor offenses. The justification for the absence of a mental state requirement is stronger with respect minor offenses that carry minimal sanctions and stigma. Yet the federal code is replete with felony offenses that contain no mental state requirement,<sup>39</sup> and courts have been inconsistent in their decisions whether to imply culpability terms in such cases, in part because poor legislative drafting poses significant interpretive challenges.

This problem with a large set of offenses could be reformed with a single statutory provision modeled on Model Penal Code (MPC) § 2.02.<sup>40</sup> Section (3) of that provision provides a default standard of culpability—recklessness—for all elements of all offenses that lack a specified culpability requirement. Its companion provision, subsection (4), states that a mental state requirement specified or presumed for a statute shall apply to all elements of a statute “unless a contrary purpose plainly appears” from that

---

<sup>37</sup> Baker, *Revisiting*, *supra* note 1, at 1-2, 6-7; BAKER, MEASURING, *supra* note 1, at 4, 10-11; WALSH & JOSLYN, *supra* note 1, at 1-10.

<sup>38</sup> *Morissette v. United States*, 342 U.S. 246, 254-55 (1952).

<sup>39</sup> For one collection of strict liability federal offenses added between 1997 and 2003, see BAKER, MEASURING, *supra* note 1, at 23-31 (citing 7 U.S.C. §§ 195, 221, 2009aa-1, 2009bb-1, 4504; 18 U.S.C. §§ 43, 476, 1014, 1204, 1905; 36 U.S.C. § 509; 40 U.S.C. §§ 8103, 14309; 47 U.S.C. § 231; 49 U.S.C. §§ 46313, 46503, 46504, 46505).

<sup>40</sup> For one version of this proposal, see Brian W. Walsh, *Enacting Principled, Nonpartisan Criminal-law Reform: A Memo to President-Elect Obama*, CHANGE WE CAN BELIEVE IN (The Heritage Found. D.C.), Jan. 9, 2009, at 2-3, available at <http://heritage.org/Research/Reports/2009/01/Enacting-Principled-Nonpartisan-Criminal-Law-Reform-A-Memo-to-President-elect-Obama> (suggesting a default criminal-intent for criminal statutes without an express culpability requirement and a requirement, comparable to Model Penal Code § 2.02(4), that mental state requirement be applied to all material elements of the criminal offense; also advocating codification of rule of lenity as a rule of statutory construction).

statute's language.<sup>41</sup> Scholars and others have widely endorsed a provision of this sort as a partial remedy for federal criminal law.<sup>42</sup>

Congress would likely want to modify the MPC provision modestly to accommodate special features of criminal law. Jurisdictional elements are typically interpreted as strict liability elements, and mental state requirements for those elements indeed usually serve interest in identifying culpability.<sup>43</sup> The federal equivalent to subsection 2.02(4) then, might exclude such elements from the culpability presumption.

Less satisfactorily, Congress might accommodate its—and the Court's—nearly century-long tradition of strict liability regulatory *misdemeanors* by limiting the application of the mental state presumption to that class of low-level offenses. The MPC recommends otherwise; it requires *mens rea* for every grade of criminal offense. Further, the argument for mental elements in misdemeanors is probably stronger in the federal regulatory context than in the state law settings that the MPC had in mind, because most regulatory misdemeanors are paired with (or based upon) regulations backed by civil sanctions that can address harmful conduct and achieve the same instrumental goals as misdemeanor convictions without proof of a culpable state of mind. That statutory choice might hinge, as a practical political matter, on whether the Justice Department would accede to the loss of strict liability misdemeanors as enforcement options. But even a statute specifying presumptive mental state requirements for felonies would be an important improvement for federal law.

## 2. A Rule of Lenity

Federal courts purport to interpret federal criminal crimes according to a statutory construction canon of lenity, which dictates that ambiguous terms should be construed narrowly so as to contract, rather than expand criminal liability. Yet scholars have amply documented that the purported rule of lenity is honored frequently, at best, inconsistently.<sup>44</sup> Professor Stephen F. Smith has proposed a federal statute that makes clear Congress's endorsement of the lenity rule—an idea recently endorsed by others as well.<sup>45</sup> If, following Congress's specification, courts made a renewed commitment to narrow construction of broad and vague criminal statutes, it

---

<sup>41</sup> MODEL PENAL CODE § 2.02 (1981).

<sup>42</sup> See WALSH & JOSLYN, *supra* note 1, at 27; *cf.* Stephen F. Smith, Congressional Testimony Before H. Subcomm. on Crime, Terrorism and Homeland Sec., (Sept. 28, 2010), at 10-12, 19 (endorsing such a provision and describing its absence as one reason for problems in federal *mens rea* doctrine).

<sup>43</sup> See, e.g., *United States v. Yermian*, 468 U.S. 63, 68-70 (1984).

<sup>44</sup> See, e.g., Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 934 (2005) (arguing that the rule of lenity has effectively become the rule of severity).

<sup>45</sup> See, e.g., WALSH & JOSLYN, *supra* note 1, at 28.

could restrain some of the undue severity of sentences as well as the excessive scope of existing offenses.<sup>46</sup>

### 3. Presumptive Exclusivity of Specific Statutes

Smith also has developed an effective, simple statutory remedy for the common contradiction of the sprawling federal code: multiple statutes that criminalize the same conduct, but assign different punishments. Many times, a broad-reaching general statute, such as mail fraud, covers the same wrongdoing as a more specific, targeted offense. Prosecutors have complete discretion to choose any applicable statute, which means comparable conduct can be, and is, inconsistently treated due to overlapping laws, and defendants receive different punishments for similar conduct.<sup>47</sup> Congress could remedy this by codifying a requirement that prosecutions must proceed exclusively under the more specific of two comparable statutes.<sup>48</sup> That rule would extend a traditional rule of interpretation rule that the more specific statute is not controlled or nullified by the more general one,<sup>49</sup> and it would ensure that prosecutions proceed under the statutes that mostly likely accord with congressional intent regarding both liability and punishment, since Congress is better able to anticipate all applications of specific statutes than general ones.

That statutory remedy would not address the scenario of *United States v. Batchelder*,<sup>50</sup> in which two offenses of equivalent generality, and substantively identical language, carried different minimum sentences. A statute requiring prosecution under the less severe provision, absent a showing for good cause for applying the more severe option, is probably politically infeasible in the American tradition of prosecutorial discretion. But Justice Department policy adopting such a rule for United States Attorneys would not be; current policy now recommends the *opposite* in most cases—charging the most severe provable charge.<sup>51</sup>

---

<sup>46</sup> For a detailed account of federal crimes, within and outside the regulatory context, that result in disproportionate punishment as well as unpredictable scope of liability, see Smith, *supra* note 44, at 897-949.

<sup>47</sup> See *United States v. Batchelder*, 442 U.S. 114, 124-25 (1979).

<sup>48</sup> See Smith, *supra* note 44, at 944. Operationally, defendants would have to raise the issue before trial, bringing a more specific offense to the attention of the judge, who would then determine whether the two statutes are general and specific versions of the same offense. Since defendants self-interestedly would raise the issue only when the more specific offense carries a lesser penalty, prosecutors would effectively remain free to charge under a general statute if *that* offense carried the lesser sentence.

<sup>49</sup> See *id.* at 944 n.163.

<sup>50</sup> *Batchelder*, 442 U.S. at 123-24.

<sup>51</sup> U.S. DEPT. OF JUSTICE, U.S. ATTORNEYS' MANUAL, FEDERAL CHARGING GUIDELINES 9-27.330, available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm).

B. *Limiting Regulatory Offenses to Substantial Harms and Repeat Offenders*

A second avenue for reform looks to Congress to limit the reach of regulatory offenses by different criteria. Ronald Gainer has long proposed a general federal statute that eliminates criminal punishment for breaches of federal regulatory offenses, with specified exceptions where they are most justified, and where political support for a criminal option is likely strongest. That is, criminal prosecution would remain an enforcement response for regulatory violations only when they: (a) cause significant harm; or (b) represent a pattern of repeated conduct.<sup>52</sup> Such a statute would be designed to override, or severely limit, the widely employed statutory form that accompanies many federal regulatory regimes and provides for criminal punishment of any person “who knowingly . . . violates any other [regulatory] requirement set forth in [a specific title] or any regulation issued by the Secretaries to implement this Act, [or] any provision of a permit issued under this Act . . . .”<sup>53</sup>

The question here is whether a single new limiting statute could override dozens of existing ones that create criminal offenses in this manner, at least without specifically referencing them in its text. A single general statute may simply conflict with, rather than impliedly repeal, existing statutes that create regulatory crimes. The better approach is for Congress to commission a study to identify all such criminal provisions within regulatory acts, repeal them in their current form and replace them with provisions containing Gainer’s limits. But as a rule of thumb, the broader the project of legal reform grows, the less politically feasible it becomes to accomplish. In another form however, Gainer’s single statute might more clearly achieve its aim. The statute’s aim would be not so much to repeal regulatory crimes altogether, as to constrain prosecutorial discretion of their enforcement to the most egregious subset of regulatory breaches—and to do so only where alternative civil sanctions exist with which agencies and prosecutors can address lesser wrongdoing. American legislatures and courts rarely restrict prosecutorial discretion, but a statute of this sort is a good candidate for initiating such a limit, and it could thereby achieve Congress’s policy objective without a wide ranging code revision. A critical question is whether the statute, unlike prosecutors’ own charging guidelines, would be enforceable by courts, so that defendants could move for dismissal of charges that do not meet the criteria of repeat offending (documented by prior regulatory response) and substantial harm.

---

<sup>52</sup> Ronald L. Gainer, *Creeping Criminalization and Its Social Costs*, LEGAL BACKGROUNDERS, (Wash. Legal Found., Wash. D.C.), Oct. 2, 1998.

<sup>53</sup> See, e.g., H.R. 3968, 109th Cong. § 506(g)(2) (2005) (environmental regulation).

C. *Procedural Reform: A Law Commission and Legislative Protocols*

A further strategy for restraining *future* passage of poorly conceived criminal statutes targets the legislative process. Walsh and Joslyn's recent Heritage Foundation–NACDL report proposes a strict congressional protocol—frequently ignored in recent years—that all bills creating new criminal liability must go through the House and Senate Judiciary Committees, which possess Congress's greatest expertise with respect to criminal drafting.<sup>54</sup> Smith has endorsed the same idea and also sketched a proposal for a standing Criminal Law Commission: to aid Congress in the careful drafting of criminal legislation; to provide needs assessments for new legislation in light of the myriad sources of liability already enacted; and to prod the agenda of periodic criminal code reform by providing Congress with analysis and proposals for revisions, repeal, or other new legislation.<sup>55</sup> The United Kingdom's Parliament has a standing Law Commission that roughly provides this service across a range of substantive law topics, and a few states such as Virginia, have criminal law commissions that serve something like this function as well; Congress has such a commission already with respect to sentencing.<sup>56</sup>

D. *Substantive Judicial Review of Criminal Law*

A less likely and promising possibility looks to courts for a more rigorous constitutional doctrine of due process (and perhaps cruel and unusual punishment)<sup>57</sup> that would confine legislatures to narrower parameters for criminal law.<sup>58</sup> Federal courts have a long history of finding state and federal criminal statutes unconstitutional, but nearly always under doctrines specific to the statute's subject matter. First Amendment and the privacy doctrines, for example, have been frequent bases for striking down criminal statutes, because Congress cannot regulate a given activity *at all*, not be-

<sup>54</sup> WALSH & JOSLYN, *supra* note 1, at 28-30.

<sup>55</sup> *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the H. S. Comm. on Crime, Terrorism and Homeland Security*, 111th Cong. 62-65 (2010) (statement of Stephen F. Smith, Professor of Law, University of Notre Dame Law School); Smith, *supra* note 44.

<sup>56</sup> Walsh and Joslyn, in fact, propose a smaller-scale version of this same idea: a requirement that Congress: (a) produce its own report prior to passage of any criminal statute identifying such points as the need for the offense and its relation to existing crimes; and (b) require annual reports from the executive branch on new regulations covered by criminalization statutes and the number of agency referrals to the Justice Department for prosecution. See WALSH & JOSLYN, *supra* note 1, at 29-30.

<sup>57</sup> See, e.g., *Robinson v. California*, 370 U.S. 660, 667 (1962) (punishment of the status of drug addiction violates Cruel and Unusual Punishment Clause).

<sup>58</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 581-96 (2001); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995).

cause it cannot do so with *criminal* law. Put differently, the Supreme Court—like the state courts—has never developed constitutional boundaries for substantive criminal law distinct from civil law; there is no constitutionalized criminal law theory.<sup>59</sup> A much smaller number of federal criminal statutes have been held to exceed Congress's power under the Commerce Clause.<sup>60</sup> A few decisions of uncertain provenance that voided criminal statutes on potentially broader grounds have failed to gain wider application.<sup>61</sup> There seems little indication, in short, that courts are willing to take on the task of restricting legislatures' expansive criminal law policy-making. That may be especially true in light of the relative lack of consensus in contemporary American legal and political thought on the scope or legitimacy of courts' constraint of democratic policymaking.<sup>62</sup>

#### E. *Desuetude Rule and Expiration Dates for Criminal Statutes*

A final possibility is a general sunset provision built in to some classes of criminal statutes, or an equivalent doctrine that allows courts to void a statute that means criteria for obsolescence or desuetude.<sup>63</sup> This idea has never caught on with regard to criminal statutes generally, despite regular use of expiration dates on other statutes and legislative policies, in part to force periodic congressional reevaluation.<sup>64</sup> But it is plausible, at least for criminal statutes integrated into federal regulatory schemes, which are subject to periodic change from altered circumstances or political preferences.

---

<sup>59</sup> Douglas Husak's important book *Overcriminalization* can be read as providing a detailed case for such a theory. See DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2008).

<sup>60</sup> See *United States v. Lopez*, 514 U.S. 549 (1995); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In the *Lochner* Era of the late-nineteenth and early-twentieth centuries, criminal regulatory statutes repeatedly failed a due process doctrine targeted at rights of contract and property, but that doctrine was subsequently abandoned by the Supreme Court, though the approach retains its adherents. See, e.g., Randy Barnett, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2005).

<sup>61</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003); *Robinson v. California*, 370 U.S. 660 (1962); *Lambert v. California*, 355 U.S. 225 (1957).

<sup>62</sup> This pattern of judicial restraint regarding legislative crime definition is part of a long tradition of expansive regulatory criminal law dating back first to state statutes widely enacted by the early nineteenth century and then followed by federal criminal regulation later in the nineteenth century. See generally WILLIAM NOVAK, *THE PEOPLE'S WELFARE* (1996) (describing state and local regulation of nineteenth century economic and social life); BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009) (describing federal government intervention in nineteenth century economy); Shaw, *supra* note 25, at 695 (nineteenth century account of regulation).

<sup>63</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). For desuetude discussion, see Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 S.C.T. REV. 27, 29-30, 48-52, 54-60 (finding three primary strands of reasoning in *Lawrence*, one of which was desuetude).

<sup>64</sup> One example is The Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973aa-6 (2006).



In addition to the lack of tradition for such a mechanism in criminal law, the roadblock likely comes from a concern that a legislature could inadvertently fail to renew a desirable offense definition that leaves wrongdoers unpunishable. Yet, that risk is probably marginal for a couple of reasons. First, under the expansiveness of contemporary codes, much conduct gives rise to liability under multiple statutes—in addition to civil sanctions for conduct that faces such regulation—so as long as statutes come up for renewal on staggered terms rather than all at once. The odds of wrongdoing going completely, as opposed to inadequately, unpunished are slim. Nonetheless, that alone provides only a somewhat haphazard assurance of appropriate criminalization. Second, expiration dates would surely incentivize greater legislative monitoring of criminal law and force consideration of law revision on to the legislative agenda, which is the primary purpose. Further, executive branch enforcement officials—the Justice Department and agencies—could be counted on to keep Congress aware of statutes they actually rely on.

To the extent this remedy is aimed at statutes that are outdated or unenforced, it is a solution to the least important part of the problem. While it is better for unnecessary statutes not to clutter the code or tempt the rare prosecutor, the more serious concern is offenses that *are* enforced either sporadically or, because of their excessive substantive reach, unfairly. A desuetude doctrine will not reach *those* offenses. Sunset limitations, and perhaps a desuetude doctrine, on the other hand, should focus legislative attention on their application. Congress might identify a regulatory track record in which civil sanctions have proven consistently adequate for enforcement officials and obviated any need for criminal penalties; it could then let the offenses expire for that reason. Sunset rules also provide a politically convenient way to handle statutes enacted as high-profile symbolic measures. An expiration date could quietly remove from the code an offense Congress either had little expectation of seeing enforced in the first place, or has subsequently learned is unneeded.

#### IV. POLITICAL REMEDY FOR OVERCRIMINALIZATION: EMBRACE THE ADMINISTRATIVE STATE

To these relatively direct and pragmatic strategies for reining in criminal law, I want to briefly offer an additional argument for a farther-reaching, if much more indirect, solution to overcriminalization. This argument returns to the focus on the problem of federal overcriminalization being one of federal law rather than criminal law. I argued above that, as a matter of political theory or ideology but not constitutional law, criminal law enjoys a privileged status of legitimacy compared to civil regulation. Challenges to federal regulation take roughly two forms: a legal argument about limits on government power and policy arguments about the efficacy of regulation. Broadly, the legal argument takes on the last several decades

of constitutional law and insists that the Commerce Clause power, properly understood, does not authorize a federal administrative state nearly as broad as we have had for the last seven or more decades.<sup>65</sup> This argument addresses the basis for federal criminal law, as well as civil regulatory law. This debate is significant, in part because some Supreme Court justices endorse some version of it.<sup>66</sup> But entering the merits of that debate is beyond the scope of this article.

The second form of challenge may be more pervasive and politically resonant. This is the recurrent policy view that regulatory regimes are often inefficient or even perverse, too often yielding fewer benefits than costs. This assessment gains some rhetorical force from its resonance with a commitment to limited government and valorization of free markets.<sup>67</sup> Responding to this second challenge with a generalized endorsement of federal regulatory authority, I want to suggest, is an important component in a broader reform effort to reduce the long-standing congressional tendency to over criminalize, at least in the regulatory arena.<sup>68</sup> The project of reducing regulatory criminalization will be much aided by preserving the capacity of the administrative state for non-criminal prevention, and remedy options to serve the risk-reduction and harm-prevention functions of regulatory criminal law.

In one obvious sense, the familiar and enduring disfavor of federal regulatory intervention has not prevailed—we have a lot of federal regulation. Congress, the executive, and agencies routinely respond to new crises and attendant harms with revised or expanded regulatory strategies. Regulatory reform addressing the 2010 BP oil spill and the Dodd-Frank legisla-

---

<sup>65</sup> See, e.g., BARNETT, *supra* note 6, at 317-18, 348-53; Lynch, *supra* note 8, at xvii; Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987). Another part of the argument challenges some features of the structure of agency and regulatory design, particularly the relative independence of agencies from executive control or the claim that legislative lawmaking is excessively delegated to agencies.

<sup>66</sup> See *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

<sup>67</sup> See *Republicans in Congress, A Pledge to America* 8, 18 (2010), available at [www.pledge.gop.gov](http://www.pledge.gop.gov) (describing negative effects of “excessive federal regulation” and calling for Congressional approval for new regulations “that has an annual cost to our economy of \$100 million or more”). For a counter view on conflict between regulation and free markets, arguing that regulation is essential to and constitutive of markets, see HARCOURT, BERNARD, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

<sup>68</sup> The juxtaposition of excessive federal criminalization in non-regulatory contexts is telling and sobering. Federal criminal law is arguably over-expansive in many contexts—violent crimes and drugs are two examples—because they duplicate state criminal law where state enforcement capacity should be fully adequate. Here, as in regulatory settings, Congress has an alternative to criminal law—state law or civil regulation. But a different story explains the expansion of federal law nonetheless, one that emphasizes federal officials’ seeking credit for responding to salient crime issues and states’ seeking aid in criminal law enforcement from federal rather than state budgets. WORLD HEALTH ORG., *WORLD REPORT ON VIOLENCE AND HEALTH* 89 (2002), available at [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/index.html](http://www.who.int/violence_injury_prevention/violence/world_report/en/index.html).

tion in the wake of the 2008 financial crisis, are only the most recent examples.<sup>69</sup> On the other hand, generalized skepticism of regulation has an incalculable, but notable influence. It affects the form, and more importantly, the efficacy of regulatory regimes including critical ancillary decisions such as funding and staffing of enforcement offices.<sup>70</sup> And it gains force by its common accord with the self-interest of regulated entities who seek less regulation. Alan Greenspan's now infamous concession of error in his faith that private markets could self-regulate and obviate the need for public regulation of capital markets is illustrative.<sup>71</sup>

Yet the demand for regulation in modern economies and societies is pervasive.<sup>72</sup> It is hard to imagine that a significant degree of regulation in some form is not inevitable in the familiar settings—capital markets, workplaces, consumer product safety, the range of endeavors posing environmental risks, and the rest. Most regulated activities, including those with regulations backed by criminal sanctions, and cited as overcriminalization, are not completely innocuous, or at least the consequences that can result from them are not.<sup>73</sup> Moreover, the broad policy trend of recent decades for privatizing various services and activities formerly handled by public entities generates *new* regulatory regimes to monitor and hold accountable private firms and individuals who are allocated public tasks by contract or otherwise.<sup>74</sup> One example, among a myriad of others, are school funding vouchers, which delegate to parents the power to distribute funding to

---

<sup>69</sup> Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010); NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING (2011), available at <http://www.oilspillcommission.gov/final-report>.

<sup>70</sup> See, e.g., Kathleen Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221 at 242-45, 242-43 nn.94-103 (2004) (describing increasingly inadequate for SEC during period of growing caseloads and responsibility in the 1990s).

<sup>71</sup> David Leonhardt, *Greenspan's Mea Culpa*, N.Y. TIMES ECONOMIX BLOGS, (Oct. 23, 2008, 4:00 PM), <http://economix.blogs.nytimes.com/2008/10/23/greenspans-mea-culpa>.

<sup>72</sup> Even dedicated libertarians concede this. See, e.g., Richard Epstein, *Beware the Green Energy Crusade*, DEFINING IDEAS (Feb. 2, 2011), <http://www.hoover.org/publications/defining-ideas/article/65391> (concluding “regulating pollution is necessary” and “cap-and-trade [regulation] worked quite well with respect to sulfur dioxide emissions,” but arguing against that regulatory method to combat global warming).

<sup>73</sup> Paul Rosenzweig offers the example of regulations requiring labels on vehicles transporting hazardous materials such as hydrochloric acid, which are important *inter alia* to alert emergency responders to fight fires with sodium rather than water. Regulations mandating labels serve a critical function; failure to label can seem petty and technical (and whether harm occurs from any given failure to label may be fortuitous). The civil regulation and reasonable sanction for its breach, are justified; the case for criminal liability, especially on first violations, is much weaker.

