



# The Enforcement **MAZE**

**Over-Criminalizing  
American Enterprise**

**Compendium**



NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS®



U.S. CHAMBER  
Institute for Legal Reform

**Copyright © 2018 National Association of Criminal Defense Lawyers**



This work is licensed under the Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License. To view a copy of this license, visit <http://creativecommons.org/licenses/by-nc-nd/4.0/>. It may be reproduced, provided that no charge is imposed, and the National Association of Criminal Defense Lawyers is acknowledged as the original publisher and the copyright holder. For any other form of reproduction, please contact NACDL for permission.

For more information contact:

**National Association of Criminal Defense Lawyers®**

1660 L Street NW, 12th Floor, Washington, DC 20036

Phone 202-872-8600

**[