<sup>74</sup> See JOHN BRAITHWAITE, REGULATORY CAPITALISM: HOW IT WORKS, IDEAS FOR MAKING IT WORK BETTER (2008). For a draft version, see John Braithwaite, *Neoliberalism or Regulatory Capitalism* (RegNet, Working Paper No. 5, 2005) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=875789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875789).

schools but require states to increase monitoring for fraud. If efforts to reduce *criminal law's* regulatory role—such as those outlined in the previous Part—are to succeed, non-criminal regulatory mechanisms must be available to serve these functions. Indeed, there are strong arguments that the weakness or absence of civil regulation often *causes* or *aggravates* criminal regulatory enforcement.

Less serious criminal law in federal regulation mostly supplements and duplicates risk-reduction policies and civil sanctions in regulatory schemes.<sup>75</sup> Yet many regulatory criminal offenses are rarely or never enforced because regulators opt to employ their civil counterparts or negotiate settlements. Civil regulation is commonly the alternative that displaces, or obviates need for, criminal punishment as a regulatory response.<sup>76</sup> But ineffective regulation or weak regulatory enforcement also frequently precedes and indirectly prompts subsequent criminal prosecution, because harmful wrongdoing that could have been prevented by effective regulatory practice that occurred in its absence. That is one large reason firms adopt internal “compliance programs”—private self-regulation—to reduce the odds of criminal and civil violations within the firm, and why federal prosecutors incentivize them to do so through charging and sentencing policies.<sup>77</sup>

Examples easily come to mind: Enron's top officers were prosecuted for conduct that more effective regulation may well have prevented;<sup>78</sup> several years earlier,<sup>79</sup> the collapse of savings and loans in the wake a much-

---

<sup>75</sup> More serious criminal offenses provide criminal sanctions that civil law largely cannot duplicate and thus are mostly reserved for intentional wrongdoing causing substantial harm or risk-creation. See, e.g., Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1091 (2001); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 140 (1998); Kathleen F. Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 WASH. U.L. Q. 71, 85 (1998).

<sup>76</sup> Of course, because civil and criminal offenses serve the same functions, both forms share the same weaknesses—poorly designed or implemented, they can produce suboptimal, perverse and unjust effects. Stories of self-interested avoidance of regulation by industry can be matched by anecdotes of myopic or overzealous enforcement officials, or regulatory schemes insensitive to diverse local conditions. One such tale comes from regulatory policy directed at core criminal conduct. Wayne Logan has documented Congress's and the Justice Department's imposition of costly registration and public notice regimes for sex offenders on state governments despite their strong complaints about marginal effectiveness and high compliance costs. Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993 (2010). The Justice Department also reorients local law enforcement priorities through the incentive of restricted grants to localities for specific projects. See *id.* at 997-99 (describing federal Byrne grants for local law enforcement projects).

<sup>77</sup> See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 54 VAND. L. REV. 1343 (1999); DEPT. OF JUSTICE, GUIDELINES ON PROSECUTION OF CORPORATIONS.

<sup>78</sup> See, e.g., Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 400 (2006); Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 225 (2004).

<sup>79</sup> Brickey, *Enron's Legacy*, *supra* note 78, at 232-34, 242-43 (describing inadequate SEC enforcement capacity in the 1990s and increased criminal enforcement resources starting in 2003 after passage of the Sarbanes-Oxley Act).

changed regulatory environment resulted in criminal convictions as well as a costly public bailout.<sup>80</sup> Studies of environmental crimes enforcement, find patterns of prosecution largely where civil regulation first failed or was deliberately flouted.<sup>81</sup> Conversely, many federal regulatory crimes go completely unenforced, and many others are rarely invoked, because civil regulation (or in some contexts private regulation by industry associations)<sup>82</sup> either prove effective at reducing incidence of risk, and harm-creating conduct, or failing that, civil sanctions and remedies prove adequate in redressing such conduct when it occurs. Civil regulation, sanctions and settlements commonly displace criminal punishment.<sup>83</sup>

Reducing the criminal law of regulation depends, in short, on a sufficient civil regulatory regime to serve the same ends. The fundamentally instrumental goals of regulation can be overwhelmingly achieved with civil and administrative mechanisms, thereby holding criminal law in reserve for culpable, substantially harmful wrongdoing.<sup>84</sup> Debates about form and details are inevitable and important, and the challenges of implementing policy choices in the context of entrenched interests are substantial.<sup>85</sup> The effi-

---

<sup>80</sup> See Kitty Calavita & Henry N. Pontell, *The State and White Collar Crime: Saving the Savings and Loans*, 28 LAW & SOC'Y REV. 297, 298 (1994) (describing the criminal enforcement response to the savings and loan crisis); see also Kitty Calavita & Henry Pontell, "Heads I Win, Tails You Lose": *Deregulation, Crime, and Crisis in the Savings and Loan Industry*, 36 CRIME & DELINQ. 309, 328 (1990).

<sup>81</sup> See, e.g., Kathleen F. Brickey, *Charging Practices in Hazardous Waste Crime Prosecutions*, 62 OHIO ST. L.J. 1077, 1091 (2001); Kathleen F. Brickey, *The Rhetoric of Environmental Crime: Culpability, Discretion, and Structural Reform*, 84 IOWA L. REV. 115, 140 (1998); Kathleen F. Brickey, *Wetlands Reform and the Criminal Enforcement Record: A Cautionary Tale*, 76 WASH. U.L.Q. 71, 85 (1998).

<sup>82</sup> For a broad description of trends and effectiveness in non-governmental corporate regulation, see BRAITHWAITE, *supra* note 74.

<sup>83</sup> Civil settlement should include Deferred Prosecution Agreements negotiated by federal prosecutors which impose various remedial and monitoring plans on firms in lieu of prosecution. For a description, see Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 886-87 (2007).

<sup>84</sup> Offenses may directly target conduct that is innocuous in itself but a legitimate component of effective regulatory regimes. Examples are reporting requirements across a range of regulatory regimes: large financial transactions, workplace safety violations, or toxic substance discharges. Failures to report may involve little or no moral wrongdoing, but prominent scholars such as R.A. Duff make plausible arguments that such mala prohibita offenses can properly be criminal offenses. That is not to say, as an instrumental matter, that criminal rather than civil sanctions *need* to be employed as widely as they currently are. See R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* (2007).

<sup>85</sup> Political development research tells the complicated story of tensions between the constraint of entrenched institutions and familiar policy practices on the one hand, and structural pressures of economic and industrial development that reveal the inadequacy of older (especially state rather than federal based) models of regulation, on the other. See generally RETHINKING POLITICAL INSTITUTIONS: THE ART OF THE STATE (Ian Shapiro et al. eds., 2006) (presenting a collection of essays on how institutions are formed, operated, and changed, both in theory and in practice); Kathleen Thelen, *How Institutions Evolve: Insights from Comparative Historical Analysis*, in *COMPARATIVE HISTORICAL ANALYSIS IN THE*

cacy of state versus federal (and occasionally international) regulatory regimes vary across settings and contexts, as do the wide range of regulatory models, from command-and-control to market-based incentives to cooperative, flexible practices for risk reduction. Despite those ongoing debates, civil law nonetheless should be the default regulatory mode and criminal law the last resort reserved for the subset of culpable regulatory breaches. That priority is less easy to sustain, however, when criminal law carries a legitimizing power to stigmatize its violation as *criminally* wrongful. Civil rule breaches not only the lack of the same justifying stigma; at least at the margins of the forces that shape regulation's content, civil rules additionally bear a burden of categorical skepticism about *regulation* in the abstract. Though criminal law regulates, its distinctive character implicitly removes it from that weakening critique, at least until one studies its details in specific settings. That "legitimacy disparity" diminishes, if only incrementally, the appeal and ability of civil law to exclusively comprise most regulatory regimes; it may also explain the enduring political appeal of attaching criminal sanctions to regulatory regimes.

## CONCLUSION

Ideas challenging the legitimacy or categorical efficacy of federal regulation, like widely shared ideas generally, have real influence in defining policy choices and legal doctrine. In the face of demands for responses to new regulatory problems, as with other policy choices, only some potential options are "thinkable" in the sense of politically plausible.<sup>86</sup> Influencing the bounds of what is thinkable, or what alternatives make it onto the table of public and political debate as acceptable options, are part of the work of policy advocates, think tanks, academics, and other "opinion leaders." The role of ideas, arguments and values generated by professionals in various fields, including economists and lawyers, are familiar contributors to stories of policy development and the broader development of public institutions.<sup>87</sup>

I have suggested here that Americans' relatively greater strain of skepticism and disparagement of regulation, generally has the perverse effect of contributing to perpetuation of a long-established tradition of regulating with criminal law, even after the federal (and in many settings, state) administrative capacity to regulate with non-criminal mechanisms should

---

SOCIAL SCIENCES ch. 6 (James Mahoney & Dietrich Rueschemeyer eds., 2003). See also STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 136, 178 (1982); Elisabeth S. Clemens, *Rereading Skowronek: A Precocious Theory of Institutional Change*, 27 SOC. SCI. HIST. 443, 447-49 (2003).

<sup>86</sup> See Clemens, *supra* note 21, at 188, 190.

<sup>87</sup> See, e.g., SKOWRONEK, *supra* note 85, at 132, 183, 286 (describing the influence of ideas and advocacy by a "small band of economists," "small cadre of bureaucratic entrepreneurs," and "an intellectual vanguard of university-trained professionals").

have displaced much criminal regulatory law. Yet Congress habitually includes duplicative criminal sanctions in regulatory regimes, even though criminal law is rarely necessary in many of those contexts, and is often designed for unjust application. Recognizing that regulatory goals can be, and commonly are, met by non-criminal regulatory law and policy; endorsing the categorical legitimacy of those regimes, might facilitate a broader recognition of criminal law's lesser legitimacy for the instrumental goals of regulation, at least in the absence of significant culpability and fault.

Reducing federal criminal law is a difficult policy ambition—so far, one that has been almost wholly unsuccessful. But emphasizing its inappropriate role in regulation—coupled with the appropriate work of administrative law for those ends—are promising, if not critical components in a strategy for achieving that ambition. Restricting criminal law in the regulatory sphere almost certainly requires an adequate civil regulatory apparatus to take its place in serving its underlying, largely legitimate goals.





PLAYING WITH THE RULES: AN EFFORT TO STRENGTHEN THE  
*MENS REA* STANDARDS OF FEDERAL CRIMINAL LAWS

Geraldine Szott Moohr\*

The culpability element of a criminal offense, the *mens rea*, is usually a necessary component of a crime that must be proven beyond a reasonable doubt. The *mens rea* narrows the scope of criminal liability by requiring the prosecution to prove a necessary state of mind in addition to the defendant's connection to the act itself. In classic common law crimes like theft, even those who cause harm are not guilty if they were simply negligent, as the *mens rea* element would not be satisfied. Yet, in our modern regulatory age, the *mens rea* principle is less likely to narrow criminal liability. *Mens rea* standards have eroded over time, making people subject to punishment who would not otherwise be blameworthy in the classic criminal law sense. In this way, the diminished significance of the *mens rea* element is part of the trend to overcriminalize.

This article, focusing on regulatory and white collar crimes, reviews the role of the current *mens rea* standards in the federal trend to overcriminalize. Strengthening the *mens rea* standards so the element properly separates those who merit punishment from those who do not would eliminate one cause of overcriminalization. To that end, this article also analyzes Congress's role in establishing standards of culpability and evaluates certain proposals aimed at strengthening *mens rea* standards in federal criminal law.

Part I briefly reviews the congressional propensity to criminalize conduct. The issue of whether regulatory criminal provisions are justified is not evaluated in this article; indeed, that question is not subject to an easy or ready answer. Congress can, nevertheless, be faulted for its focus on conduct and its lack of attention to *mens rea* terms. Part II reviews the significance of *mens rea* in criminal law doctrine, surveys culpability standards in federal white collar and regulatory offenses, and highlights current problematic *mens rea* issues. That section concludes that in the federal system, the combination of passing more criminal laws and deferential judicial interpretation has, over time, weakened the role of *mens rea* in determining guilt and distinguishing between criminal and noncriminal conduct.

---

\* Alumnae Law Center Professor of Law, University of Houston Law Center, J.D., American University. I gratefully acknowledge the support of my research by the University of Houston Law Center Foundation. I also thank my research assistant, Lataya Johnson, for her help on this paper and Mon Yin Lung, Associate Director of the University of Houston Law Center Library.

Correcting this problem is Congress's responsibility.<sup>1</sup> In Part III, this article analyzes a new study on the congressional role in defining crimes—*Without Intent, How Congress Is Eroding the Criminal Intent Requirement in Federal Law*—and assesses its recommendations.<sup>2</sup> The study, which analyzed non-violent federal criminal laws that were proposed in the 2005–06 congressional term, demonstrates Congress's responsibility for the erosion of the *mens rea* standard in non-violent crimes. For example, more than half of the offenses surveyed did not include a *mens rea* element that would prevent unjust punishment.<sup>3</sup>

The authors of *Without Intent* recommend that Congress establish new default rules for federal courts to follow when interpreting a statute's *mens rea* element.<sup>4</sup> This article evaluates three of their recommendations in light of current case law, judicial debates, and academic analysis. After identifying the questions and issues these sources raise, this article concludes that the proposed rules are less helpful than they initially appear. If adopted as written, they are unlikely to be effective in achieving the authors' goals. Indeed, they may undermine those goals, threatening to add more indeterminacy to federal *mens rea* standards. My analysis of the default rules identifies these weaknesses, suggesting how they might be amended for greater effectiveness.

## I. OVERCRIMINALIZATION

“Too many crimes, too much punishment.”<sup>5</sup>

This descriptive and succinct definition encapsulates the overcriminalization phenomenon, where legislators have made a broad swath of conduct a matter of criminal law and imposed unduly harsh penalties.<sup>6</sup> Eric Luna

---

<sup>1</sup> See *Dixon v. United States*, 548 U.S. 1, 12 (2006) (“Federal crimes ‘are solely creatures of statute’”) (quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)); *United States v. Hudson*, 11 U.S. 32, 34 (1812) (holding that federal courts may not exercise common law criminal jurisdiction).

<sup>2</sup> BRIAN W. WALSH & TIFFANY M. JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* 1-32 (2010) [hereinafter *WITHOUT INTENT*].

<sup>3</sup> See *id.* at 13 (of 446 offenses, 255 or 57% of them did not include an adequate *mens rea* element).

<sup>4</sup> The report also recommends actions to improve the legislative process. See *id.* at 28-32. Focusing on the *mens rea* issue, my analysis does not evaluate these suggestions.

<sup>5</sup> DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3 (2008).

<sup>6</sup> This article does not directly consider the issue of punishment levels. One might consider that the California prison system is under a federal court order to reduce its prison population until it is able to provide adequate medical care for inmates. See *Coleman v. Schwarzenegger*, U.S. Dist. LEXIS 2711, at \*35-36 (N.D. Cal. Jan. 12, 2010) (ordering the reduction of prison populations in California); Adam Liptak, *Justices Hear Arguments on California Prison Crowding*, N.Y. TIMES, Dec. 1, 2010, at A22; Solomon Moore, *Court Panel Orders California to Reduce Prison Population by 55,000 in 3 Years*, N.Y. TIMES, Feb. 10, 2009, at A12. For an overview of American punishment practices, see JAMES Q.

adds a more normative dimension, defining “overcriminalization” as an “abuse of . . . a criminal justice system” that results in unjustified punishment.<sup>7</sup> Strict liability and lowered *mens rea* standards are aspects of overcriminalization under this conception because they increase the risk of unjustified punishment.<sup>8</sup>

The tendency of federal legislators to rely on criminal law to control certain conduct and further social policies is well-documented. John Baker estimates there are over 4,450 federal criminal statutes.<sup>9</sup> Congress has added new crimes<sup>10</sup> and new kinds of crimes to Title 18,<sup>11</sup> the nominal federal criminal code. Congress has also sprinkled crimes, as one sprinkles salt,

---

WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 41-64 (2003).

<sup>7</sup> Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (“Overcriminalization, then, is the abuse of the supreme force of a criminal justice system — the implementation of crimes or imposition of sentences without justification.”).

<sup>8</sup> More generally, overcriminalization refers to a decades-long trend of increased use of criminal law, and its pernicious effects have long been noted. The first critics, writing at mid-century about federal economic regulations, warned that treating regulatory violations as crimes would, in the long run, engender a disrespect for law and the criminal justice system. See generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963). The research of Tom Tyler and Paul Robinson continues to elaborate on this theme. See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006); Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law*, 28 HOFSTRA L. REV. 707 (2000).

Other scholars make similar, though more specific, points. See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005) (analyzing common problems of overcriminalization); John Hasnas, *The Centenary of a Mistake: One Hundred Years of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1329 (2009) (critiquing corporate criminal liability as overcriminalization because guilt is not based on personal responsibility); JOHN S. BAKER, JR., HERITAGE FOUNDATION L. MEMO. NO. 26, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008) (arguing against the enhanced role of federal authority in the criminal law as an affront to the paramount role of the states in criminal law matters).

<sup>9</sup> See Baker, *supra* note 8, at 1.

The cause of congressional activism in criminal law has been summed up in one word—politics. *Id.* at 5 (noting the number of new crimes enacted in election years significantly surpassed those in non-election years between 2000 and 2007 (except for one year)); Paul Rosenzweig, *Epilogue, Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809, 810 (2005). As Sara Beale noted, “the epithet ‘soft on crime’ is the contemporary equivalent of ‘soft on Communism.’” Sara Sun Beale, *What’s Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997). It is difficult to discern whether public opinion is formed by law-and-order political candidates or whether they are merely responding to public anxiety.

<sup>10</sup> See, e.g., 18 U.S.C. § 1348 (Supp. III 2009) (securities fraud); 18 U.S.C. § 1349 (2006) (conspiracy and attempt to commit fraud).

<sup>11</sup> See, e.g., 18 U.S.C. § 1350(a) (2006) (penalizing failure of corporate officers to certify financial reports).

into many other titles in the federal code.<sup>12</sup> It has divided offenses into prohibition and punishment sections and placed the divisions in different titles,<sup>13</sup> and used a combination of federal civil law, agency regulations, and criminal prohibitions to target certain conduct.<sup>14</sup> Congress also ratified specific executive orders, thereby making violations of them a crime as well.<sup>15</sup> This evidence suggests that Congress enacted many of the criminal statutes with little thought to the efficacy of civil regulatory actions or consideration of the ultimate questions of what conduct merits just deserts or deterrence.<sup>16</sup>

Yet the numbers do not tell the whole story. Whether a criminal provision is necessary is not subject to a universal answer. Is a criminal law necessary? Maybe not, but criminal laws are a useful back-up that give force to civil administrative actions.<sup>17</sup> Is a criminal regulatory law necessarily bad? Not when the danger to the public is so overwhelming that no one would hesitate to treat the prohibited conduct as a crime.<sup>18</sup> And, although a sound argument can be made that criminal laws are most appropriately used as a last resort, private civil enforcement is not invariably good

---

<sup>12</sup> See, e.g., 26 U.S.C. § 5861(d) (2006) (whoever violates gun registration requirements in 26 U.S.C. §§ 5801-5872 is subject to up to ten years imprisonment); 26 U.S.C. § 7201 (2006) (tax evasion).

<sup>13</sup> See, e.g., 17 U.S.C. § 506 (2006 & Supp. III 2009) (banning willful criminal infringement of a copyright); 18 U.S.C. § 2319 (2006 & Supp. III 2009) (providing terms of punishment).

<sup>14</sup> See 15 U.S.C. § 78j (2010) (stating it is unlawful to use or employ a deceptive device in connection with trade of security); 15 U.S.C. § 78ff (2006) (authorizing punishment for willful of violations); 17 C.F.R. § 240.10b-5 (2010) (similar to 15 U.S.C. §§ 78j, 78ff).

<sup>15</sup> See *United States v. Arch Trading Co.*, 987 F.2d 1087, 1091-92 (4th Cir. 1993) (holding that violation of an executive order constitutes conspiracy to commit a federal offense, 18 U.S.C. § 371, when Congress has enacted a criminal sanction relating to the order, in this case, 50 U.S.C. § 1705(b)).

<sup>16</sup> See H. L. A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 8 (1968) (noting general disregard for the question of what conduct should be made criminal in the first place).

<sup>17</sup> Securities fraud is an example of this rationale. Securities fraud laws provide three avenues of enforcement: private civil actions, civil administrative actions by the Securities and Exchange Commission, and criminal enforcement. See Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1474-78 (2009) (explaining that administrative regulatory laws are not a panacea for strengthening compliance); see also Raymond W. Mushal, *Up from the Sewers: Perspective on the Evolution of the Federal Environmental Crimes Program*, 4 UTAH L. REV. 1103, 1105 n.8 (2009) (noting administrative remedies do not provide sufficient punishment).

<sup>18</sup> Consider, for example, the company executives who misled doctors and the public for five years, claiming that OxyContin was less prone to abuse than similar drugs. See Barry Meier, *Ruling is Upheld Against Executives Tied to OxyContin*, N.Y. TIMES, Dec. 10, 2010, at B2. As this was being drafted, new stories disclosed “barns infested with flies, maggots and scurrying rodents, and overflowing manure pits” on Iowa egg farms. See William Neuman, *Egg Farms Violated Safety Rules*, N.Y. TIMES, Aug. 31, 2010, at B1. For a discussion of the moral content of regulatory crimes, see Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 36 EMORY L.J. 1533 (1997).

or an improvement over administrative actions.<sup>19</sup> The answer in each case depends on the circumstances.

Simply stated, criminal enforcement merits more serious consideration than Congress gives. For instance, there is little evidence that Congress analyzes the effect of criminalizing conduct or considers whether civil enforcement would achieve its goal. The numbers also do not speak to the quality of the criminal statutes. Carelessly drafted statutes lead to abuse of the criminal justice system. Criminal laws that are couched in broad, vague language invite the executive branch to argue, *ex post*, that an actor's conduct violated the provision.<sup>20</sup> Prosecutors offer a new interpretation of the statute, effectively asking courts to formulate a new type of crime.<sup>21</sup> Once courts accept the government's position, more conduct becomes criminal.<sup>22</sup> By using broadly-worded statutes with undefined terms, Congress effectively delegates authority to the courts to determine if the conduct at issue is encompassed by the statute. Institutional prerogatives and the balance now established between the judicial and executive branches practically guarantee that this common law method of creating crimes will continue.<sup>23</sup> Although Congress usually has constitutional authority to enact corrective legislation, legislators seem more likely to do so when judicial interpretation has narrowed, rather than broadened, the scope of a criminal law.<sup>24</sup>

---

<sup>19</sup> See David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, MICH. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1740567> (noting that criminal action against British Petroleum is more likely to adequately compensate for harm to the environment and coastal communities).

<sup>20</sup> The pressure brought by prosecutors on courts to interpret criminal statutes expansively, effectively to define new crimes, was identified by Chuck Ruff over thirty years ago. See Charles F. C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement*, 65 GEO. L.J. 1171 (1977). More recent commentators have brought that insight up to date. See generally Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM L. REV. 2117 (1998); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>21</sup> See e.g., *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting) (objecting to majority's creation of a new crime of breaching fiduciary obligations).

<sup>22</sup> See *United States v. O'Hagan*, 521 U.S. 642 (1997) (adopting misappropriation theory of insider trading); *United States v. Turkette*, 452 U.S. 576 (1981) (holding that the enterprise element of the Racketeer Influenced and Corrupt Organizations act is not limited to lawful organizations).

<sup>23</sup> See Lynch, *supra* note 20; Stuntz, *supra* note 20 (examining the institutional pressures on legislators, courts, and the executive branch that encourage overcriminalization).

<sup>24</sup> The mail and wire fraud statutes are well-known examples. Congress passed the honest service amendment following the decision in *McNally* that rejected that theory of liability. See 18 U.S.C. § 1346 (2006); *McNally v. United States*, 483 U.S. 350 (1987). As of the writing of this article, a legislative proposal to correct the Court's recent decision in *Skilling* is already in circulation. See S. Res. 3854, 111th Cong. (2d Sess. 2010); *Skilling v. United States*, 130 S. Ct. 2896 (2010) (limiting honest services fraud to cases involving bribes and kickbacks); Ashley Southall, *Justice Department Seeks a Broader Fraud Law to Cover Self-Dealing*, N.Y. TIMES, Sept. 28, 2010, at B3 (reporting that legislation has been introduced in the Senate).

To recap, these trends—poorly-drafted criminal provisions forcing courts to interpret statutory terms—combine to capture increasingly more conduct. The plethora and confusion of federal criminal laws raise notice issues, and, more pertinently, result in unnecessary punishment if civil sanctions would achieve compliance with laws and regulations. Nonetheless, in addition to criminalizing more conduct, Congress has increased the risk of unnecessary punishment by giving scant attention to the *mens rea* element.

## II. THE *MENS REA* ELEMENT IN FEDERAL CRIMINAL LAW

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.<sup>25</sup>

As Justice Jackson observed, an actor's state of mind, whether encapsulated in the Latin *mens rea* or the Model Penal Code's concept of culpability, is a necessary element of a crime.<sup>26</sup> The concept of culpable conduct plays a significant role in both retributive and utilitarian criminal theory.<sup>27</sup> Culpable conduct is central to retributive criminal theory, which teaches that only those who choose to impose harm or violate established social norms merit punishment.<sup>28</sup> Establishing *mens rea* beyond a reasonable doubt makes it more likely that only those who made that choice are convicted. The utilitarian theory of punishment is similarly served by a robust *mens rea* requirement.<sup>29</sup> In this case, a strong *mens rea* component promotes just punishment, furthering the goal of deterring others from engaging in similar conduct. Researchers have shown that the example of deserved punishment leads to deterrence, as it encourages respect for law and informal enforcement among peers.<sup>30</sup> Punishing only those who are culpable reinforces the community's respect for the criminal justice system. For both retributive and utilitarian purposes, criminal law casebooks make clear

---

<sup>25</sup> *Morrisette v. United States*, 342 U.S. 246, 250 (1952) (Jackson, J.).

<sup>26</sup> *See id.* at 251 (noting the "human instinct" that requires a mental element and noting a child's familiar exculpatory, "[b]ut I didn't mean to.>").

<sup>27</sup> *See Staples v. United States*, 511 U.S. 600, 605 (1994); *Dennis v. United States*, 341 U.S. 494, 500 (1951) ("the existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence").

<sup>28</sup> *See generally* MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 *LAW & CONTEMP. PROBS.* 47 (1986).

<sup>29</sup> *See generally* JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (London, Oxford 1876); Kent Greenawalt, *Punishment*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1282 (Joshua Dressler, ed., 2d ed. 2002).

<sup>30</sup> *See Robinson & Darley*, *supra* note 8; TYLER, *supra* note 8.

in their first pages that crime is a “compound concept,” requiring a mental element in addition to conduct.

The *Morissette* opinion reflects these values, making clear that without culpability, even an “inherently evil” act does not merit punishment.<sup>31</sup> Accordingly, the Court held that the statute at issue, a codification of common law theft, implicitly required proof that the defendant knew that the property he had taken had not been abandoned. Even though the Court interpreted this common law offense to require a *mens rea*, it also recognized a significant change in the criminal law.

By 1952, when *Morissette* was decided, Congress had passed a core of strict liability offenses that were designed to regulate economic activity<sup>32</sup> and protect the public from dangerous products.<sup>33</sup> Justice Jackson distinguished public welfare offenses from common law crimes, describing the new offenses as “a category of another character, with very different antecedents and origins.”<sup>34</sup> Noting legislators’ tendency to create new duties and strict liability crimes, Justice Jackson conceded such laws were necessary to protect the public from increased dangers that affect public health, safety, and welfare.<sup>35</sup>

Ironically, even while the Court reinforced the requirement of culpability in common law felonies, it endorsed a new category of criminal laws.<sup>36</sup> In certain circumstances, some criminal laws would no longer require an evil-meaning mind connected to an evil-doing hand. Thus, there

<sup>31</sup> See *Morissette*, 342 U.S. at 251 (citing Blackstone’s statement that to constitute any crime there must first be a “vicious will”).

<sup>32</sup> See e.g., 15 U.S.C. § 1 (2006) (under the Sherman Act, enacted in 1903, anyone who restrains trade is guilty of a felony); 15 U.S.C. § 2 (2006) (monopolizing, attempting to monopolize, or conspiring to monopolize any part of trade is also a felony under the Sherman Act).

<sup>33</sup> See e.g., Food Drug and Cosmetic Act, 21 U.S.C. §§ 331(a), 333(a) (2006); Harrison Narcotics Tax Act, ch. 1, 38 Stat. 785, 786 (1914); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (noting that offense of shipping misbranded drugs did not require knowledge that items were misbranded); *United States v. Balint*, 258 U.S. 250, 254 (1922) (holding that government must prove only that the defendant knew he was selling drugs).

<sup>34</sup> See *Morissette*, 342 U.S. at 252-60 (discussing at length emerging public welfare offenses and legal commentary about the trend).

<sup>35</sup> See *id.* (noting the “great traffic in velocities, volumes, and varieties, and wide distribution of goods.”).

Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. . . . Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

*Id.* at 254.

<sup>36</sup> The irony did not go unnoticed. See Hart, *supra* note 8, at 431-33, n.70. Hart rebuked the Court in *Morissette* for its “examination and labored distinction of the notorious instances in which Congress and this Court have sanctioned blatant defiance of the principle of moral blameworthiness.”

were now two kinds of crimes: those that required culpability and those that did not.

In the years following *Morissette*, Congress expanded economic crimes that achieved social policies and offenses relating to dangerous materials.<sup>37</sup> Congress seemed satisfied to create new kinds of criminal conduct, but continued to rely on *mens rea* terms based on the common law.<sup>38</sup> This trend continues to this day because, unlike Model Penal Code jurisdictions, federal legislators are not constrained by a real criminal code.<sup>39</sup> The United States Code does not define *mens rea* terms or provide interpretive guidelines.<sup>40</sup> Instead, each federal criminal law specifies its own *mens rea* element, making it possible for legislators to select from a wealth of common law terms.<sup>41</sup>

By one count, federal criminal laws use seventy-eight different *mens rea* terms.<sup>42</sup> These terms often have numerous and conflicting meanings. For example, in bribery and obstruction statutes, Congress uses the *mens rea* term “corruptly,” which has no intrinsic meaning, and then guarantees inde-

---

<sup>37</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 282-94 (1993) (presenting the introduction of regulatory and public health crimes in American criminal law).

<sup>38</sup> This pattern continues. See *infra* Part III(A) (discussing proposed offenses during 2005–06 term).

<sup>39</sup> Criticism of Title 18, an alphabetical compilation of disparate offenses, has been critiqued almost since it was established in 1948. It has been described as chaotic, incomprehensible, and a disgrace. See PETER W. LOW & JOSEPH L. HOFFMANN, *FEDERAL CRIMINAL LAW* 6-7 (1997) (quoting extensively from NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, *STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE* (1970), that stated, “[w]ithin Title 18 itself, chaos reigns”); Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 *BUFF. CRIM. L. REV.* 195, 195 (1997) (“[T]he criminal code title of the United States Code should be completely rewritten.”); Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 *J. CRIM. L. & CRIMINOLOGY* 643 (2006); Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 *BUFF. CRIM. L. REV.* 225 (1997) ([t]he federal criminal law [is] almost incomprehensible”).

<sup>40</sup> The Model Penal Code drafters rejected common law *mens rea* terms because they lacked precision and clarity. Instead, they chose only four, and specifically defined each of them. See MODEL PENAL CODE § 2.02 (Official Draft & Revised Comments 1985) (listing and defining four culpability standards; purposeful, knowing, reckless, and negligent). More specifically, the drafters sought to “advance the clarity of draftsmanship in the delineation of the definitions of specific crimes, to provide a distinct framework against which those definitions may be tested, and to dispel the obscurity with which the culpability requirement is often treated when . . . [common law terms] have been employed.” See MODEL PENAL CODE § 2.02 cmt. 1; see also *Morissette*, 342 U.S. at 252 (noting “the variety, disparity and confusion of judicial definitions of “the requisite but elusive mental element”).

<sup>41</sup> See LOW & HOFFMANN, *supra* note 39, at 9 (listing, among others, “willfully,” “corruptly,” “maliciously,” “wantonly,” “unlawfully,” “fraudulently,” “improperly,” “neglectfully,” and combinations thereof); see also Robert Batey, *Judicial Exploitation of Mens Rea Confusion, at Common Law and Under the Model Penal Code*, 18 *GA. ST. U. L. REV.* 341 (2001); Stephen F. Smith, *Proportional Mens Rea*, 46 *AM. CRIM. L. REV.* 127 (2009).

<sup>42</sup> See PAUL H. ROBINSON, *CRIMINAL LAW* § 4.1, at 212 n.17 (1997).



terminacy by failing to define it.<sup>43</sup> Courts must construe the term as best they can, depending on the circumstances of the case and a reading of congressional intent.<sup>44</sup> Understandably, interpretations of identical terms have come to vary significantly.

The plethora of new crimes makes the *mens rea* element even more significant. For one thing, the culpability element in a federal criminal law is often the only term that separates civil liability from criminal liability. Thus, a person who acts willfully in infringing a copyright has committed a crime; otherwise, the conduct is a private civil matter.<sup>45</sup> For another, culpability can be the only distinction between behavior that is not unlawful at all, even in the civil sense.<sup>46</sup> Thus, campaign contributions are legal unless the actor understands that the gift is an exchange for an official act or because of an official act.<sup>47</sup> Recently drafted statutes assign punishment based on the actor's *mens rea*, giving greater significance to the culpability level.<sup>48</sup> Some *mens rea* standards, especially in white collar crimes, have been interpreted to include civil notions of blameworthiness.<sup>49</sup> One study of criminal statutes that contained parallel civil provisions found that criminal courts in many cases accepted low *mens rea* standards that had been defined in civil cases.<sup>50</sup>

Even though criminal law doctrine and the rights of the accused call for certainty, the reality is that federal criminal law uses a wide range of *mens rea* terms that are defined according to circumstance. The following sections highlight some particularly troublesome developments posed by this problem.

---

<sup>43</sup> See 18 U.S.C. § 201(b) (2006) (bribery); 18 U.S.C. § 666 (2006) (federal program bribery); 18 U.S.C. §§ 1503, 1512(b) (2006) (obstruction). See generally Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129 (2004).

<sup>44</sup> The Supreme Court corrected judicial interpretations of "corruptly" as used in two obstruction provisions. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *United States v. Aguilar*, 515 U.S. 593 (1995).

<sup>45</sup> See 17 U.S.C. § 506(a)(1) (2006) (copyright infringement); 18 U.S.C. § 2319 (2006 & Supp. III 2009) (providing penalties).

<sup>46</sup> See Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 75 ALB. L. REV. 1 (2009).

<sup>47</sup> See 18 U.S.C. § 201 (2006) (bribery); 18 U.S.C. § 1951 (2006) (extortion); *Evans v. United States*, 504 U.S. 255 (1992) (discussing quid pro quo requirement in bribery).

<sup>48</sup> See e.g., Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2006 & Supp. III 2009).

<sup>49</sup> See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal?"*: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193 (1991) (noting tendency of federal courts to turn civil breaches of fiduciary duty into crimes).

<sup>50</sup> See Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209 (2003) (analyzing the relation between civil and criminal causes of action for the same conduct).

### A. *The Mens Rea of Mail and Wire Fraud*

Fraud is a traditional common law offense, first recognized as being akin to theft by English courts and Parliament in the eighteenth century.<sup>51</sup> The Supreme Court has recognized these common law antecedents of the federal mail and wire fraud statutes.<sup>52</sup> These statutes, the workhorses of federal prosecutors, prohibit fraud executed through the use of the mail or by wire.<sup>53</sup> Although neither statute specifies a *mens rea* term,<sup>54</sup> the statutes require proof of three types of culpability.

In accordance with *Morissette*, courts first read a knowing *mens rea* element into the element of misrepresenting a material fact. Under this standard, the defendant must know that the false or misleading information he or she conveyed is false.<sup>55</sup> The second *mens rea* element applies to the use of the mail. The mailing, once thought of as the *actus reus* of the offense, now merely requires that the actor foresee some use of the mail by someone.<sup>56</sup> Thus, culpability as to mailing is at best a reckless standard and at worst a tort concept. There is no requirement that the defendant know that a mailing would occur as long as it furthers the scheme to defraud.

Finally, a third *mens rea* requirement must also be satisfied. Mail fraud is an inchoate offense because it prohibits “devising or intending to

---

<sup>51</sup> See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 8.1(b), 705-06 (2d ed., 1986).

<sup>52</sup> See *McNally v. United States*, 483 U.S. 350, 359 (1987) (“the words ‘to defraud’ commonly refer ‘to wronging one in his property rights by dishonest methods or schemes’ and ‘usually signify the deprivation of something of value by trick, deceit, chicane or overreaching’”) (citing *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)).

<sup>53</sup> See Mail Fraud Act, 18 U.S.C. §§ 1341, 1343, 1346 (2006 & Supp. III 2009). Sharing common conduct elements of deceit and fraud, the mail and wire fraud statutes are jointly interpreted, and readings of one statute apply to the other. See *Carpenter v. United States*, 484 U.S. 19, 24 (1987). For convenience’s sake, mail fraud is used here to refer to both statutes.

<sup>54</sup> Courts commonly state that the offenses have two elements: a scheme to defraud and a mailing or wire. Notwithstanding this simplification, every circuit has added elements to that basic structure. According to one treatise, the government must prove that the defendant: (1) engaged in a scheme to defraud; (2) involving a material misstatement or omission; (3) “with the specific intent (or purpose) to defraud;” (4) resulting or would result in “loss of money, property, or honest services;” (5) use of the United States mail, a private courier, or interstate or international wires; (6) in furtherance of the scheme; and (7) the defendant used, or caused the use of such communication. J. KELLY STRADER, *UNDERSTANDING WHITE COLLAR CRIME* § 4.02[B] (2d ed. 2006).

<sup>55</sup> See *Neder v. United States*, 527 U.S. 1, 15-17 (1999).

<sup>56</sup> See *Schmuck v. United States*, 489 U.S. 705, 721 (1989); *Pereira v. United States*, 347 U.S. 1, 8-9 (1954). There are various minor permutations of this standard. See Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 230 (1992). It is generally agreed that the mailing element functions to establish federal jurisdiction; the government must show that a foreseeable mailing occurred. See Peter J. Henning, *Maybe It Should Just Be Called Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 450-51 (1995); Podgor, *supra*.

devise a scheme or artifice to defraud.”<sup>57</sup> The scheme need not come to fruition, and proof of harm is not required for conviction. Thus, the offense is similar to an attempt, and requires a similar level of culpability: knowing conduct (deception) undertaken with the purpose of defrauding or harming the victim.<sup>58</sup> Nevertheless, courts do not always require that the defendant act with intent to harm; instead they conflate the terms “deceive” and “defraud,” and require a “specific intent” of knowing deception.<sup>59</sup> The problem with this standard is that the intent to deceive is a general or knowing intent to act, not a specific intent to defraud or harm a victim of deceit.<sup>60</sup>

Disturbingly, the Supreme Court recently appeared to accept this lower, flawed standard. In *Skilling v. United States*,<sup>61</sup> the Court, outlining the requirements of a congressional response to its holding, noted that the government’s conception of the *mens rea* was a “specific intent to deceive.”<sup>62</sup> Fortunately, the Court’s comment is *dictum*, and it is to be hoped that appellate courts will promptly revise this formulation before lower courts begin to apply it. A reformulation is also necessary because the error of conflating an intent to act and a further purpose is not confined to mail and wire fraud. Although the federal code does not include a general attempt provision, many other federal crimes are either inchoate<sup>63</sup> or expressly include attempts.<sup>64</sup>

---

<sup>57</sup> Mail Fraud Act, 18 U.S.C. §§ 1341, 1343 (Supp. III 2009); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 3 (1989) (noting that fraud is an inchoate offense so that attempt to commit fraud is a doubly inchoate crime).

<sup>58</sup> See *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180-81 (2d Cir. 1970); see also Robbins, *supra* note 57, at 8 n.15 (explaining that specific intent in inchoate offenses is a special mental element above and beyond any other required intent to commit the actus reus and is the intent to effect the consequence that is proscribed by the object crime).

<sup>59</sup> See, e.g., *United States v. Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996) (stating that the government satisfied a specific intent to defraud if it proved an intent to deceive).

<sup>60</sup> Interested readers may want to refer to an earlier article in which I discussed this issue. See Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. CIN. L. REV. 1, 20-23 (1998).

<sup>61</sup> 130 S. Ct. 2896 (2010) (confining honest service fraud under § 1346 to schemes that involve bribes or kickbacks).

<sup>62</sup> *Id.* at 2933 n.44 (2010) (citing Brief for the United States at 43-44) (emphasis added). Although the Court raised several questions about the government standard, its comments did not address the issue of specific intent. *Id.* at 2932-33.

<sup>63</sup> See, e.g., 18 U.S.C. § 1503(a) (2006) (omnibus clause of obstruction); 18 U.S.C. § 371 (2006) (conspiracy).

<sup>64</sup> See, e.g., Computer Fraud and Abuse Act, 18 U.S.C. § 1030(b) (2006 & Supp. III 2009); 18 U.S.C. § 1348(1)-(2) (Supp. III 2009) (securities fraud provision enacted as part of the Sarbanes-Oxley Act).

### B. *Willful Blindness*

Other *mens rea* issues bedevil defendants, courts, and commentators. For instance, federal courts do not use a uniform standard in applying the “willful blindness” rule.<sup>65</sup> The rule comes into play when the crime at issue requires proof of knowledge and there is no direct evidence that the defendant knowingly acted. In this typical circumstance, a willful blindness instruction, more colorfully known as an “ostrich” instruction,<sup>66</sup> allows the jury to find knowledge based on deliberate ignorance of the fact at issue.<sup>67</sup> Jurors may decide that those who buried their head in the sand, like an ostrich, instead of ascertaining incriminating facts acted with knowledge or awareness of those facts.<sup>68</sup> The instruction is designed for cases in which there is evidence that the defendants, knowing or at least strongly suspecting that they are involved in unlawful conduct, take steps to avoid acquiring full knowledge of those dealings.<sup>69</sup> Properly instructed, jurors may not use an objective, reasonable person standard—should have known—but must assess the subjective act of deliberately ignoring what would have become obvious to the defendant.<sup>70</sup> Courts have expressed concern that the instruction may lead jurors to find guilt on the ground that the defendant was subjectively reckless as to whether the fact existed.<sup>71</sup> The lack of uniformity and the shading of knowing conduct into reckless conduct makes willful blindness a poor substitute for a knowing *mens rea*.

### C. *The Mens Rea of Public Welfare Offenses*

When a statute or regulatory scheme conforms to the parameters of a public welfare offense, strict liability for the conduct is reluctantly accept-

---

<sup>65</sup> See JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 115 n.40 (2d ed. 2003) (providing cases).

<sup>66</sup> United States v. Black, 530 F.3d 596, 604 (7th Cir. 2008).

<sup>67</sup> The instruction is also called a *Jewell* instruction after the case that articulated the rule that acting with an awareness of a high probability of the existence of the fact at issue is tantamount to knowledge. See United States v. Jewell, 532 F.2d 697, 700-01 (9th Cir. 1976) (relying in part on MODEL PENAL CODE § 2.02 (7) (Official Draft & Revised Comments 1985)).

<sup>68</sup> See United States v. Buckley, 934 F.2d 84, 88-89 (6th Cir. 1991) (failure to investigate when aware of facts which demanded investigation). For a defense of the ostrich, who does not actually hide its head in the sand, see *Black*, 530 F.3d at 604.

<sup>69</sup> United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990); *Black*, 530 F.3d at 604, *vacated on other grounds*, 130 S. Ct. 2963 (2010).

<sup>70</sup> See *Giovannetti*, 919 F.2d at 1227-28.

<sup>71</sup> See United States v. Skilling, 554 F.3d 529, 548-49 (5th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2896 (2010) (expressing concern that the instruction will mislead jurors into thinking they can convict on negligence or reckless ignorance, rather than intentional ignorance). The Fifth Circuit held that any error on this score was harmless. *Id.* at 550.

ed.<sup>72</sup> Public welfare offenses eliminate the *mens rea* element in order to protect a public that cannot protect itself by avoiding the danger. In addition to strict liability, public welfare offenses are marked by light penalties that do not include incarceration, low stigma, and the notion that those in highly regulated industries have notice of criminal regulations.<sup>73</sup>

Congress has also passed criminal statutes that resemble public welfare offenses, except with a *mens rea* element such as knowing conduct. Notwithstanding the statutory element, when the offense sounds in public welfare, a court is likely to interpret knowing conduct more broadly, making it easier to find guilt. For instance, in *United States v. International Minerals*,<sup>74</sup> the defendant company argued that it was not aware of the regulation that required it to label the contents being shipped with specific names prescribed by regulations.<sup>75</sup> Categorizing the argument as an ignorance of the law defense, the Supreme Court rejected it and held that defendants must know only that they are shipping dangerous items.<sup>76</sup>

The case is notable not for its rejection of a mistake of law defense, but for its reasoning. The Court based its decision on the justifications for public welfare offenses, danger to the public, and the involvement of a highly regulated business.<sup>77</sup> Courts continue to use the justification that supports strict liability offenses to formulate loose definitions of knowledge.<sup>78</sup> In brief, the justification for strict liability in public welfare offenses has migrated to statutes that include *mens rea* terms.<sup>79</sup>

---

<sup>72</sup> See Green, *supra* note 18, at 1548, n.30 (noting near unanimity of opinion against strict liability offenses); Hart, *supra* note 8, at 423; see also Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419-22 (1993) (explaining reasons for strict liability doctrine in public welfare offenses).

<sup>73</sup> See *Staples v. United States*, 511 U.S. 600, 616-19 (1994) (considering characteristics of public welfare crimes); *Morissette v. United States*, 342 U.S. 246, 255 (1952) (defining public welfare offenses).

<sup>74</sup> *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971).

<sup>75</sup> See *id.* at 560.

<sup>76</sup> See *id.* at 564-65.

<sup>77</sup> *Id.* at 565 (“But where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.”).

<sup>78</sup> See, e.g., *United States v. Weitzenhoff*, 35 F.3d 1275, 1279-80 (9th Cir. 1993) (*en banc*).

<sup>79</sup> It would be remiss not to note that another development takes the opposite approach, rigorously applying a *mens rea* standard even when one could reasonably argue that the offense is one of strict liability. The Supreme Court has recently interpreted regulatory statutes to allow defenses of ignorance of law and mistake of fact. See *Staples v. United States*, 511 U.S. 600, 622-23 (1994) (interpreting a facially strict liability statute to require a *mens rea* element and holding that ignorance of factual characteristics of the gun negated proof of *mens rea*); see also *Ratzlaff v. United States*, 510 U.S. 135, 136-37 (1994) (holding that a money laundering statute requires the government to prove the defendant acted with knowledge that the conduct was unlawful); *Cheek v. United States*, 498 U.S. 192, 205 (1991) (creating an ignorance of tax law defense); *Liparota v. United States*, 471 U.S. 419, 434 (1985) (holding that defendant must know that food stamps were acquired in an unauthorized manner).

#### D. *Variations on “Willful”*

Many economic regulations become crimes if the prohibited action was willfully committed. In these regulatory schemes, that single word—willfully—is often the only distinction between civil and criminal conduct. Despite this centrality in establishing guilt, it is generally conceded that the term is a “word of many meanings.”<sup>80</sup> It can denote reckless, knowing, or purposeful conduct, depending on the context in which the term is used.<sup>81</sup> In the tax context, courts define willfully as “a voluntary, intentional violation of a knowing legal duty,” a standard that creates an ignorance of the law defense.<sup>82</sup> However, in a case involving licenses to sell guns, the court interpreted “willful” to require that defendants were merely aware that some aspect of their conduct was unlawful.<sup>83</sup>

The Model Penal Code drafters, unable to escape the powerful draw of the common law term, ultimately provided that a defendant can satisfy willfulness by acting knowingly as to the material elements of the offense.<sup>84</sup> It is worth noting the reaction of Judge Learned Hand, recorded in the commentary to the Code:

It’s a very dreadful word . . . . It’s an awful word! It is one of the most troublesome words in a statute that I know. If I were to have the index purged, “willful” would lead all the rest in spite of its being at the end of the alphabet.<sup>85</sup>

---

A common denominator in the cases is concern that innocent individuals who are not blameworthy may become embroiled with the criminal justice system. See Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 128-29 (1997); David J. Luban, *The Publicity of Law and the Regulatory State*, 10 J. POL. PHIL. 296 (2002); Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859, 940-41 (1999); John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1022 (1999).

<sup>80</sup> See *Spies v. United States*, 317 U.S. 492, 497 (1943); *United States v. Murdock*, 290 U.S. 389, 394-95 (1933) (stating that “willful” in a criminal statute “means an act done with a bad purpose, without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right so to act.”).

<sup>81</sup> See *United States v. O’Hagan*, 139 F.3d 641, 650 (8th Cir. 1998) (upholding a jury verdict of willful conduct based on evidence that the defendant knowingly breached his fiduciary duty); STRADER, *supra* note 54, § 1.06[2].

<sup>82</sup> See *Cheek*, 498 U.S. at 205.

<sup>83</sup> See *Bryan v. United States*, 524 U.S. 184, 192 (1998) (interpreting “willful” in 18 U.S.C. § 924(a)(1)(D) as an action carried out by the defendant with “knowledge that his conduct was unlawful”). The Court also stated that “the term knowingly does not necessarily have any reference to a culpable state of mind.” *Id.*

<sup>84</sup> See MODEL PENAL CODE § 2.02(7) (Official Draft & Revised Comments 1985).

<sup>85</sup> See *id.* § 2.02 n.47.

In civil securities fraud cases,<sup>86</sup> prosecutors can satisfy willfulness by a showing of recklessness, or disregarding the risk that a statement might be false.<sup>87</sup> Most circuits have reportedly adopted the reckless standard in criminal insider trading cases,<sup>88</sup> although there are signs of disagreement. In *United States v. O'Hagan*, the misappropriation insider trading case, the Eighth Circuit on remand stated that jurors may infer willful conduct if the defendant acted with knowledge.<sup>89</sup> That court also interpreted a statement in the Supreme Court's *O'Hagan* opinion as rejecting a negligence or recklessness culpability standard for securities fraud.<sup>90</sup> The Supreme Court has yet to rule on whether a reckless state of mind satisfies the statutory requirement of willfulness.

In summation, the federal white collar laws now capture more conduct because Congress liberally uses criminal law as an enforcement mechanism for traditional offenses, economic regulations, and public welfare crimes. While Congress has been innovative in describing new forms of prohibited conduct, it has relied heavily on *mens rea* terms from the common law. Because the federal criminal code does not define *mens rea* terms, courts provide definitions, which, understandably, vary according to the circumstances of the case and the statutory schemes. The examples of problematic issues discussed in previous paragraphs demonstrate that the *mens rea* element in federal criminal law is often too weak to prevent unjustified punishment.

At this point, one might usefully recall that Congress is ultimately responsible for the content of criminal laws, including the *mens rea* element. The recently reported analysis of criminal proposals during a recent term assesses how Congress met this responsibility.

### III. HOW CONGRESS IS ERODING THE FEDERAL CRIMINAL INTENT REQUIREMENT

The study on which the report, *Without Intent*, is based sought to determine whether Congress, in its 2005—06 term, wrote criminal laws that

---

<sup>86</sup> See 15 U.S.C. § 78j(b) (2010) (prohibiting the use of manipulative and deceptive devices); 15 U.S.C. § 78ff(a) (2006) (authorizing punishment for willful violations); 17 CFR § 240.10b-5(2010).

<sup>87</sup> See *United States v. Weiner*, 578 F.2d 757, 786 (9th Cir. 1978), *cert. denied*, 439 U.S. 981 (1978); *Solan*, *supra* note 50, at 2238-44 (providing the historical development of insider trading from civil administrative adjudication to criminal treatment).

<sup>88</sup> See STRADER, *supra* note 54, § 5.04 n.32.

<sup>89</sup> See *United States v. O'Hagan*, 139 F.3d 641, 646-47 (8th Cir. 1998) (stating that it is not necessary to prove defendant knew his conduct violated a specific statute). In *O'Hagan*, the Court endorsed a theory of insider trading based on misappropriation of nonpublic information from any source to whom the actor owed a heightened duty. *Id.*

<sup>90</sup> See *id.*

included “meaningful” *mens rea* requirements.<sup>91</sup> The study springs from the conviction that criminal law must be firmly grounded in fundamental principles of justice, in accordance with criminal law theory.<sup>92</sup> Two principles that underlie the study are the constitutional mandate that citizens have fair notice of what conduct is criminal and the notion, from criminal theory, that punishment requires culpability.<sup>93</sup>

#### A. *The Data*

The data presented in the report reveal the extent to which Congress utilizes *mens rea* standards that seem likely to result in the punishment of those who are not culpable in the traditional criminal law sense. In addition, the authors provide specific recommendations that are designed to correct this deficiency in legislation.

##### 1. The Large Number of Proposed Criminal Offenses

Concern over fair notice led the researchers to confine the study of *mens rea* to proposals that involved nonviolent and non-drug offenses.<sup>94</sup> They reasoned that inherently wrongful conduct, especially violent conduct, “forecloses the possibility of punishing individuals who are not truly culpable.”<sup>95</sup> But when citizens commit non-violent or regulatory offenses, the assumption that they were aware that their conduct was wrongful, a substitute for statutory notice, cannot be made. Although the choice to confine the study in this way is reasonable, this self-imposed limitation has a drawback. Non-violent and non-drug offenses are more likely to incorporate weaker *mens rea* standards than traditional criminal conduct.<sup>96</sup> Thus it is not necessarily surprising that the *mens rea* elements of the offenses that

---

<sup>91</sup> WITHOUT INTENT, *supra* note 2, at 1. “Meaningful” *mens rea* elements are defined as those that ensure that only the culpable are subject to the punishment and that all citizens have fair notice of the prohibitions. *See id.*

<sup>92</sup> *See id.* at 3.

<sup>93</sup> *Id.* at 3-4. The House has held two hearings on the report and its recommendations. *See Reining in Overcriminalization: Assessing the Problems, Proposing Solutions, Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 2 (2010); *Over-Criminalization of Conduct and Over-Federalization of Criminal Law, Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 11th Cong. 1 (2009).

<sup>94</sup> The study excluded proposed statutes that were related to violent or professional crimes, immigration violations, firearms, pornography, and drug-related offenses. *See* WITHOUT INTENT *supra* note 2, at 33 Methodological App. Some of these crimes, such as immigration violations, are not necessarily violent, but the report does not provide further explanation.

<sup>95</sup> *See id.* at 1.

<sup>96</sup> *See supra* text accompanying notes 34-35 (discussing public welfare and regulatory offenses).



were analyzed skewed toward the weak side. Notwithstanding this caveat, the data are revealing.

The researchers analyzed 446 non-violent and non-drug criminal law proposals contained in 203 proposed statutes.<sup>97</sup> The large number of criminal proposals, even to the untutored eye, seems disproportionate to the number that a legislative body could responsibly consider. This is borne out by the result; Congress ultimately enacted only thirty-six (8%) of the proposed offenses,<sup>98</sup> an apparently unexceptional ratio.<sup>99</sup> The study also shows that criminal statutes were enacted at a rate that was 45% higher than the rate for all other types of proposed bills.<sup>100</sup>

As the authors point out, the flood of proposals makes “simply unreasonable” any expectation that a substantial proportion could receive adequate legislative oversight and scrutiny.<sup>101</sup> The large number of criminal law proposals also seems to illustrate the proclivity of legislators to rely on criminal laws to enforce a wide range of programs and policies. The data also show that Congress did not fully attend to the *mens rea* element.

## 2. The Small Number of Offenses with Adequate *Mens Rea* Terms

The study defines a *mens rea* element as “adequate” if it is more likely than not to prevent conviction of a person who did not know the conduct was unlawful or sufficiently wrongful to provide notice of possible exposure to criminal responsibility, and did not intend to violate the law.<sup>102</sup> Of the 446 offenses analyzed, only 191 (43%) included an adequate *mens rea* element.<sup>103</sup> That is, over one-half, 255 (57%), of the proposals provided a *mens rea* element that was inadequate to protect individuals from criminal

---

<sup>97</sup> The discrepancy between the number of statutes and the number of offenses is explained by the choice to count as separate offenses all sections of a statute that required a *mens rea*. See WITHOUT INTENT, *supra* note 2, at 11. This choice reflects the purpose of the study, an inquiry into *mens rea* standards and to examine the independent protectiveness of the *mens rea* requirement of each offense. *Id.* The authors also counted the offenses as separate when a single statute included more than one course of conduct. *Id.* When the mental state applied to two different actions, the offense was counted twice. *Id.*

<sup>98</sup> See *id.* at 13 Chart 3.

<sup>99</sup> See *id.* at n.35 (citing Baker’s calculation that between 2000 and 2007, Congress enacted an average of 56.5 crimes a year).

<sup>100</sup> See *id.* at 13.

<sup>101</sup> See WITHOUT INTENT, *supra* note 2, at 2 (noting that the large number of proposals, even of the non-violent and non-drug sort, explains why so many of them were poorly drafted and never received adequate deliberation or oversight).

<sup>102</sup> See *id.* at 11.

<sup>103</sup> See *id.* at 12 Chart 1.

punishment for unknowing conduct.<sup>104</sup> Of the thirty-six proposals actually enacted, twenty-three (63.8%) lack an adequate *mens rea* requirement.<sup>105</sup>

The authors of the study graded the *mens rea* element of the proposals as either “none” (as in strict liability offenses), “weak,” “moderate,” or “strong.”<sup>106</sup> None and weak *mens rea* elements are inadequate because they are unlikely to provide notice or to justify punishment, so strict liability and offenses using negligence standards received a grade of none;<sup>107</sup> 113 or 25.3% fell into this category.<sup>108</sup>

The next slightly higher grade, weak, includes offenses that use the terms knowingly or intentionally in the introductory text of the offense or in a manner that leaves unclear the terms to which *mens rea* applies;<sup>109</sup> 142 (31.8%) were categorized as weak.<sup>110</sup>

The authors graded offenses with *mens rea* elements that provide adequate protection as either moderate or strong.<sup>111</sup> A grade of moderate was given to offenses that use variations of the term willful in their introductory text;<sup>112</sup> 155 (34.8%) were graded as moderate.<sup>113</sup>

The highest grade that could be given to a *mens rea* element, strong, went to offenses that use some combination of the terms knowingly and willfully, coupled with a specific intent to violate the law or to engage in an inherently wrongful act.<sup>114</sup> Of 446 proposals, only thirty-six (8.1%) received a *mens rea* grade of strong.<sup>115</sup>

In sum, a majority of the proposed offenses and enacted offenses incorporated inadequate *mens rea* elements that were insufficiently robust to prevent punishing non-culpable individuals.

#### B. *Devising New Rules to Restore Mens Rea Standards*

The report recommends the enactment of three laws that are designed to protect individuals who are not blameworthy from criminal liability. The recommendations are directed to both Congress and the courts: Congress is to enact rules that direct the federal courts in interpreting statutes. The rules

---

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at 13 Chart 3.

<sup>106</sup> *Id.* at 35-36.

<sup>107</sup> *See* WITHOUT INTENT at 35-36 Methodological App.

<sup>108</sup> *See id.* at 12 Chart 1.

<sup>109</sup> *See id.* at 35-36 Methodological App.

<sup>110</sup> *See id.* at 12 Chart 1.

<sup>111</sup> In contrast to the inadequate category, these terms are likely to prevent conviction of a person who acted without intent and knowledge that the conduct was unlawful.

<sup>112</sup> *See* WITHOUT INTENT, *supra* note 2 at 35-36 Methodological App.

<sup>113</sup> *See id.* at 12 Chart 1.

<sup>114</sup> *See id.* at 35-36 Methodological App.

<sup>115</sup> *See id.* at 12 Chart 1.

for the courts, however, are not triggered unless Congress fails to make its intentions clear. Thus, the recommendations constrain both branches by requiring Congress to make its intent clear and requiring judges to follow default rules when Congress does not. When Congress has not given specific direction, then the rules effectively limit the scope of the congressional action by delegating decisions to the judiciary. Whether the default rules will guide judicial interpretation and congressional indifference as envisaged by the authors is another matter.

### 1. Limit Strict Liability Offenses

The first default rule directs federal courts to read a *mens rea* term into any criminal offense that omits the element.<sup>116</sup> The report affirms that Congress may continue to enact strict liability offenses as long as it makes that purpose clear by express language in the statute. That is, unless Congress has made plain its intention that the statute is one of strict liability, courts are to read a protective, default *mens rea* requirement into the provision.

One benefit of this rule is that it avoids the inadvertent passage of strict liability crimes. In time, the number of strict liability offenses would include only those that Congress specifically marks with that designation. Because people can rely on the statutes, citizens and business firms would have actual notice when conduct is a strict liability offense. This new rule addresses Congress's tendency to enact strict liability crimes; 24% of the 2005—06 proposals analyzed did not include a *mens rea* element.<sup>117</sup>

The proposal goes further than the holding in *Morissette*, which read a *mens rea* element into a statute, but limited that practice to “inherently evil” common law offenses.<sup>118</sup> In contrast, the default rule applies to all federal criminal offenses, including criminal offenses that enforce regulatory laws. The recommendation also goes further than the Model Penal Code, which allows punishment if the actor was reckless.<sup>119</sup> The report rejects the *mens rea* standard of recklessness because it is not sufficiently protective of non-culpable actors.<sup>120</sup>

The authors do not explicitly recommend a specific *mens rea* standard, saying only that the default term should be the “most protective of those

---

<sup>116</sup> *Id.* at 27. In the 2005—06 congressional term, nine of the thirty-six enacted offenses were strict liability offenses that did not specify a *mens rea* term. *See id.* at 13 Chart 3.

<sup>117</sup> *See supra* text accompanying notes 107-108.

<sup>118</sup> *See supra* text accompanying notes 25-26, 31-35.

<sup>119</sup> *See* MODEL PENAL CODE § 2.02(3) (Official Draft & Revised Comments 1985) (stating that, unless otherwise provided, culpability is established if a person acted recklessly).

<sup>120</sup> *See* WITHOUT INTENT, *supra* note 2, at n.95.

who are not truly blameworthy.”<sup>121</sup> That general standard immediately raises two questions: What does it mean? Who should decide?

Given the lexicon of culpability elements, the report suggests that conduct must, at a minimum, be accomplished with a knowing state of mind.<sup>122</sup> However, as noted earlier, that standard includes willful blindness, recklessness, a general intention to act, and knowledge of generalized unlawfulness or dangerousness.<sup>123</sup> The knowing standard may not always be rigorous enough to meet the “most protective” standard.

The second question raised by this default rule is who should decide what *mens rea* term will suffice to meet the standard. The report seems to envisage that Congress will choose the default standard.<sup>124</sup> This is a wise choice in light of the report’s goal of restricting delegated authority to enact criminal laws. But if Congress fails to specify the default *mens rea* term, courts will be forced to choose the *mens rea* standard, leading inevitably to inconsistent rulings.<sup>125</sup> If Congress is genuinely concerned about the integrity of the *mens rea* element, it will specifically identify and define what culpability standard is sufficient to protect those not blameworthy for violating a criminal law.

In sum, the recommendation effectively requires that Congress attend to the *mens rea* element in every offense it enacts. When Congress has spoken clearly, the courts have no authority to impose a *mens rea* term; when Congress has not made its intention clear, courts are to use the “most protective” standard. But a gap in the recommendation may undermine the report’s goal—unless Congress specifies and defines the default *mens rea* term, the consequence will be more, not less, variance in *mens rea* elements.

## 2. Apply the Culpability Term to All Elements

Under this suggested rule, federal courts are directed to apply “any introductory or blanket *mens rea* term to each element of the offense.”<sup>126</sup> This recommendation is based on the Model Penal Code’s explanation of how its

---

<sup>121</sup> *Id.* The recommendation reads: “[I]t is strongly recommended that any default *mens rea* provision enacted into federal law rely on the *mens rea* terms that are most protective of persons who are not truly blameworthy.” *Id.* On this ground, a negligent culpability element would also be insufficiently protective of those whose conduct is not worthy of condemnation.

<sup>122</sup> *See id.*

<sup>123</sup> *See supra* Part II.

<sup>124</sup> *See* WITHOUT INTENT, *supra* note 2, at n.95.

<sup>125</sup> The recommendation seems consistent with the result in *Staples*. The holding that the gun control law was not a public welfare offense and thus merited a *mens rea* element may not have been what Congress intended. *See Staples v. United States*, 511 U.S. 600, 624 (1994) (Stevens, J., dissenting).

<sup>126</sup> *See* WITHOUT INTENT, *supra* note 2, at 27.

provisions should be interpreted.<sup>127</sup> Under the suggested rule, federal courts would require the government to prove that the defendants are culpable for each element of the offense. As with the first default rule, this procedure does not alter Congress's ability to except a law from that interpretive standard, as long as the text of the statute makes Congress's intention clear.<sup>128</sup> This suggestion is aimed at weak *mens rea* elements; 31% of the proposed offenses in the report were graded as weak.<sup>129</sup>

One benefit of this default position is that it simplifies the courts' task by imposing a single standard. It avoids a common problem of statutory interpretation and will, in time, reduce the number of inconsistent decisions. The authors cite *Flores-Figueroa v. United States*,<sup>130</sup> recently decided by the Supreme Court, as an example of correct application of the *mens rea* element and take some encouragement from it.<sup>131</sup> That encouragement, however, may be unwarranted.

In *Flores-Figueroa*, the Court considered the Aggravated Identity Theft statute, which imposes an additional two-year consecutive term of imprisonment for those convicted of certain offenses, including the crime of knowingly using false identity documents.<sup>132</sup> The circuit courts had reached diametrically opposite conclusions on whether the *mens rea* of "knowingly" applied to the means of identification of another person.<sup>133</sup> If it did, the government would be obliged to prove that the defendants knew that the false identity document, which the defendants used to find work, belonged to an actual person.

Relying on statutory construction and rules of grammar,<sup>134</sup> the Court unanimously agreed that "knowingly" applied to the documents as well as to their use. Thus, the government must prove that the defendants knew

<sup>127</sup> See *id.* at n.96; MODEL PENAL CODE § 2.02(4) (Official Draft & Revised Comments 1985) (stating that when an offense does not distinguish among its material elements, the prescribed culpability term "shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.").

<sup>128</sup> This deference to legislative prerogatives also appears in the Model Penal Code provision on which the recommendation is based. See MODEL PENAL CODE § 2.02(4).

<sup>129</sup> See *supra* text accompanying notes 109-110.

<sup>130</sup> 129 S.Ct. 1886 (2009).

<sup>131</sup> See, e.g., *id.*; see also *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68 (1994) (holding that the government must prove that the defendant knew the victim had not reached the age of majority).

<sup>132</sup> See 18 U.S.C. §§ 1028A, (c)(4) (2006) (listing provisions relating to fraud and false statements).

<sup>133</sup> Compare *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006) (holding that the government did not have to prove that the defendant knew that the means of identification actually belonged to another person), with *United States v. Godin*, 534 F.3d 51 (1st Cir. 2008) (holding that the government must establish that defendant knew the means of identification actually belonged to another person).

<sup>134</sup> See *Flores-Figueroa*, 129 S.Ct. at 1891 ("In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb is telling the listener how the subject performed the entire action, including the object as set forth in the sentence.").

that the means of identification did, in fact, belong to someone else. The opinion included the statement: “courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word ‘knowingly’ as applying that word to each element.”<sup>135</sup> This statement mirrors the rule recommended in *Without Intent*.

Three concurring justices wrote specifically to critique the statement, challenging whether it was the “ordinary practice” of courts to apply the *mens rea* to every element in the offense. Justice Alito argued that while it is fair to begin with such a general presumption, he was wary of an “overly rigid rule” that could impede a court when deciding the issue. In his view, a particular context may rebut that presumption of general application to every element.<sup>136</sup> Justice Scalia, with Justice Thomas joining, noted that while the majority’s statement may be descriptively correct, it is not what courts *should do*.<sup>137</sup>

The debate in *Flores-Figueroa* illustrates the contextual aspect of *mens rea* in federal criminal law<sup>138</sup> and the preference for continuing contextual interpretation. The concurring justices’ objections also demonstrate that the courts developed the federal *mens rea* jurisprudence from the bottom-up—through applications in many circumstances. Courts may resist directives from another source, especially if the default rule makes it difficult to maintain some order among their prior holdings and precedents.<sup>139</sup>

As a final point, the report suggests that the courts apply the *mens rea* to each element,<sup>140</sup> which would seem to include jurisdictional<sup>141</sup> and threshold circumstances.<sup>142</sup> Yet, the report confusingly cites the Model Pe-

<sup>135</sup> *Id.* at 1890.

<sup>136</sup> *See id.* at 1895 (Alito, J., concurring) (citations omitted).

<sup>137</sup> *See id.* at 1894 (Scalia, J., concurring) ((expressing concern that a *mens rea* term might be “expanded” to reach an element that the statutory text had limited) (emphasis in original)). Because under the default rule Congress is free to draft a statute that specifically states the *mens rea* is not to apply to every element, Justice Scalia’s concern is less pertinent to the recommendation.

<sup>138</sup> *See supra*, text accompanying note 42-50 (discussing *mens rea* element in federal criminal law and noting that the same terms carry different implications, depending on the type of law and other circumstances).

<sup>139</sup> *See generally* Batey, *supra* note 41 (providing evidence that courts are unwilling to leave the definition of mental requirement to the legislature).

<sup>140</sup> *See* WITHOUT INTENT, *supra* note 2, at 27.

<sup>141</sup> Federal criminal laws, especially those enacted before the expansion of the Commerce Clause, often require a crossing of state lines using a channel or instrument of commerce. *See, e.g.*, National Stolen Property Act, 18 U.S.C. §§ 2311-2322 (2006). Other statutes rely on specific constitutional provisions or the necessity of managing its affairs. *See e.g.*, Mail Fraud Act, 18 U.S.C. § 1341 (Supp. III 2009) (authorized by the postal and necessary and proper clauses of the Constitution); 18 U.S.C. § 1001 (2006) (false statements).

<sup>142</sup> For examples of threshold values, *see* 18 U.S.C. § 666 (2006) (program bribery, threshold values of \$5,000 and \$10,000); 17 U.S.C. § 506 (2006 & Supp. III 2009) (criminal copyright, threshold value of \$1,000 total retail value); Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (amended 2008)

nal Code, which applies the *mens rea* only to material elements.<sup>143</sup> The federal courts have held that *mens rea* does not apply to jurisdictional and other non-material elements in case law.<sup>144</sup> This appears to be a point that can be easily clarified, but it is presently unclear whether the authors intended that Congress or the courts decide the matter. If the matter is delegated to the courts to decide—which the report sought to avoid—the prospect of inconsistent decisions increases. It would be preferable if Congress drafts the default statute to explain to which other elements and circumstances the *mens rea* applies.

### C. Codify the Common Law Rule of Lenity

The third recommendation of the report is that Congress directs courts to apply the rule of lenity. The rule of lenity is a common law device that is applied to break a deadlock that occurs when a statutory term is ambiguous.<sup>145</sup> In that case, courts are to interpret the statute in favor of the defendant, choosing the less harsh reading.<sup>146</sup> The trigger for exercising lenity is ambiguity, defined as “two rational readings of a criminal statute, one harsher than the other.”<sup>147</sup> The harsher reading is chosen only when Congress has spoken in clear and definite language so the statute is not ambiguous.<sup>148</sup> Only when doubt exists about the meaning of a statutory term does the benefit of that doubt go to the defendant.

The rule is based on two rationales: the due process requirement that citizens have notice of banned conduct, and Congress’s power to delegate lawmaking authority to the courts.<sup>149</sup> As explained in *United States v. Bass*,

---

(various values for sentencing purposes); see also *United States v. Morris*, 928 F.2d 504 (2d Cir. 1991) (abrogated by statute).

<sup>143</sup> See MODEL PENAL CODE § 2.02(4) (Official Draft & Revised Comments 1985).

<sup>144</sup> See *United States v. Yermian*, 468 U.S. 63, 76 (1984) (holding that government need not prove that false statements were made with actual knowledge of federal agency jurisdiction); *United States v. Feola*, 420 U.S. 671, 695-696 (1975) (holding that proof of defendant’s knowledge that victims were federal officers is not required); *United States v. Lindemann*, 85 F.3d 1232, 1241 (7th Cir. 1996) (knowing or reasonably foreseeable use of interstate wire not required under 18 U.S.C. § 1343 (wire fraud)); *United States v. Bryant*, 766 F.2d 370, 375 (9th Cir. 1985) (wire fraud).

<sup>145</sup> For comprehensive reviews of the lenity doctrine and its connections to overbreadth and vagueness in criminal statutes, see John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241 (2002), and Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

<sup>146</sup> See *United States v. Santos*, 553 U.S. 507, 514 (2008) (stating that “[u]nder a long line of our decisions, the tie must go to the defendant.”).

<sup>147</sup> *McNally v. United States*, 483 U.S. 350, 359 (1987) (exercising lenity to limit mail and wire fraud to the deprivation of property rights) (citation omitted).

<sup>148</sup> See *id.* at 359-60.

<sup>149</sup> See *United States v. Bass*, 404 U.S. 336, 347-49 (1971) (stating that the rule of lenity is dictated by “wise principles this Court has long followed”) (citation omitted). A concern for the balance in

it is appropriate to require Congress to speak in language that is clear and definite; doing so ensures fair warning in language that will be understood.<sup>150</sup> The Court in *Bass* also stated that the seriousness of criminal sanction dictates that legislatures, and not courts, should define criminal activity.<sup>151</sup> Codifying the rule of lenity thus reflects and furthers the report's goal of providing fair notice by reducing delegation of law-making authority.<sup>152</sup> Whether these benefits come to pass, however, depends on how two issues are resolved.

The first issue is fundamental and concerns whether the rule of lenity should be ignored or applied only in a constrained form.<sup>153</sup> The Model Penal Code contains a version of lenity that markedly constrains the scope of a court's interpretation of a statute.<sup>154</sup> It states that when a statutory text is susceptible of differing constructions, it is to be interpreted in a way that furthers the general purposes of the Code as a whole.<sup>155</sup> In sum, the Model Penal Code recognizes the possibility of unclear and ambiguous statutes, but does not empower courts to examine the text of the statute at issue, its legislative history, or its purpose.<sup>156</sup> However, the Model Penal Code directive is of little use to the federal system because federal criminal offenses

---

criminal law between the states and the federal government, also referred to by the Court in *Bass*, is not relevant here. *See id.* at 349-50.

<sup>150</sup> *See id.* at 347-48 (stating also that fair warning includes notice of what the law intends to do if a certain line is passed). *See also* *Bell v. United States*, 349 U.S. 81, 83-84 (1955) (stating that the rule merely indicates that unless Congress makes its meaning clear, any doubt will be resolved in favor of the defendant). The Court in *Bell* also stated that resolving an ambiguity in favor of lenity is "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Id.*

<sup>151</sup> 404 U.S. at 348.

<sup>152</sup> *See* WITHOUT INTENT, *supra* note 2, at 28. The report also postulates that a codified rule of lenity would empower lower courts to evaluate statutes, thus serving the rights of defendants at every stage of the criminal process. *See id.*; *see also* Conrad Hester, Note, *Reviving Lenity: Prosecutorial Use of the Rule of Lenity as an Alternative to Limitations on Judicial Use*, 27 REV. LITIG. 513, 529-30, 534-35 (2008).

<sup>153</sup> Dan Kahan has suggested that the rule of lenity obscures another well-established rule, that Congress may delegate criminal lawmaking power to the Courts. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (1994); *see also* Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 232 (1997) (describing interpretive guidelines when provisions are ambiguous).

<sup>154</sup> *See* MODEL PENAL CODE § 1.02(3) (Official Draft & Revised Comments 1985). *See also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04 (5th ed. 2009) ("The Model Penal Code does not recognize the lenity principle.").

<sup>155</sup> MODEL PENAL CODE § 1.02(3). "The drafters deliberately rejected the 'ancient rule that penal law must be strictly construed, . . . because it unduly emphasized only one aspect of the problem,' namely fair notice to potential offenders." Kahan, *supra* note 153, at 384 n.190 (quoting MODEL PENAL CODE § 1.02 cmt. 4).

<sup>156</sup> The states seem in some disarray on this point. Some have adopted the Model Penal Code standard; others have eliminated the rule entirely, while others have codified the common law rule. *See* Hester, *supra* note 153, at 524-26 (reviewing state approaches to the rule).



es, especially regulatory and welfare offenses, do not share a uniform general purpose.

The second issue raised by the recommendation concerns the way courts determine that a statute is ambiguous, the necessary trigger for exercising lenity. Traditionally, courts find ambiguity only after first using other interpretive devices to divine Congress's intent in enacting the statute. Thus, a statute is ambiguous only after viewing "every thing [sic] from which aid can be derived,"<sup>157</sup> including "the language and structure, legislative history, and motivating policies of the statute."<sup>158</sup> Justice Souter, writing for the majority in *United States v. R.L.C.*, noted that the Court invoked the rule after "examining nontextual factors that make clear the legislative intent."<sup>159</sup>

Another approach, supported by Justice Scalia, would find ambiguity based solely on the text of the statute.<sup>160</sup> In *United States v. Santos*, the Court debated the meaning of the word "proceeds" in a money laundering statute.<sup>161</sup> Justice Scalia, writing for a plurality, stated that "[f]rom the face of the statute" the term was ambiguous.<sup>162</sup> The rule of lenity was then invoked over the objections of four dissenting justices and the concurrence of Justice Stevens. Relying on a traditional inquiry of all relevant material, Justice Stevens argued that the provision was not ambiguous and the rule of lenity was inapplicable.<sup>163</sup> Significantly, Justice Alito, in dissent, noted that five justices agreed that recourse to legislative purpose is warranted.<sup>164</sup>

Although the issue of recourse to legislative materials seems settled, it may not remain so, as the composition of the Court has changed since *Santos* was decided in 2008. As it stands, the recent application of lenity in the Supreme Court is a contested development whose outcome is far from clear. If the authors of the report hope to encourage courts to use the rule more liberally, they should urge Congress to add specific standards for find-

<sup>157</sup> *United States v. Fisher*, 6 U.S. 358, 386 (1805).

<sup>158</sup> *United States v. R.L.C.*, 503 U.S. 291, 293 (1992) (Scalia, J., concurring) (citation omitted).

<sup>159</sup> *Id.* at 306 n.6 (citation omitted).

<sup>160</sup> *See id.* at 307-11 (1992) (Scalia, J., concurring); *see also* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197 (1994).

<sup>161</sup> 553 U.S. 507 (2008) (invoking lenity to determine that the term "proceeds" in a money laundering statute means profits, not gross receipts).

<sup>162</sup> *See id.* at 514 (plurality opinion) (stating that the term "proceeds" could mean either receipts or profits).

<sup>163</sup> *See id.* at 524-28 (Stevens, J., concurring) (noting also that ambiguous terms effectively delegate to federal judges the task of filling statutory gaps).

<sup>164</sup> *See id.* at 532 n.1 (Alito, J., dissenting). The Court's most recent holding on lenity in a case challenging the Bureau of Prisons' calculation of good time credit is probably not its last. *See Barber v. Thomas*, 130 S. Ct. 2499, 2508-09 (2010) ((stating that "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended.") (emphasis added) (citations omitted)).

ing ambiguity. Codifying the rule of lenity as it exists will not prevent variations that undermine the goal of the recommendation.

To summarize the analysis in this section, each of the three recommendations raises issues that could negatively affect the goal of pressuring Congress to take responsibility for *mens rea* elements in criminal laws. Requiring courts to insert a *mens rea* element when Congress is unclear about its intention to enact a strict liability crime leaves significant questions unanswered about the ultimate standard of “most protective” and which body should define the standard. Resistance to the recommendation to apply the *mens rea* term to all elements of an offense arises from both the significance of context in federal *mens rea* precedents and the uncertainty about the term’s application to jurisdictional and threshold elements of an offense. Finally, the recommendation to codify the rule of lenity does not include a method for finding the threshold requirement of ambiguity, effectively giving courts the choice to invoke the rule. In essence, each of the three recommendations suffers from the same flaw—pushing decisions on to the courts only institutionalizes the status quo rather than providing direction for changing it.

#### CONCLUSION

One way to curtail overcriminalization is to allow the *mens rea* element to perform its traditional function of ensuring that only the culpable are subject to punishment. Yet the advent of regulatory and public welfare crimes, use of common law *mens rea* terms, and judicial interpretation of those terms has weakened *mens rea* standards in the federal system. Despite these developments, the words of *Morissette* ring true: a robust *mens rea* element remains a necessary prerequisite to criminal liability and just punishment.

Thanks to the authors and sponsors of *Without Intent*, we now have a better grasp of the extent of congressional responsibility for the weak *mens rea* elements in federal criminal laws. Although the proposed default rules may not lead to stronger *mens rea* standards in their present form, they provide a basis for further consideration and commentary. This article identifies weaknesses in the proposed default rules, a first step in amending them for greater effectiveness.

REMARKS ON RESTORING THE *MENS REA* REQUIREMENT

*Harvey Silverglate\**

I begin by admitting that I am not a legal scholar; I am a criminal defense and civil liberties trial and appellate *practitioner*. I am also an occasional journalist and author. So when I was asked to comment on a presentation by a real academic, on the subject of “overcriminalization,” I feared that the professor and I would be inhabiting somewhat different worlds. However, I decided to accept the invitation—for which I thank the organizers of this conference—because the subject focuses on what I consider to be one of the most dangerous and intractable problems in the federal criminal justice system. A problem which has its theoretical side, but which also happens to be an increasingly common and disturbing one for trial and appellate lawyers and their often beleaguered clients. It is a problem that requires the urgent attention of scholars, practitioners, and indeed, folks throughout civil society.

I begin with my view of what is really the central problem. The term overcriminalization might be a bit misleading. You will find it used throughout the magnificent joint report, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, co-authored by Heritage and NACDL.<sup>1</sup> But what does the term actually mean?

When I think of overcriminalization, I think of the problem endemic to modern federal criminal legislation, from the 1930s to the present, caused by the fact that too many things are made criminal.<sup>2</sup> Besides the burgeoning federal criminal code, there is also the monumental Code of Federal Regulations. No human being could possibly know, nor intuit, all of the actions in which he or she engages in the course of a day that might arguably be a federal crime. Lord only knows how many federal felonies each of us in this room committed yesterday. Indeed, I know a former prosecutor who would come close to considering this conference to be a conspiracy to obstruct justice!

However, this problem of unknowingly committing myriad felonies in a typical day is due only in part to what I, at least, deem to be overcriminalization. Sure, it is a big problem that we cannot know or intuit that some-

---

\* Author and Of Counsel, Zalkind, Rodriguez, Lunt & Duncan, LLP.

<sup>1</sup> See BRIAN W. WALSH AND TIFFANY JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW*, available at <http://www.nacdl.org/withoutintent>.

<sup>2</sup> By 2007, the U.S. Code contained more than 4,450 criminal offenses, up from 3,000 in 1980. See JOHN S. BAKER JR., *MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION* (May 2004), available at <http://www.heritage.org/Research/LegalIssues/lm26.cfm>.

thing we are doing happens to violate a statute or regulation simply because there are so many of them. But an equally—if not indeed more—serious problem arises when the statutes and regulations, in addition to being *too numerous* for ordinary human beings to know, are *too vague* for the typical, intelligent citizen or even lawyer to understand. There is simply no way to assure your compliance with a vague statute, even if you are aware of its existence.

I am told, and I believe, that the movement to combat overcriminalization comprehends both statutes that criminalize too many aspects of daily life and commerce, as well as those that are simply incomprehensible. When too many activities are denominated federal crimes—overcriminalization in its most common meaning—we enter into a tyranny that, in theory, might bother primarily libertarians and federalists. But again, in theory, with the right technology, we could keep track of everything deemed criminal by the feds—not that it would be easy. However, when these laws are *incomprehensible* because they employ such vague language that even a machine-like brain cannot figure out what conduct would constitute the criminal transgression, we enter into even more dangerous territory, one that transcends political ideology.

Vagueness has generally been thought to be essentially a “due process” problem. The due process clause of the Fifth Amendment protects citizens from being prosecuted under federal laws that are so vague that they fail to give notice of what conduct is prohibited. Similarly, the due process clause of the Fourteenth Amendment provides this protection from state laws. But my experience is that by and large we can understand the conduct that is criminalized under state law. Maybe this is because our state criminal codes are derived from common law concepts, where the notion of *mens rea* is deeply embedded. Historically, the state could not obtain a conviction unless it could show that the miscreant not only committed the act, but that he or she did so intentionally and with the knowledge that the act violated the law. Furthermore, it is generally easier to intuit when conduct violates a state law, in contrast to a federal law. Murder, for example, is easier to grasp than, say, some esoteric mail or securities fraud.

To be sure, there are *some* state crimes that have a touch of vagueness. During the period of civil rights demonstrations in the Jim Crow South during the 1960s, sheriffs would arrest demonstrators and charge them with “disturbing the peace” under state laws that were unclear as to precisely what divided disturbing the peace from a constitutionally protected protest demonstration. The Supreme Court in 1961 reversed the conviction of Reverend B. Elton Cox for leading a demonstration “in or near” a court-

house, because the statute prohibiting such demonstrations in proximity to a house of justice was too vague.<sup>3</sup>

But by and large, state laws do not suffer from such vagueness problems, in part because such laws have common law antecedents that inform their meaning in both the courts and in common parlance and understanding. Part of this common law tradition entails the doctrine of *lenity*; if a criminal statute is sufficiently ambiguous so that it is not clear to a reasonable person that his conduct fits within the statute, the defendant is entitled to the benefit of the doubt. But in 1812 the Supreme Court held that federal law is entirely statutory, not common law.<sup>4</sup> And so the long history, wisdom, and experience of common law jurisprudence have been largely unavailable, or at least not mandatory, in the interpretation and enforcement of federal criminal law. I consider this to be a recipe for prosecutorial mischief.

When federal criminal law began its path of deviation from ancient common law, one of the casualties was the doctrine of *mens rea*. I have to tell you, frankly, that I do not really understand the role of *mens rea* in federal criminal law. Maybe if I listen closely enough today I'll figure it out, but I suspect that I am not the only one. It seems to me that the Congress does not understand it any better than I do. And alas, the federal courts are not too good at it either. Sometimes *mens rea* counts, sometimes it does not. Sometimes it is applied more strictly, sometimes hardly at all. Sometimes *mens rea* requires that the defendant be proven to know what he was doing, or what the law requires. Often such a state of mind or knowledge matters not. It is truly a mess. And the growing list of strict liability laws threaten what little influence the doctrine of *mens rea* has retained in the federal criminal justice system.

Let me give you one example from my recently published book, *Three Felonies a Day: How the Feds Target the Innocent*.<sup>5</sup> I will here truncate my discussion of the case, but you can read about it more fully in the book's concluding chapter. Bradford C. Councilman worked at a company that provided an online listing service for rare and out-of-print books. It supplied a number of its book-dealer customers with electronic mail addresses and thereby acted as an Internet Service Provider. As part of the service it rendered, it made temporary copies of all emails that went through its system, and then eventually deleted those copies when it was clear that the email had actually arrived at its destination. Councilman's computer, in other words, was a sort of way-station for electronic messages.

The feds indicted Councilman for violation of the wiretap statute. As the litigation unfolded, it became obvious that it was unclear whether the

---

<sup>3</sup> Cox v. Louisiana, 379 U.S. 536 (1965).

<sup>4</sup> United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

<sup>5</sup> HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).

statute covered Councilman's activity, since he did not exactly make a copy of the emails *while* they were in transit, as the statute appeared to define wiretapping. Instead, he copied the emails while they were temporarily standing still in his company's computer, and then sent them on to the recipient. He was not, I thought, a wire-tapper in any reasonable nor even technical sense. He was engaging in "business as usual" for a person in his industry.

The federal district judge at first denied Councilman's motion to dismiss.<sup>6</sup> The judge then changed his mind when he found a Ninth Circuit opinion<sup>7</sup> that interpreted the statute in such a way so as to exclude conduct like Councilman's. In that case, incidentally, the Department of Justice advanced a definition much like Councilman's in his Massachusetts litigation, but in the Ninth Circuit case it was in the government's interest to have a *more restrictive* definition of wiretapping in order to protect government agents from liability.

In Councilman's case, the DOJ appealed to the First Circuit, where a three-judge panel upheld the dismissal, concluding that the statute covered copying an email only while it was in transit.<sup>8</sup> But the government persisted, and the First Circuit en banc reversed the panel in August of 2005.<sup>9</sup> The en banc court said that its opinion pivoted on a question central in the criminal law: "whether Councilman had fair warning that the Act would be construed to cover his alleged conduct in a criminal case, and whether the rule of lenity or other principles require us to construe the Act in his favor."<sup>10</sup> The five-judge majority claimed to "find no basis to apply any of the fair warning doctrines."<sup>11</sup> Nor did they see fit to apply the "rule of lenity," which holds, essentially, that if doubt over the interpretation of a criminal statute exists, the defendant has to be given the benefit of that doubt.

The en banc court's analysis was remarkable for the degree to which it dismissed all of the doubts previously expressed about the meaning and reach of the Wiretap Act. In response to Councilman's argument that the "plain text" of the statute did not cover his actions, the majority said: "As often happens under close scrutiny, the plain text is not so plain."<sup>12</sup> But this lack of clarity, rather than working *for* Councilman, somehow worked *against* him. The majority claimed to resolve "this continuing ambiguity" in the statute's language by looking to the legislative history, a notoriously difficult task.<sup>13</sup> Congress intended to give "broad" protection to electronic

---

<sup>6</sup> United States v. Councilman, 245 F.Supp.2d 319 (D. Mass. 2003).

<sup>7</sup> Konop v. Hawaiian Airlines, Inc., 302 F.3d 868 (9th Cir. 2002).

<sup>8</sup> United States v. Councilman, 373 F.3d 197 (1st Cir. 2004).

<sup>9</sup> United States v. Councilman, 418 F.3d 67, 67 (1st Cir. 2005) (en banc).

<sup>10</sup> *Id.* at 72.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 73.

<sup>13</sup> *Id.* at 76.

communications, they concluded, and so the panel's *Councilman* decision was deemed flawed.

The majority of First Circuit judges must have been a bit self-conscious about reinstating an indictment that was so controversial and that had perplexed so many fine judicial minds. The court could not entirely deny that there was *some* degree of ambiguity. But the rule of lenity, the majority intoned, applies only in cases of "grievous ambiguity in a penal statute."<sup>14</sup> In this case, the majority remarked, in one of its more bizarre formulations, there was only "garden-variety, textual ambiguity."<sup>15</sup>

It was this last part of the majority's opinion reinstating the indictment that drew the seeming ire of Circuit Judge Juan Torruella, who issued a stinging dissent, with which only one fellow judge agreed. Judge Torruella argued that surely the rule of lenity must be applied in this case: "Councilman is being held to a level of knowledge which would not be expected of any of the judges who have dealt with this problem, to say nothing of 'men [and women] of common intelligence.'"<sup>16</sup> "If the issue presented be 'garden-variety,' this is a garden in need of a weed killer."<sup>17</sup>

The overcriminalization approach must not be pursued without due attention paid to the related but analytically distinct problem of vagueness. In the *Councilman* case, after all, few would think that it is overcriminalization for Congress to outlaw wiretapping. And given the clear interstate nature of electronic communications, even federalists would likely concede legitimate federal jurisdiction and interest. The problem here is not reasonably classified, in my view, as *overcriminalization*, but rather, as statutory *vagueness*. In other words, if a law criminalizes being "bad," then requiring knowledge of this law before punishing a citizen is putting the cart before the horse.

---

<sup>14</sup> *Id.* at 83.

<sup>15</sup> *Councilman*, 418 F.3d at 84. (quoting *Sabeti v. Dipaolo*, 16 F.3d 16, 18 (1st Cir. 1994) (Breyer, C.J.).

<sup>16</sup> *United States v. Councilman*, 418 F.3d 67, 90 (1st Cir. 2005) (en banc) (Torruella, J., dissenting) (addition in original).

<sup>17</sup> *Id.* (internal citations omitted).





## THE BETTER PART OF LENITY

*Marie Gryphon\**

In her thoughtful evaluation of the report titled, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*,<sup>1</sup> Geraldine Moohr explores the contribution of the federal criminal law's diminished *mens rea* requirements to the problem of "overcriminalization." Overcriminalization is a neologism that defies uncontroversial definition, but that generally refers to the unjustified use of the criminal law to punish conduct that is not blameworthy in any traditional sense.<sup>2</sup> This comment expands on Professor Moohr's response to *Without Intent's* recommendation that Congress pass legislation codifying the rule of lenity,<sup>3</sup> a judicial canon of construction applicable specifically to criminal laws, which holds that ambiguous criminal laws should always be construed narrowly, in the manner most favorable to the criminal defendant.<sup>4</sup> Like Professor Moohr, I am concerned that a codified rule of lenity may be interpreted and applied by the courts in a way that could "undermine the goal of the recommendation."<sup>5</sup> The following analysis summarizes the current state of the law and makes some predictions about the likely effect of a codified lenity in order to help those battling the phenomenon of overcriminalization to evaluate the perils and rewards of this particular strategy.

Lenity has been a part of the English common law for several centuries, and was in use long before the ratification of the United States Constitution.<sup>6</sup> The Supreme Court recognized the rule of lenity as a principle of U.S. law as early as 1820 in *United States v. Wiltberger*, where the Court held that a federal statute criminalizing manslaughter "on the high seas" did

---

\* Olin-Searle Fellow in Law, Harvard Law School; Adjunct Fellow, Manhattan Institute Center for Legal Policy; B.A., University of Washington; J.D., University of Washington School of Law; Ph.D. candidate in public policy, Harvard University.

<sup>1</sup> See BRIAN W. WALSH & TIFFANY M. JOSLYN, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW* (2010).

<sup>2</sup> See Geraldine Moohr, *Playing With the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Law*, 7 J.L. ECON. & POL'Y 685, 686 (2011).

<sup>3</sup> See WALSH & JOSLYN, *supra* note 1, at 28.

<sup>4</sup> See 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 59:3 at 167 (7th ed. 2007) ("[P]enal statutes should be strictly construed against the government . . .").

<sup>5</sup> Moohr, *supra* note 2, at 707.

<sup>6</sup> See John Calvin Jefferies, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985). See also *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) ("The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.").

not apply to manslaughter committed on an American vessel in an inland Chinese river way.<sup>7</sup>

Jurists and scholars advance two traditional justifications for the rule of lenity. The oldest justification for the rule, predating the American Revolution, is that the criminal law should provide fair notice to citizens of what behavior it will punish.<sup>8</sup> Because of the grave consequences of a criminal conviction, “the law-making body owes a duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen may lose his life or liberty.”<sup>9</sup> Where the legislature has instead been ambiguous, the rule of lenity ensures fair notice by adopting a narrow interpretation of the statutory language.<sup>10</sup>

The other frequently invoked justification for the rule of lenity is that it prevents judicial usurpation of the legislative power to determine what conduct is criminal.<sup>11</sup> In this capacity, Cass Sunstein explains, it is a kind of non-delegation doctrine: “One function of the lenity principle is to ensure against delegations [of the lawmaking authority to the judicial branch]. Criminal law must be a product of a clear judgment on Congress’s part.”<sup>12</sup> In the absence of such a clear judgment, a broad interpretation of an ambiguous criminal statute raises the “fear that expansive judicial interpretations will create penalties not originally intended by the legislature.”<sup>13</sup>

Lenity is only one of many canons of construction that judges traditionally use when interpreting statutory law. The canons can be very

<sup>7</sup> *Id.* at 95-96, 103. See also Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 91 (1998).

<sup>8</sup> See Hari M. Osofsky, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 202 (1997).

<sup>9</sup> *Snitkin v. United States*, 265 F. 489, 494 (7th Cir. 1920).

<sup>10</sup> Lenity performs this function well enough when the conduct criminalized by one plausible reading of the statute is a wholly included subset of the conduct criminalized by the alternative reading, but it doesn’t provide clear guidance on how a court should interpret a statute with multiple plausible meanings, each of which would make criminal some conduct that would be innocent under an alternative reading. The Court faced this problem in *Skilling v. United States* when interpreting the so-called “honest services fraud” statute. 130 S. Ct. 2896 (2010). The majority, invoking lenity, construed the statute to cover only the conduct prohibited by all plausible interpretations of the law. See *id.* at 2930-31. Justice Scalia, while concurring in the judgment, strongly objected to this approach:

[I]t is obvious that mere prohibition of bribery and kickbacks was not the intent of the statute. To say that bribery and kickbacks represented “the core” of the doctrine, or that most cases applying the doctrine involved those offenses, is not to say that they *are* the doctrine. All it proves is that the multifarious versions of the doctrine *overlap* with regard to those offenses. . . . Among all the [interpretations] of honest-services fraud, not one is limited to bribery and kickbacks. That is a dish the Court has cooked up all on its own.

*Id.* at 2939 (Scalia, J., concurring).

<sup>11</sup> *Ratzlaf v. United States*, 510 U.S. 135, 148-49 (1994) (citing *United States v. Bass*, 404 U.S. 336, 347-350 (1971)).

<sup>12</sup> Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000).

<sup>13</sup> 3 SINGER & SINGER, *supra* note 4, § 59:4, at 190.

roughly divided into two main groups: “language canons” and “substantive canons.”<sup>14</sup> Language canons help judges discern the objective meaning (for textualists) or intended meaning (for intentionalists) of the statutory text.<sup>15</sup> “The rule of the last antecedent,” or the rule that a more specific statutory provision should, if applicable, take precedence over a conflicting general provision, is a good example of a language canon. By contrast, substantive canons do not necessarily help judges to discover legislative intent, although they are often couched in terms of “presumptions” about it.<sup>16</sup> Rather, they resolve ambiguities in favor of certain constitutional or public policy values.<sup>17</sup>

The rule of lenity is a substantive canon that resolves statutory ambiguities in favor of protecting constitutional rights from potential legislative or judicial incursion.<sup>18</sup> One of lenity’s justifications, the provision of fair notice to citizens about the content of the criminal law, is “rooted in fundamental principles of due process . . . .”<sup>19</sup> The other justification—that only the legislature is constitutionally empowered to decide what conduct is criminal—is grounded in separation of powers doctrine.<sup>20</sup>

At this point, one might reasonably ask: what on earth does it mean for a judicial canon of construction to be rooted or grounded or “in the shad-

<sup>14</sup> See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005). Jacob Scott has also created a helpful taxonomy of canons. See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

<sup>15</sup> See Brudney & Ditslear, *supra* note 14, at 12-13. Examples include the rule of last antecedent, which limits the effect of a proviso to the clause that immediately precedes it, and the rule that a more specific statutory provision should, if applicable, take precedence over a conflicting general provision. See [2A] SINGER & SINGER, *supra* note 4, § 47:33. Cf. *United States v. Hayes*, 129 S. Ct. 1079, 1086 (2009) (declining to apply the rule of the last antecedent because it is “not an absolute,” but can be overcome by other evidence of meaning (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003))).

<sup>16</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 27 (Amy Gutmann ed., 1997).

<sup>17</sup> See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 113-14 (2010); see also YULE KIM, CONG. RESEARCH SERV., 97-589, *STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS* CRS-17 (2008). For example, the canon that an ambiguous statute should be construed in a way that promotes a public interest rather than a private one is not a method of determining which interpretation is more objectively correct or truer to Congressional intent. Rather, it places a judicial thumb on the scale in favor of a particular public policy. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226, 252 (1986). The canon that ambiguous statutes should be construed not to apply retroactively is similarly grounded in constitutional considerations rather than epistemic ones. KIM, *supra* note 17, at 20-21.

<sup>18</sup> See Scott, *supra* note 14, at n.267.

<sup>19</sup> *Dunn v. United States*, 442 U.S. 100, 112 (1979).

<sup>20</sup> 1 SINGER & SINGER, *supra* note 4, § 4:6, at 149-50 (“The doctrine of separation of powers does not permit a legislature to abdicate its function by passing statutes which operate at the discretion of the courts, or under which courts are allowed to determine conditions in which the statute will be enforced.”).

ow” of the constitution?<sup>21</sup> Canons grounded in the Constitution are essentially specific applications of the more general judicial canon of constitutional avoidance,<sup>22</sup> which holds that courts should avoid unnecessarily addressing constitutional issues in cases that can be resolved by other means.<sup>23</sup> In the context of statutory construction, if one interpretation of a statute will raise grave constitutional questions, while another will not, courts usually choose the interpretation that avoids raising the constitutional question.<sup>24</sup> Supporters of constitutional avoidance view it as an exercise in judicial restraint: if a court is faced with a choice between narrowly construing a statute and striking it down entirely, choosing the narrow construction preserves as much of the legislature’s policy as possible, thereby deferring to it’s lawmaking prerogative.<sup>25</sup>

Jurists widely accept the validity of most common canons of construction, but there is much less agreement about when and how they should be deployed. In practice, the multiplicity of available canons and lack of consensus about the roles they play in the overall scheme of statutory interpretation afford individual judges wide latitude with respect to their use.<sup>26</sup> This does not mean that the judiciary should abandon the canons; in their absence, judges would have to resolve the inevitable ambiguities in statutory law with even less guidance. It does mean, however, that careful analysis of the purposes of different canons, and their relationship to each other and to the constitutional system, could yield a substantially more coherent and predictable interpretive methodology than we have today.

While judges almost universally acknowledge lenity as a valid canon, the case law reflects two major competing views about when the rule comes into play to resolve a statutory ambiguity. The current majority view might

---

<sup>21</sup> Scott, *supra* note 14, at 389.

<sup>22</sup> See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 600 (1992).

<sup>23</sup> See *Ashwander v. TN Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Some scholars have criticized the avoidance canon as hostile to congressional intent. See Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1573-1601 (2000).

<sup>24</sup> See *Skilling v. United States*, 130 S. Ct. 2896, 2929 (2010) (“The elementary rule is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality.” (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))).

<sup>25</sup> The canonical presumption in favor of the severability of unconstitutional provisions in larger statutory schemes has a similar rationale. See 2 SINGER & SINGER, *supra* note 4, § 44:1, at 580-81 (“Courts recognize a duty to sustain an act whenever this may be done by proper construction, and extend the duty to include the obligation to uphold part of an act which is separable from other and repugnant provisions.”).

<sup>26</sup> Some scholars even suggest that judges make use of this latitude to advance their preferred public policies through opportunistic use of the canons. See, e.g. Jonathan R. Macy & Geoffrey P. Miller, *The Canons of Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 660 (1992).

appropriately be called the “lenity last” view.<sup>27</sup> Lenity should be used, on this account, only when “a reasonable doubt persists about a statute’s intended scope even *after* resort to ‘the language and structure, legislative history, and motivating policies’ of the statute.”<sup>28</sup> “Lenity last” is a seldom used, last ditch tiebreaker, invoked only when every other clue to the legislature’s intent has been examined without success.

On the competing minority view, lenity should apply immediately if the statutory text alone, interpreted with the aid of the language canons, fails to yield a single clear meaning. Justice Scalia is the most prominent champion of this “lenity first” approach, in part because his textualist judicial philosophy holds that lawmakers’ intentions have no legal force unless they are plainly expressed in the language of statutes that have passed by a constitutionally adequate vote. If textualism is correct, then “lenity first” is obviously the right methodological approach, because it is improper to consider extrinsic evidence of legislative intent anyway.

But one need not be a textualist to embrace “lenity first.” Some non-textualists view “lenity first” as a good way to protect criminal defendants’ constitutional right to fair notice of the content of the criminal law.<sup>29</sup> For example, Justice Kennedy sometimes consults legislative history when interpreting civil law, but in criminal cases he joins opinions that justify the “lenity first” approach on due process grounds.<sup>30</sup>

In light of all of this, what exactly will change if Congress passes a statute codifying the rule of lenity? More specifically, can we expect a codified rule of lenity to combat the problem of overcriminalization more effectively than the current judicial canon alone? The answers to these questions, as Professor Moohr warns, are more uncertain than proponents of codification have acknowledged.

The uncertainty arises because Congress can’t comprehensively regulate via statute the judicial activity of interpreting statutes. This is no mere

---

<sup>27</sup> See 3 SINGER & SINGER, *supra* note 4, § 59:4, at 188-89 (“The rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed, not at the beginning . . .”).

<sup>28</sup> *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992) (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

<sup>29</sup> Justice Scalia also regularly invokes due process in support of the “lenity first” approach. See *id.* at 309 (Scalia, J., concurring) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports.” (citation omitted)).

<sup>30</sup> See, e.g., *Nat’l Cable & Telecomm. Ass’n v. Gulf Power, Inc.*, 534 U.S. 327, 358-59, 360 (2002) (consulting legislative history to determine the Federal Communications Commission’s powers over broadband internet and cable). See also *R.L.C.*, 503 U.S. at 307 (Scalia, J., concurring, joined by Kennedy, J. & Thomas, J.) (joining Justice Scalia’s opinion which applied the “lenity first” approach).

constitutional difficulty;<sup>31</sup> it is a theoretical impossibility.<sup>32</sup> If the current Congress codifies the rule of lenity, the courts will then have to interpret the new lenity statute and reconcile it with potentially conflicting language in other statutes by using their own judicial canons of interpretation. Because Congress cannot take over the judicial task of statutory interpretation, even if it would like to do so, judges will treat codified canons as additional grist for the mill of judicial interpretation, rather than as literal instructions to the judiciary about how to do its job.

In the worst-case scenario for overcriminalization's opponents, codifying lenity would have the perverse effect of solidifying the current majority view that lenity is a last resort in the game of statutory interpretation. Judges already committed to the more popular "lenity last" view would interpret a new statutory lenity in accordance with the judicial canon of common law usage, according to which, when the legislature employs words or concepts with well-settled common law meanings, courts should assume that it intends the words to mean what they do at common law.<sup>33</sup> Despite occasional vigorous dissents<sup>34</sup> and concurrences<sup>35</sup> arguing against it, the "lenity last" view has generally prevailed in recent Supreme Court cases.<sup>36</sup> It would be a pyrrhic victory for the forces arrayed against overcriminalization if, by persuading Congress to codify lenity, Congress placed the legislative imprimatur on its most impotent iteration. We already have "lenity last." What advocates of codification really want to do is to replace "lenity last" with "lenity first."

But, for better or worse, Congress probably lacks the constitutional authority pass a law requiring judges to adopt "lenity first." Such a law would have to instruct judges not to consider legislative history or other available extrinsic evidence of legislative intent when interpreting criminal statutes. Congress could try announcing, by statute, that such evidence does not re-

---

<sup>31</sup> Constitutional objections are at least plausible. See Scott, *supra* note 14, at 410 (raising the possibility that "legislative control over judicial interpretive methodology is unconstitutional. The claim here would be that statutory interpretive rules impermissibly intrude on the judicial power . . .").

<sup>32</sup> Immanuel Kant (Paul Guyer, Allen Wood ed.), *Critique of Pure Reason*, Cambridge University Press, 1998, p. 268 "[T]o show generally how one ought to subsume under these rules, i.e., distinguish whether something stands under them or not, this could not happen except once again through a rule. But just because this is a rule, it would demand another instruction for the power of judgment, and so it becomes clear that although the understanding is certainly capable of being instructed and equipped through rules, the power of judgment is a special talent that cannot be taught but only practiced."

<sup>33</sup> Scott, *supra* note 14, tbl. 11.

<sup>34</sup> See, e.g., *United States v. Hayes*, 129 S. Ct. 1079, 1093 (2009) (Roberts, J., dissenting) ("If the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history.")

<sup>35</sup> See, e.g., *R.L.C.*, 112 S. Ct. at 1339 (Scalia, J., concurring).

<sup>36</sup> See, e.g., *United States v. Granderson*, 511 U.S. 39, 54 (1994) ("In these circumstances—where text, structure, and [legislative] history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). See also *Dean v. United States*, 129 S. Ct. 1849, 1856 (2009); *Hayes*, 129 S. Ct. at 1088-89.

flect its intent. But this would not really be an empirical claim about the relationship between the contents of committee reports and the contents of the minds of members of Congress; it would be a legal claim about what kind of legislative intent the Constitution requires, and the judiciary remains the final authority on questions of constitutional law.<sup>37</sup> Similarly, if the “lenity last” majority on the bench does not think that due process requires the text of criminal statutes alone to provide fair warning to citizens, then Congress cannot tell them otherwise.

Still, a carefully drafted statute indicating that ambiguous language in criminal laws is intended in its narrower sense might navigate successfully between the Scylla of impotence and the Charybdis of unconstitutionality. If it did, the result would be something that must inartfully be called “lenity in-the-middle.” In this scenario, the new statutory lenity would just be additional textual evidence of legislative intent (or statutory meaning, for textualists), to be thrown in the mix with all the rest. For this reason, “lenity in-the-middle” would have a less sweeping and permanent effect on the law than reformers might hope. Its reach could be limited by court decisions that reconcile it with contrary language elsewhere in the criminal code, such as the specific instruction in the text of the Racketeer Influenced and Corrupt Organizations Act (RICO) directing that it be liberally construed.<sup>38</sup> According to the canon that specific congressional directives generally prevail over more general ones, the instruction in RICO could trump the lenity statute.<sup>39</sup> Future Congresses, whose members usually wish to appear tough on crime, might routinely include RICO-like language in future criminal laws. Contrary instructions in future criminal laws might also take precedence on the basis of the canon that newer statutes impliedly repeal or limit the reach of inconsistent older ones.<sup>40</sup> And, of course, Congress would be free to repeal statutory lenity on the heels of some unpopular future court decision.

In the best case scenario, the judiciary would respond to the codification of lenity by recognizing two rules of lenity instead of one: the new statutory lenity would guide inquiries into legislative intent in the limited way described above, and the old judicial canon would protect due process rights and police the separation of powers. If competently pursued, this approach would result in marginally greater protection for criminal defendants; they would retain whatever constitutional protection the judicial canon

---

<sup>37</sup> See *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803); *United States v. Klein*, 80 U.S. 128, 147 (1871).

<sup>38</sup> See Pub. L. No. 91-452 § 904(a), 84 Stat. 922 (1970) (“The provisions of this title . . . shall be liberally construed to effectuate its remedial purposes.”) (codified as amended at 18 U.S.C. § 1961-68 (2006)).

<sup>39</sup> See Scott, *supra* note 14, at 366.

<sup>40</sup> See, e.g., *Credit Suisse v. Billing*, 551 U.S. 264, 279 (2007) (holding that new federal statutes regulating securities had impliedly repealed inconsistent provisions in older antitrust legislation).

currently provides and receive an additional boost from statutory lenity's status as evidence of congressional intent. I am concerned, however, that it is unrealistic to expect judges and criminal defense lawyers to regularly juggle two lenities for only marginal benefit. If they failed to do so, the new statutory lenity might cause the old judicial canon of lenity to fall even further by the wayside.

This would be an unfortunate and unintended outcome for the authors of *Without Intent*. For them, "the tenderness of the law for the rights of individuals" is the better part of lenity.<sup>41</sup> Because this part of lenity is rooted in constitutional due process principles, its renaissance must take place within the court system itself.

---

<sup>41</sup> United States v. Wiltberger, 18 U.S. 76, 95 (1820).



DEVELOPING CONSENSUS SOLUTIONS TO  
OVERCRIMINALIZATION PROBLEMS: THE WAY AHEAD

*Jeffrey S. Parker\**

The foregoing symposium prints papers that were presented initially at the conference on *Overcriminalization 2.0: Developing Consensus Solutions* held in Washington, D.C., on October 21, 2010. I thank all of the participants in the conference, and the sponsoring organizations,<sup>1</sup> for making the conference successful. In particular, I would like to give special thanks to Professor Ellen Podgor of Stetson University, with whom I collaborated in assembling the speakers and program, to my faculty colleagues Frank Buckley and Henry Butler, successive directors of the Law and Economics Center at George Mason University School of Law, whose encouragement and support brought the project forward in terms of my participation, and to the editors and members of the *Journal of Law, Economics, and Policy*, which actually put on the conference and is publishing this symposium.

The basic themes of the conference were two-fold, both indicated in the conference title. First, as indicated by borrowing the cyber-term “2.0,” the conference sought to advance the ongoing discussion of overcriminalization problems. Second, as indicated in the subtitle, and in the wide array of viewpoints invited to participate, the conference sought to focus on developing solutions to those problems that could achieve broad consensus support. Both themes are amply reflected in the papers published in this symposium, and in the other contributions made during the conference sessions.<sup>2</sup>

Professor Podgor’s *Foreword*<sup>3</sup> ably surveys the contents of the symposium papers and conference proceedings. In this concluding essay, my aim is to develop some of those ideas toward the longer-term objective of finding solutions that can achieve both consensus support and substantial potential for ameliorating the problems of overcriminalization. Of course, I can-

---

\* Professor of Law, George Mason University School of Law. The author would like to acknowledge the research assistance of Meredith Schramm-Strosser (in the lead on overcriminalization), Ashley Finnegan, and Krista Goelz. Research support was provided by the Law and Economics Center at George Mason University School of Law.

<sup>1</sup> The sponsoring organizations included the National Association of Criminal Defense Lawyers, the Foundation for Criminal Justice, the *Journal of Law, Economics & Policy*, and the Law and Economics Center at George Mason University School of Law.

<sup>2</sup> While the principal papers and some comments are published in this issue, the full proceedings from the conference, and interviews with some of the participants, are available in video through the *Journal*’s web site, at [www.jlep.net/home/?page\\_id=315](http://www.jlep.net/home/?page_id=315), or at [www.vimeo.com/masonlec/videos](http://www.vimeo.com/masonlec/videos).

<sup>3</sup> See Ellen S. Podgor, *Foreword*, 7 J.L. ECON. & POL’Y 565 (2011).

not do justice to all of the ideas expressed during the conference, and, by necessity, must be selective. Nor are any of the other participants responsible for my comments here, nor my errors or omissions in interpreting their ideas, which are entirely my own.

This essay develops three main themes. The first is consensus. As several conference participants pointed out, concerns about “overcriminalization”—the misuse or overuse of the criminal sanction—are neither new nor unique in America. Moreover, the breadth of that concern, across ideological or methodological divisions, is not new either. However, the current critique reflects both a remarkable degree of consensus, and the potential for even greater consensus-building as we move forward. The vicissitudes of our political system are such that one can never be sure how much consensus is enough. Therefore, more is generally better. This will not be easy, as even the existing members of the coalition for reform are people of fundamentally differing views. Nevertheless, at some point successful consensus-building is likely to overcome political frictions.

While consensus-building is necessary, it may not be sufficient in itself to achieve successful reform. We have had some previous experience with broadly bipartisan law reforms gone awry, most notably the federal sentencing reform of the mid-1980s, which failed to account for the institutional incentives of the several actors that make up the criminal justice system. Therefore, the second theme developed here is the need to take an institutional perspective on reform initiatives. This perspective is applied to three important features of the current system: (1) broad prosecutorial discretion; (2) dilute or non-existent standards of *mens rea*, and otherwise vague standards of liability; and (3) the interrelationships among substantive, procedural, and evidentiary law. Even heroic efforts at law reform can end as empty words on paper—or worse, as producing untoward consequences that no one intended—unless reformers attend to the actual operation of the system in practice.

As is readily apparent from the first two themes, efforts at addressing overcriminalization problems can be fraught with pitfalls and perils. Accordingly, my third theme is to encourage patience, persistence, and modesty in reform efforts. As aptly phrased during the conference in the remarks of Ronald Gainer, himself a long-time veteran of the process,<sup>4</sup> “reform is no sport for the short-winded,”<sup>5</sup> and could backfire, so it may be that “things are bad enough as they are.”<sup>6</sup> The past history of reform efforts, especially at the federal level—both successful and unsuccessful—can be daunting to

---

<sup>4</sup> See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45 (1998).

<sup>5</sup> See Ronald L. Gainer, *Remarks on the Introduction to Criminal Law Reform*, 7 J.L. ECON. & POL'Y 587, 596 (2011).

<sup>6</sup> *Id.* at 590.

the most committed reformer. However, it is doubtful that there is any other responsible choice but to persevere.

Even advocates of reform may differ over how bad the problem has become, but there is no doubt that the level of criminalization in the United States today is in completely uncharted territory. Measured by per capita incarceration rates alone—which is an incomplete indicator of the social consequences of criminalization—the United States is now five *times* higher than the world average, five to ten times higher than other Western industrialized nations with comparable crime rates,<sup>7</sup> and about four to five times higher than its own historical average.<sup>8</sup> My opinion is that, among other consequences, the overuse of the criminal sanction, especially at the federal level, is a significant causative factor in the sluggishness of the U.S. economy over the past several business cycles, and places Americans at a substantial disadvantage in the competitive global economy. But even if those assessments were wrong, it still would be an embarrassment to American values that the Land of the Free also imprisons the largest incarcerated population on earth—both in per capital terms and (with the possible exception of China) in absolute size.<sup>9</sup> How can such a state of affairs be justified? Unless and until we obtain a compelling answer to that question, the impetus to reform will persist.

---

<sup>7</sup> The comparative incarceration rates are based on Walmsley, *World Prison Population List-8th Edition*, KING'S COLLEGE LONDON: INTERNATIONAL CENTRE FOR PRISON STUDIES, www.prisonstudies.org (data as of 2008). The rates (per 100,000 population) are 756 for the United States, versus approximately 150 for the world average, and the following in individual countries: U.K.-152 (England and Wales), Canada-116, Australia-129, New Zealand-185, Belgium-93, Denmark-63, Iceland-44, Sweden-74, Switzerland-76. According to U.N. comparative data, all of the foreign countries mentioned have roughly equivalent or higher rates of crime than the United States. See DIJK, VAN KESTEREN, & SMIT, *CRIMINAL VICTIMIZATION IN INTERNATIONAL PERSPECTIVE*, Ch. 2, Tables 3, 5 (2007).

<sup>8</sup> The historical trends through 2002 are analyzed in U.S. SENTENCING COMM'N, *FIFTEEN YEARS OF GUIDELINES SENTENCING* 39, Figure 2.1 (2004), which comments that “both federal and national imprisonment rates . . . remained fairly steady for fifty years before climbing to over four times their historic levels by 2002.” *Id.* at 40. Federal imprisonment rates grew faster than state rates, with the result that the historical federal share of national prison population had roughly doubled by 2002. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-2002*, Table 6.23. However, imprisoned populations are only part of the picture: by 2008, in addition to a U.S. national prison population of 2.3 million, there were another 5 million people then serving a sentence of “criminal justice supervision,” i.e., on probation, parole, or supervised release. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 1. The combined total of some 7.2 million people (excluding juveniles) currently deprived of their liberty by a criminal sentence of some type represents “about 3.1% of adults in the U.S. resident population.” *Id.* at 2.

<sup>9</sup> As noted by Walmsley, *supra* note 7, China holds only 1.6 million prisoners purportedly for “crime,” but another 800,000 in “administrative detention.” Only if the latter are included does the absolute size of China’s prison population—2.4 million—barely exceed the U.S. total of 2.3 million imprisoned for crime. Of course, whether or not the administrative detentions are counted, the per capita rates are not even close, as China’s total population is four times higher than the United States.

## I. BUILDING CONSENSUS

Over the past several years, a remarkable consensus has coalesced around the recognition of the overcriminalization problem. Exploring the history and potential of that consensus was one of the major themes of our conference. Norman Reimer's opening remarks stressed the emergent bipartisan consensus among members of Congress, which is all the more remarkable within an otherwise highly contentious political environment.<sup>10</sup> Roger Fairfax's paper examined the relationship between the overcriminalization critique and a separate "smart on crime" movement advocating alternatives to traditional criminal justice practices.<sup>11</sup> Darryl Brown's paper examined the relationship between regulation and criminalization, and potential trade-offs between the two.<sup>12</sup>

Of course, the scope of the overcriminalization critique extends beyond the participants and topics involved in this particular conference. A number of other symposia and conferences over the past several years have examined various aspects of the problem.<sup>13</sup> There also has been a notable recent outpouring of monographs and edited books on the subject, also from a variety of perspectives.<sup>14</sup> The overcriminalization critique has brought together groups that do not usually work in tandem, which has captured the attention of the general media.<sup>15</sup>

---

<sup>10</sup> See Norman L. Reimer, *Opening Remarks*, 7 J.L. ECON. & POL'Y 573 (2011).

<sup>11</sup> See Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597 (2011).

<sup>12</sup> See Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L. ECON. & POL'Y 657 (2011).

<sup>13</sup> See, e.g., *Overcriminalization: The Politics of Crime*, 54 AM. UNIV. L. REV. 541 (2005) [hereinafter "American University Symposium"]; *Symposium: Corporate Criminality: Legal, Ethical, and Managerial Implications*, 44 AM. CRIM. L. REV. 1269 (2007) [hereinafter "Georgetown Symposium"]; *Symposium: The Criminal Law and Policing Corporate Conduct*, 1 OHIO ST. J. CRIM. L. 373 (2004); *Symposium: Prosecutorial Discretion*, 6 OHIO ST. J. CRIM. L. 367 (2009); *Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1283 (2010).

<sup>14</sup> See, e.g., GENE HEALEY, *GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING* (2004); JOHN HASNAS, *TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW* (2006); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); RONALD T. LIBBY, *THE CRIMINALIZATION OF MEDICINE: AMERICA'S WAR ON DOCTORS* (2008); TIMOTHY LYNCH, *IN THE NAME OF JUSTICE* (2009); HARVEY SILVERGLATE, *THREE FELONIES A DAY* (2009); PAUL ROSENZWEIG & BRIAN W. WALSH, *ONE NATION UNDER ARREST: HOW CRAZY LAWS, ROGUE PROSECUTORS, AND ACTIVIST JUDGES THREATEN YOUR LIBERTY* (2010).

<sup>15</sup> See Adam Liptak, *Right and Left Join Forces on Criminal Justice*, N.Y. TIMES, Nov. 23, 2009, at A1. Liptak's article features the work of the Heritage Foundation's overcriminalization project, under the leadership of former Attorney General Edwin Meese III and Brian Walsh. A principal partner in that work with Heritage is the National Association of Criminal Defense Lawyers (one of this conference's sponsors), and other participating organizations have included the American Civil Liberties Union, Families Against Mandatory Minimums, the Prison Fellowship, the Constitution Project, Washington

As emphasized by Professor Fairfax's scholarly review of the history of criminal justice reform efforts, crossing ideological, political, or "interest group" lines to seek reform is not a new phenomenon, but it also is not easy to accomplish, and requires everyone to reach out to groups and interests that may be unfamiliar. He illustrates his points by a careful examination of the "smart on crime" movement, which is conventionally unconnected with the overcriminalization critique, but is shown to stem from many of the same concerns. The broader point I take from this aspect of his work is that the overcriminalization critique may have many more allies than it yet knows, and that consensus-building is an unfinished task.

Professor Brown's paper examines the other side of the subject, which is that consensus-building can be hindered by disagreements on other issues, such as the extent of regulation or the proper role of state versus federal governments. Judging from reactions given at the conference, while such pitfalls do exist, they need not impair the effort: disagreements over such things as federal-state division of powers do not logically (or legally) impinge on the scope of criminalization, and therefore should not undermine the consensus on that separate issue. With the exception of specific provisions relating to offenses against international law and counterfeiting U.S. coin and securities,<sup>16</sup> the Constitution provides no enumerated authority for Congress to define federal crimes. Outside of those areas, and with the arguable exception of federal enclaves,<sup>17</sup> Congress's power to criminalize is certainly no broader than its authority to enact civil legislation.<sup>18</sup>

Professor Brown may be correct in suggesting that members of Congress and voters alike may be seduced by the "crime" label, together with the "tough on crime/soft on crime" dichotomy that Professor Fairfax discusses. Of course, as applied to nearly all federal crime-defining legislation, that political narrative is a rhetorical trick: deciding whether something should be a "crime" is what Congress is doing; Congress cannot fall back on any broader background assumption of our law, because it long ago

---

Legal Foundation, the Cato Institute, the Institute for Justice, Texas Public Policy Foundation, and the Association of American Physicians and Surgeons, among others. Even that partial list suggests the breadth of the emerging critical consensus. For more information on the Heritage project, see the project website at [www.overcriminalized.com](http://www.overcriminalized.com).

<sup>16</sup> U.S. CONST. art. I, § 8, cl. 6, 10.

<sup>17</sup> U.S. CONST. art. I, § 8, cl. 17.

<sup>18</sup> To the contrary, the text of the federal Constitution gives far more attention to limiting federal powers to operate in areas traditionally related to criminal prosecution, as in: the Habeas, Attainder, and Ex Post Facto clauses, U.S. CONST. art. I, § 9, cl. 2, 3; the special attention to limiting the previously-abused offense of treason, U.S. CONST. art. III, § 3; imposing procedural restrictions on the trial of crimes, U.S. CONST. art. III, § 2, cl. 3; and the Bill of Rights, U.S. CONST. amds. I-X, where the principal thrust is to limit criminal law enforcement. The Fourth, Fifth, Sixth, and Eighth Amendments are primarily or exclusively concerned with that subject.

exhausted the list of traditional or common law crimes.<sup>19</sup> Nevertheless, Professor Brown's observations should make us vigilant against new variations on the divide-and-conquer strategy employed by rulers against citizens since antiquity. That recognition is part of the consensus-building process.

The conference's keynote address<sup>20</sup> by Larry Thompson, former Deputy Attorney General of the United States, also advanced the theme of consensus-building in several important ways.

First, by developing the example of "corporate crime" within this general conference, Thompson's address underscores the commonality of the problems faced in all facets of the criminal justice system, whether "white collar" or "street" crime, and whether individual or corporate.<sup>21</sup>

Second, Thompson's address recognized that consensus-building also involves the joinder of different methodologies, by making explicit reference to law and economics analysis in examining problems of overcriminalization. He gave the example of a corporate compliance regime that requires an industry to incur compliance costs many times greater than the cost of offenses prevented, which makes society worse off. As he acknowledged, "law and economics scholars have been making this same point for many, many years. At the same time, I cannot help but think that the argument needs to be made again and again. The scandal-regulation cycle repeats itself over and over . . . ."<sup>22</sup>

We can generalize this example, which is not limited to the corporate context: any regime of prevention—including deterrence through criminal penalties—that imposes more costs of compliance than the harms avoided will produce a net harm to society. This is what economic analysts mean by "over-deterrence," which has been a much-misunderstood term: it does not refer only, or even primarily, to over-punishing offenders. It also refers to the destructive effects on non-offenders who are forced to divert resources to compliance, which impoverishes all of society.<sup>23</sup> Moreover, the

---

<sup>19</sup> One of the major drivers of overcriminalization has been the proliferation of federal criminal prohibitions, as documented by the work of Professor Baker of LSU, which extended prior work by the ABA. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE LEGAL MEMORANDUM (Heritage Found., Wash. D.C.), 2008; John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, FEDERALIST SOC'Y POL'Y STUDY (2004); ABA TASK FORCE, *THE FEDERALIZATION OF CRIMINAL LAW* (1998).

<sup>20</sup> See Larry Thompson, *Keynote Speech*, 7 J.L. ECON. & POL'Y 577 (2011).

<sup>21</sup> For further development of this point from different perspectives, see Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503 (2007), and Jeffrey S. Parker, *Corporate Crime, Overcriminalization, and the Failure of American Public Morality*, in F.H. BUCKLEY, *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* (forthcoming 2011).

<sup>22</sup> Thompson, *supra* note 20, at 583.

<sup>23</sup> One of the earliest, and still one of the best, demonstrations of this effect was given in Michael K. Block, *Optimal Penalties, Criminal Law, and the Control of Corporate Behavior*, 71 B.U. L. REV. 395 (1991). What Block shows is that even relatively minor misspecifications of either penalty levels or

destructive effect of criminalization increases not only with the level of penalties and the burden of compliance, but also with the attenuation of *mens rea* requirements.<sup>24</sup> The strict liability regime of federal corporate criminal prosecution is a dramatic current example, but it is only part of the larger problem of *mens rea* attenuation. And in turn, even that effect is only part of a still more general problem that any legal regulation or prohibition can impose more cost than benefit, because legal standards are not a “free lunch,” either, even to the law-abiding. Criminal prohibitions are among the most costly of legal policies, because they involve severe consequences, to both offenders and non-offenders, that are difficult to predict or control in their incidence.<sup>25</sup>

Third, and perhaps most importantly, Thompson’s address acknowledges that part of the overcriminalization problem may lie in prosecutorial procedures and decision making. In this, he joins a growing number of former senior Justice Department officials in recognizing that a more responsible use of the prosecutorial power must be part of the solution to overcriminalization problems.<sup>26</sup>

Among those officials is former Attorney General Dick Thornburgh, who, though not present at our conference, gave an important speech just two weeks earlier under the title of *Overcriminalization: Sacrificing the Rule of Law in Pursuit of “Justice.”*<sup>27</sup> Among other solutions, Thornburgh advocated several “steps which could be taken by the Department of Justice itself to aid in the process of reducing overcriminalization,” including “pre-

---

compliance standards can cripple or destroy firms or entire industries. The growth of global competition over the past twenty years makes this problem all the more severe today: even a slightly less efficient U.S. industry can be obliterated by foreign competition. Moreover, while Block focused his analysis on corporate actors, the point is a general one. So, as criminal offenses and compliance regimes proliferate in their effects on small businesses, entrepreneurs, and professionals, their destructive effects on both economic and human values become more profound and widespread.

<sup>24</sup> This is the main point of Jeffrey S. Parker, *The Economics of Mens Rea*, 79 VA. L. REV. 741 (1993).

<sup>25</sup> See Jeffrey S. Parker, *The Blunt Instrument*, in DEBATING CORPORATE CRIME ch. 4 (Lofquist, Cohen, & Rabe eds., 1997).

<sup>26</sup> Former U.S. Attorneys General Meese and Thornburgh have been particularly active. In addition to his work in leading the Heritage overcriminalization project, Meese has written on the subject. See Edwin Meese III, *Introduction*, in ONE NATION UNDER ARREST, *supra* note 14; Georgetown Symposium, *supra* note 13, at 1545 (closing commentary). In addition to the speech discussed here, Thornburgh made an important contribution to that same symposium, in *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 (2007). But Meese and Thornburgh are not alone; in April 2010, they (along with Thompson and other former senior Justice Department officials) joined with four other former U.S. Attorneys General (of both major political parties), in writing a letter to the district court judge opposing the “severe injustice” of the government’s sentencing position in *United States v. Rubashkin*, a widely noted case. See Julia Preston, *27-Year Sentence for Plant Manager*, N.Y. TIMES, June 22, 2010, at A18.

<sup>27</sup> See Dick Thornburgh, *Overcriminalization: Sacrificing the Rule of Law in Pursuit of “Justice”*, HERITAGE LECTURES (Heritage Found., Wash. D.C.), 2011.

clearance by senior officials of novel or imaginative prosecutions of high-profile defendants” and “a revitalized Office of Professional Responsibility [which] should help ensure that ‘rogue’ prosecutors are sanctioned for their overreaching.”<sup>28</sup> In other words, “[t]he Department of Justice must with greater vigor ‘police’ those empowered to prosecute.”<sup>29</sup>

I will have more to say about this topic below.<sup>30</sup> However, for present purposes, the remarks of Thompson, Thornburgh, and others<sup>31</sup> identify another important aspect of consensus-building, which is to reach across the various functional roles in the criminal justice system to find agreement. In the case of prosecutors, this will be difficult—perhaps next to impossible with currently serving prosecutors—but is both necessary and feasible with the prosecutorial bar more generally. This is where the statesmanlike remarks of Thompson and Thornburgh can be helpful. Nearly everyone who has served as a public official recognizes that even the best of intentions can go awry, and that untoward consequences rarely are apparent to the office holder at the time. That is why prosecutors, like every other public official, need to operate under a system of checks and balances, governed by the rule of law, and subject to public scrutiny of their actions. The fair-minded among them should acknowledge those principles. If they do, then prosecutors too can become an important part of a growing consensus for reform.

## II. AN INSTITUTIONAL PERSPECTIVE ON REFORM

A criminal justice system is more than a collection of substantive and procedural laws; it also involves a variety of operating institutions—legislatures, regulatory and investigative agencies, prosecuting authorities, courts, probation officials, prisons, and even the defense bar—that function under a variety of both formal and informal rules, customs, policies, and practices, that involve some degree of discretionary judgment, and that include individuals who are presented with sometimes divergent incentives. Like other complex systems (such as business firms), it may seem to have a “mind” of its own, which does not coincide with the intentions or policies of any of its constituent parts or reflects a dysfunctional synergy between the incentives of multiple actors. This phenomenon is often referred to as the “law of unintended consequences,” and has been the recognized bane of

---

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> Part II.A, *infra*.

<sup>31</sup> In addition to the former AG’s, Deputies, and SG’s, other former prosecutors have joined the critique. See, e.g., Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411 (2007) (former head of the DOJ Enron Task Force); Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 954 (2010) (former line prosecutor in the DOJ).



law reformers for centuries, as is captured in Ronald Gainer's attribution to Bentham of resistance to reform on the grounds that "things are bad enough as they are." However, I am not sure that "unintended" is the correct term, as it grants too much slack to erstwhile reformers: "unforeseen," or perhaps "unacknowledged," may be more accurate.

My own prior experience with these effects concerns the last major reform to the federal criminal justice system, which was the Sentencing Reform Act of 1984<sup>32</sup> and its mandate for determinate sentencing guidelines. While the criticisms of that system were many, two major problems best illustrate the "unintended consequences" effects of ignoring adjoining institutions. One was the effect on Congress itself, which was enabled to dabble in the details of the sentencing system with the now-familiar result of cranking up the "one-way ratchet" toward greater severity and less flexibility.<sup>33</sup> Another was the result, in effect, of shifting unreviewed discretion from the sentencing judge to the charging prosecutor.<sup>34</sup> Neither effect appears to have been either intended or foreseen in advance by the enacting Congress, and yet both perhaps should have been completely predictable by examining the institutional structures and incentives surrounding the changes in sentencing procedures. Moreover, both effects appear to have persisted beyond the rejection of the mandatory guidelines system by the Supreme Court in its 2005 *Booker* decision,<sup>35</sup> which indicates that institutional memory can become entrenched, even within a relatively short period.

From this perspective, one of major contributions to our conference was Larry Ribstein's highly original paper, *Agents Prosecuting Agents*.<sup>36</sup> In that paper, Professor Ribstein presents an analysis of corporate criminal liability standards alongside the comparable problems of regulating prosecutorial conduct, analyzing both in terms of agency cost theory, in essence treating the prosecutorial function as analogous to the control problems of a business firm. The comparison is quite stark: while corporate agents are subject to a plethora of legal, institutional, and market constraints, there is very little analogous control of similar or even more severe agency cost problems in criminal prosecutions. Professor Ribstein limits his discussion

---

<sup>32</sup> Pub. L. No. 98-473, tit. II, ch. 2 (Oct. 12, 1984).

<sup>33</sup> See Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; Or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001 (2001).

<sup>34</sup> See, e.g., Kate Stith & Jose A. Cabranes, *Judging under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247 (1997); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

<sup>35</sup> See *United States v. Booker*, 543 U.S. 220 (2005). The Sentencing Commission's own study found very little effect on such factors as sentencing severity and the incidence or grounds for departure from the now-advisory guidelines. U.S. SENTENCING COMM'N, *FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING* (2006). Whether this result is holding over the longer term is still an open question, and is discussed in Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).

<sup>36</sup> See Larry E. Ribstein, *Agents Prosecuting Agents*, 7 J.L. ECON. & POL'Y 617 (2011).

to his immediate context of corporation criminal prosecution, but I would like to emphasize the broader methodological lesson of his work, which is the value of taking the institutional perspective on reform. Had such an analysis been performed before federal sentencing reform was enacted, then it may have been easier to predict—and therefore prevent—the untoward consequences that rippled through the federal criminal justice system for the next twenty years, creating problems that still persist today.

More generally, treating all actors in the criminal justice system as imperfect agents, whose actions will be influenced by their institutional structures and personal incentives within the frictions of an imperfect operating system, represents a sound and clear-headed approach to reform. Otherwise, even very well-intentioned efforts at law reform can be ineffectual or even counter-productive. Indeed, a similar effect is part of the overcriminalization problem itself: legislators or prosecutors may be reacting to the issue or scandal du jour, and it may be impracticable to operate directly on their personal or political motivations, and therefore a structural constraint may be needed.

Fortunately, this is not a new problem in American constitutional government, but was quite familiar to the Framers of our federal Constitution. Their principal solution was to divide governmental powers among the three branches, and to establish competing checks and balances among the branches that could neutralize abuses. Unfortunately, in the context of overcriminalization, the branch most likely to strike this balance—the federal judiciary—has been desultory in that role. While several participants in the conference suggested revived judicial development of constitutional doctrine as one possible solution to overcriminalization problems, it seems unlikely that judicial action alone will be sufficient. As Dick Thornburgh's speech concluded, the overcriminalization problem will require the attention of all three branches "if productive change is to be forthcoming."<sup>37</sup> As the judiciary is reticent to act alone, and the executive institutionally resistant, meaningful solutions will require congressional participation, which will be difficult but not impossible, provided that there has been sufficient attention to consensus-building.

If Congress can be induced to act, then what can or should be done? I will focus here on three types of systemic reform that were discussed during the conference, and that I believe have some potential to make important inroads on the overcriminalization problem: (a) constraining prosecutorial discretion; (b) restoring *mens rea* requirements and reforming the rule of lenity; and (c) procedural reform.

---

<sup>37</sup> Thornburgh, *supra* note 26, at 6.

A. *Bringing Prosecutorial Discretion Within the Rule of Law*

I am mindful of the risk that bringing the near-sacred subject of prosecutorial discretion explicitly into the discussion may be perceived as stepping on the “third rail” of criminal justice policy, and motivating the opposition of the most powerful anti-reform lobbyist in Congress. However, for the reasons developed in Part I above, it is not clear whether anything useful can be done without engaging the prosecutorial bar. Moreover, the subject continually appears in many papers given at this and other conferences, and in books and papers published elsewhere, almost always treated with the delicacy and euphemism reserved for such a subject. I certainly am willing to adopt the usual disclaimers that “most” or “the overwhelming majority” of our prosecutors are honest, forthright, and dedicated public servants who would never do anything knowingly wrong, etc., because those reservations are beside the point. Raising concerns about prosecutorial discretion and prosecutorial abuse is not an attack on the prosecuting bar; it is the invocation of the more fundamental principle of the rule of law. Prosecutors are neither demons nor angels; they are, like the rest of us, only human.

Therefore, even with all such disclaimers imaginable, I do not think that it is wise or even possible to avoid the subject, for three main reasons.

First, prosecutorial discretion is ubiquitous throughout the criminal system, and largely dominates its outcomes. Especially in the federal system, it covers every phase of a prosecution—prosecutors decide who to investigate, how to investigate, who to charge, what to charge, how many redundant charges to present, what evidence to present, how that evidence is presented, who is not charged, who is immunized (and therefore probably a prosecution witness), who is implicated but not immunized (and therefore denied as a defense witness), what to take up under the asymmetrical criminal appeals statute, whether to plea bargain, how to plea bargain, what is in the plea bargain, and so on, *ad infinitum*—and all largely beyond any judicial scrutiny whatsoever.<sup>38</sup> Under the grand jury secrecy rule of Criminal Rule 6, and the limited discovery obligations under Criminal Rule 16, much of their work is held secret from the public (and from the defense and the court). In the federal system, over 90% of all convictions are obtained by guilty pleas, usually under plea bargains, whose outcome is influenced by the unreviewed selection of charges and evidence (and therefore sentencing ranges under the guidelines), and the prosecution’s unlimited access to public resources. They are subject only to cursory review under the standards of Criminal Rule 11. For these reasons, virtually any reform short of broad-ranging repeal of most criminal prohibitions could be easily circumvented

---

<sup>38</sup> For a general survey of American practice, see Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. SUPP. 643 (2002).

by the unreviewed discretion of the prosecutor at one or more of these stages.

Second, prosecutorial discretion is virtually unique in American law as violating the fundamental precept of official accountability under the rule of law. There is no other place in our law where so many official decisions profoundly affecting a person's life, liberty, and property are taken behind closed doors, with no judicial review and no enforceable rules to govern official discretion. As noted by Ron Cass, current deference to broad prosecutorial discretion "pulls our practice away from the rule of law."<sup>39</sup> In this respect, overcriminalization has exacerbated a preexisting anomaly into a serious problem.<sup>40</sup> Under traditional criminal law, this pocket of unaccountable official action was both limited and temporary: the prosecution ultimately had to justify its legal and factual case at trial; criminal prohibitions were simple and few; and penalties were finite. But under current law, the myriad of criminal prohibitions can be combined into a multiplicity of vague and overlapping counts that often defy common logic, and present innovative theories of liability, providing a credibly threatened sanction of complete destruction of the defendant,<sup>41</sup> which produces a conviction by plea bargain in most cases.<sup>42</sup> Whether or not this is fair to defendants, it always deprives the public of a full vetting of the prosecution's case and its tactics, and it raises serious questions about the overall accuracy of the criminal adjudication process.

Third, even if one grants that abuses of prosecutorial power are the exception rather than the rule, they are far from rare. The overcriminalization literature is replete with examples, and Professor Ribstein's paper presents statistical data. There is a gross disparity between documented instances of prosecutorial misconduct and disciplinary action against the miscreants. Even former Attorney General Thornburgh refers to the need for a stronger

---

<sup>39</sup> RONALD CASS, *THE RULE OF LAW IN AMERICA* 29 (2001).

<sup>40</sup> One aspect of this problem was examined by Professor Dervan's paper. See Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645 (2011).

<sup>41</sup> The problems that arose under the federal guidelines sentencing system were exacerbated by the adoption of a DOJ policy that federal prosecutors "should charge . . . the most serious offense that is consistent with the nature of the defendant's conduct," with "most serious" defined as "that which yields the highest range under the sentencing guidelines." UNITED STATES ATTORNEYS' MANUAL, § 9-27.300. That policy, coupled with a multiplicity of vague and overlapping offense definitions, extraordinarily broad definitions of the "relevant conduct" that could be considered under the guidelines, and lax judicial standards permitting consideration of uncharged or even acquitted conduct, places enormous bargaining leverage in the prosecutor.

<sup>42</sup> At the same time that overcriminalization has been exacerbating the problems created by broad prosecutorial discretion, the federal courts, led by the Supreme Court, actually have been diluting the level of judicial scrutiny of prosecutorial choices. See Judge James F. Holderman & Charles B. Redfern, *Preindictment Prosecutorial Conduct in the Federal System Revisited*, 96 J. CRIM. L. & CRIMINOLOGY 527, 576-77 (2006). After analyzing that trend, Judge Holderman comments that "perhaps Congress may decide to provide additional legislation." *Id.* at 577.

internal disciplinary structure within the Justice Department.<sup>43</sup> Like the problem of overcriminalization itself, the problem of prosecutorial abuse need not be routine in order to threaten the integrity of the process. This factor often is overlooked.<sup>44</sup> Even a relatively few silly or abusive prosecutions creates a profound threat to the security and prosperity of the citizenry, and undermines public confidence in the rule of law. As prosecutors are wont to say, the commencement of a prosecution in one or a few cases is designed to “send a signal.” What some prosecutors apparently overlook is that the signal can be very destructive, if it discourages productive and lawful activity. In this context also, economic analysis is useful: it is the *marginal* case, not the “typical” or “average” one, that provides the primary effect on future conduct. This is why novel legal theories of prosecution are always bad for human welfare, and incompatible with our rule of law tradition.

For these reasons, the problem of unchecked prosecutorial discretion cannot be overlooked and should not be discounted. Nor is the conventional “third rail” wisdom necessarily correct. As was pointed out in the keynote address by former Deputy Attorney General Larry Thompson, his ultimately controversial “Thompson Memorandum” was motivated by an internal effort to restrain and structure prosecutorial discretion. So, responsible officials within the Department are not necessarily opposed to that idea. And the vast majority of honest, dedicated, and ethical prosecutors probably feel the same way, though they may be constrained by their positions and their collegial relationships from expressing those views in public.

Nor has Congress been averse to legislating on the subject of prosecutorial abuse. Both the Hyde Amendment,<sup>45</sup> and the McDade Amendment,<sup>46</sup> were enacted over the Department’s lobbying opposition. The problems with those statutes are more attributable to parsimonious judicial interpretations.

As indicated by the examples of the Hyde and McDade Amendments, it is not necessary nor perhaps desirable to enact a “code” of prosecutorial discretion.<sup>47</sup> More modest proposals can have important benefits, and oper-

---

<sup>43</sup> See Thornburgh, *supra* note 26, at 6. He is joined by other former Justice officials in the criticism. In response to an expose on the problem published by *USA Today* in late 2010, former U.S. Attorney Joseph diGenova commented that internal discipline was “very, very poor . . . serious discipline is basically non-existent.” Brad Heath & Kevin McCoy, *Federal Prosecutors Likely to Keep Jobs After Cases Collapse*, USA TODAY, Dec. 8, 2010. But here again, prosecutors are essentially the only officials allowed to audit themselves, and in secret. The poor results should come as no surprise.

<sup>44</sup> In my view, some of the discussion during the closing session of our conference with the judicial panel reflected this misperception.

<sup>45</sup> 18 U.S.C. § 3006A (2010).

<sup>46</sup> 28 U.S.C. § 530B (2010).

<sup>47</sup> However, one of the interesting suggestions by Judge Holderman is that Congress simply overrule by legislation what are now DOJ administrative rules, generally respected by the courts, that neither the McDade Amendment nor the United States Attorneys’ Manual create enforceable legal rights in the

ate in more subtle ways. Several examples were presented at our conference: Ronald Gainer proposed a statute limiting the application of criminal penalties in a specified group of “regulatory” offense cases; Lucian Dervan’s proposal for more rigorous review of plea bargains, though based in case law, also could be enacted by statute or amendment to Criminal Rule 11; Darryl Brown presents another option of limiting punishment under overlapping prohibitions.<sup>48</sup> Other types of procedural reform—to grand jury secrecy, to pretrial discovery under Criminal Rule 16, to create more symmetrical standards of interlocutory appeal, or to tighten the standards of “harmless error” review, among others—also have some potential.

In my view, the precise forms of such measures are less important than acceptance of the underlying principle that prosecutors, like all other public officials in our system, are subject under the rule of law to public accountability and review of their actions by an independent branch. If the prosecuting bar is unwilling to accept some form of that principle, then we have more profound problems than any of us now knows. If it does accept that principle—as I believe it must—then the details are negotiable, with the participation of the prosecuting bar. Constructive engagement here is superior to political conflict.

#### B. *Mens Rea, Vagueness, and the Rule of Lenity*

Aside from the sheer proliferation and variety of enactments, one of main problems of overcriminalization is the breadth and vagueness of prohibitions, and this problem is exacerbated by the dilution or omission of *mens rea* requirements. Of course, it also is negatively synergistic with prosecutorial discretion. Accordingly, one of the four plenary sessions of our conference, session four, was devoted to this set of problems.

This session also highlighted one of the important achievements of the current overcriminalization critique, which was the issuance in 2010 of the joint Heritage–NACDL report, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*.<sup>49</sup> That report presents a detailed analysis of the legislative product of the 109th Congress, in order to show “just how far federal criminal lawmaking has drifted from its doctrinal anchor,”<sup>50</sup> and proposes a series of recommended measures designed to correct that trend—including the enactment of default rules for supplying

---

victims of a violation by a Department lawyer. Holderman, *supra* note 42, at 577. See 28 C.F.R. § 77.5; UNITED STATES ATTORNEYS’ MANUAL § 9-27.150.

<sup>48</sup> Professor Brown’s views are presented in more depth in Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453 (2009).

<sup>49</sup> BRIAN W. WALSH AND TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW (2010) [hereinafter WITHOUT INTENT].

<sup>50</sup> Meese & Reimer, *Foreward*, in WITHOUT INTENT, *supra* note 49, at vii.

*mens rea* standards for federal crimes, codification of the rule of lenity, and reform of legislative procedures to ensure that new criminal statutes are fully considered and clearly drafted.<sup>51</sup>

At our conference session, Geraldine Moohr presented the principal paper on *mens rea*,<sup>52</sup> while Marie Gryphon wrote on the rule of lenity,<sup>53</sup> and Harvey Silverglate addressed the problem of vagueness in federal criminal statutes.<sup>54</sup> Professor Moohr's article traces the history of erosion in federal *mens rea* law, and presents a thorough critical analysis of the solutions proposed by *Without Intent*, in terms of both reforming *mens rea* and codifying the rule of lenity. Gryphon's commenting paper extends the analysis of proposed codification of the rule of lenity. Silverglate's commenting paper calls attention to the distinction between "overcriminalization" in the sense of proliferation of prohibitions, and the perhaps more intractable problem of vagueness in prohibitory language. All three of these papers deserve careful attention as contributing to the development of solutions to overcriminalization problems. However, they are all haunted by the deeper problem that the institutions in question are resistant to the proposed reforms.

Both Moohr and Gryphon make convincing cases that the proposed reforms may be unsuccessful or counter-productive because of resistance by the judiciary, or because of a lack of specification of which institution—courts or Congress—is responsible for giving content to the rules. Silverglate makes a similar point in passing by noting that judicial due process vagueness doctrine has not prevented vagueness problems from continuing to appear routinely in federal prosecutions.

Thus, all three papers in this session call our attention once again to the importance of taking an institutional perspective. The Supreme Court has been somewhat attentive to the problem of *mens rea* specification, but otherwise the federal judiciary's record in spontaneously generating robust standards is very poor. Moohr's analysis suggests that more fully-specified legislative standards could be helpful, while Gryphon suggests that, at least in the case of the rule of lenity, efforts at legislative reform may themselves be subverted through an ongoing debate within the Supreme Court itself on the general topic of statutory construction. Something quite similar might also affect legislative efforts to rein in prosecutorial discretion, as separation of powers "deference" has been used by the courts as a device for evading difficult problems of cross-branch checks and balances.

Even if these cross-branch problems can be overcome, what about the Congress itself? Congress has a poor track record of bonding itself against

---

<sup>51</sup> The recommendations are summarized in *WITHOUT INTENT*, *supra* note 49, at xi-xiii, 26-32.

<sup>52</sup> See Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Requirements of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685 (2011).

<sup>53</sup> See Marie Gryphon, *The Better Part of Lenity*, 7 J.L. ECON. & POL'Y 717 (2011).

<sup>54</sup> See Harvey Silverglate, *Remarks on Restoring the Mens Rea Requirement*, 7 J.L. ECON. & POL'Y 711 (2011).

future excess, and, with very few and sporadic exceptions, the Supreme Court has been unwilling to constitutionalize either the *actus reus* or *mens rea* doctrines. In a sense, the effort to restore some viability to these doctrines in Congressional legislation is an effort to protect the institutional integrity of the criminal law itself. If the courts are generally unwilling to play that protective role—as I believe they are—then who will?

This is where the “politics of crime” have generated increasing overcriminalization across the past several decades, especially at the federal level. Periodic recodification of criminal law may help to reset the criminalization margin, which is why the failure at the federal level in the 1970s of the last generation of recodifications, based on the Model Penal Code, may have had such dramatic effects. But, as Professor Moohr points out, the federal drift away from *mens rea* standards prevailing in state law pre-dates even that era.

In short, we now have a problem that “unlawful” is often equated with “criminal.”<sup>55</sup> If the courts remain unwilling to constitutionalize the distinction between civil and criminal liability, then Congress needs to find a way. While the types of reforms suggested by *Without Intent*—after further development to answer the critiques given here and elsewhere—are probably worthwhile as creating meaningful impedance to legislative excess, they do not completely solve the Congress’s institutional problem.

As a supplement to those measures, I would endorse and expand upon the suggestion previously made by Paul Rosenzweig that more transparent measures of the costs of criminalization be developed.<sup>56</sup> In this respect, I am guardedly optimistic, given several recent developments that may help Congress learn how to distinguish between the event and the intent.

First, the excesses of “corporate crime” prosecutions have convinced a larger body of opinion that criminal law enforcement is disproportionately destructive as compared with civil enforcement, which is a viable and analytically superior alternative in most situations. This insight can apply *a fortiori* to the types of overcriminalization offenses now being brought against individuals as well as firms. At some point, when speaking of such matters as lobster tail packaging, bush pruning, or mailing label omission, which are the types of offenses now amply documented in the overcriminalization literature,<sup>57</sup> it will become impossible to maintain the “tough on crime” fiction.

Second, our economic woes and the consequent focus on budgetary and financial matters may have convinced Congress of the need to take account of the costs of new legislation it enacts, and more importantly, has

---

<sup>55</sup> See John C. Coffee, *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. REV. 193 (1991).

<sup>56</sup> Paul Rosenzweig, *Overcriminalization: An Agenda for Change*, 54 AM. UNIV. L. REV. 809 (2005), in American University Symposium, *supra* note 13.

<sup>57</sup> These are among the cases documented in ONE NATION UNDER ARREST, *supra* note 14.



educated the public to that need. Debatably improper packaging of lobster tails becomes a distinctly less popular target for criminalization when the public learns of the systemic costs of imposing such sanctions, as compared with civil or administrative alternatives much less costly to the taxpayer and the consumer.

Third, and especially applicable to individuals, the overcriminalization problem simply has become too large to ignore. As noted above, we now have 3.1% of our adult population under criminal justice sentence, and therefore stigmatized as “criminals.” Under very conservative assumptions,<sup>58</sup> that rate eventually will produce a cumulative lifetime exposure of about 15% of the adult population. By 2020, that rate will produce approximately 40 million “criminals” in an adult U.S. population of about 255 million and a total population of about 343 million.<sup>59</sup> As each one of these “criminals” is likely to have at least one other adult family member profoundly affected by the criminal conviction and sentence, this will mean that at least 80 million adults—nearly one-third of the adult population—will be interested directly in the subject. Moreover, there are a number of other individuals—business colleagues, customers, suppliers, and so on—who will be personally though indirectly affected, and still more will be affected through the economic consequences of criminal enforcement. Note that, at the same time, the measures of “index” crime—what the ordinary citizen thinks of as crime—now have been declining in almost every category for the last thirty years, whether incarceration rates are rising, falling, or remaining constant.

So, it is quite plausible that by 2020, something on the order of 30% to 50% of the electorate will have had a personal experience with the criminal justice system, and most of those experiences are likely to be perceived by the voter as negative. These conditions will not necessarily end the calls for criminal prosecution as a response to every misfortune, from financial crises to oil spills, but broader knowledge of the problem will produce a much more sophisticated electorate. In any event, the scale of numbers is such that even the most cynical member of Congress may not safely ignore the subject of overcriminalization.

---

<sup>58</sup> My assumptions are that per capita rates of prosecution and sentence imposition remain constant, that there is a 10% annual net substitution rate (the number of new non-recidivist offenders replacing those who have completed their sentences), and a 40-year lifetime exposure to adult criminal sanctions.

<sup>59</sup> These projected population data are from the recent Social Security Trustees’ report. THE 2011 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND FEDERAL DISABILITY INSURANCE TRUST FUNDS (2011), at Table V.A.2.

C. *Substance, Procedure, and Evidence*

Though mentioned only in passing during our conference proceedings, another area where an institutional perspective can be valuable is in considering the interrelationships between substantive law and procedural or evidentiary law.

We already have seen one example in the several suggestions to address similar problems of unchecked prosecutorial discretion, through changes either to substantive legal standards or sentencing rules. The more general point is that there is rarely a single and unique way to address a given problem, and that alternative routes may encounter less political or institutional resistance.

Another example that comes to mind is the Hyde Amendment, which provides for defense fee reimbursement for certain types of unfounded prosecution. Conventionally, the Hyde Amendment is considered as a remedy for prosecutorial “abuse” or “misconduct.” In that role, it has largely failed, because of its grudging interpretation by the courts. There are current proposals to amend the statute to restore its efficacy, and one factor to be considered is that a remedy like the Hyde Amendment can have a number of favorable side effects, beyond compensation to an aggrieved defendant. In particular, the Hyde Amendment provides an incentive to more transparency of both the costs and the tactics involved in federal criminal prosecution. Moreover, the Hyde Amendment could operate to provide a subtle disincentive to one of the more intractable problems of overcriminalization, which is the novel or “innovative” legal theory of prosecution.<sup>60</sup> This is an example of a problem that may be difficult to regulate directly, as through oversight by senior justice officials or explicit review by the courts as such, but could be indirectly regulated by the incentive against novelty embedded in a fee-shifting regime.

A third example concerns the erosion of *mens rea* standards, especially as represented by such things as the “willful blindness” doctrine, that rest on a failure to consider the substantive standard in conjunction with a sophisticated view of evidence law. In actual jury trials, standards of “proof” are so lax that the giving of a “willful blindness” instruction is the equiva-

---

<sup>60</sup> This problem appears in the recent federal indictment returned against John Edwards, the former Presidential candidate. See Katharine Q. Seelye, *Edwards Charged with Election Finance Fraud*, N.Y. TIMES, June 4, 2011, at A1. The theory of prosecution plainly pushes the envelope of criminalization, as it is based on the allegation that Edwards diverted funds that otherwise would have been campaign contributions to his personal use in covering up his affair with one of his staffers. In other words, Edwards is accused of “violating” campaign finance law by avoiding its applicability. In many ways, Edwards is the paradigm of the overcriminalization case: by choosing an unsavory target unlikely to have any public sympathy, the prosecution maximizes its chances of setting a legal precedent it can use against others later, whether or not they are prominent politicians, unsavory or otherwise. Edwards is this season’s “Al Capone.” Now, as then, the price is too high to pay.

lent of allowing juries to convict on negligence, or less. In fact, this is a general problem in criminal trials. Traditionally, criminal prosecutions involved very simple and familiar rules of law, but subtlety in questions of fact; the customs of criminal trials have been shaped accordingly. However, with overcriminalization, legal and factual subtlety are combined, with the result that the apparatus of criminal procedure (minimal pleadings, weak discovery rules, sketchy jury instructions, and a lax enforcement of ordinary evidence rules) are no longer appropriate to the subjects under adjudication, which in many of these cases are more like civil than criminal litigation. This suggests that more borrowing from civil practice and procedure may be a useful course for future criminal procedure reform.

### III. THE LONG HAUL, AND THE IMMEDIATE OPPORTUNITIES

As indicated above, we may now be at an opportune moment to achieve some meaningful reforms that will reduce our overcriminalization problems. Politicians are struggling mightily with the grand issues of public finance and deficit reduction, which ironically might provide an opening for some modest, bipartisan, “good government” initiatives. The state of the art in considering the true costs of criminalization has advanced at the same time that concerns about fiscal austerity and economic performance are at a relative peak. And the problem unfortunately has become so large and commonplace that it can no longer be ignored in the national debates.

Our conference has provided some indicators to a way forward, but I will resist the temptation to lay out a prescribed agenda. For those who wish such an agenda, I endorse and recommend those previously suggested by Paul Rosenzweig<sup>61</sup> and by Timothy Lynch.<sup>62</sup> However, I wish to stress that no agenda, however complete, will be either necessary or sufficient to lay this subject to rest, and I acknowledge the risk that things may be “bad enough as they are.” Modest and incremental reform might be the best approach.

The basic subject is a perennial one, as the criminal law paradoxically is at once both the primary protector of our basic freedoms and the most dangerous threat to their exercise. Whether or not any reforms can be accomplished over the next few years, we can be assured that the subject will not go away.

While there is at least some evidence that political dysfunction and a general erosion of constitutional safeguards are partly to blame, another part of the fault may lie in ourselves. Perhaps our elected leaders would be less willing to criminalize for mere convenience or expediency if their con-

---

<sup>61</sup> See Rosenzweig, *supra* note 56.

<sup>62</sup> See Timothy Lynch, *Introduction: First Principles of American Criminal Justice*, in *IN THE NAME OF JUSTICE*, *supra* note 14, at vii-xxx.

stituents made fewer such demands. For the legislator, the prosecutor, the judge, and the citizen, the fundamental problem is one of morality. In a free society under the rule of law, there are very few occasions that actually justify the application of violent force against one's fellow citizen. The criminal law is violent force coupled with moral condemnation, and is justified in still fewer occasions. We know that violence begets violence, and moral condemnation without fault begets resentment. We also know that power corrupts. So, before we arrogate to ourselves the power use this extraordinary sanction of last resort, we must be assured that its use is strictly necessary, both in incidence and degree, and that no lesser sanction would suffice. The failure to require that assurance is immoral, and is the essence of overcriminalization.







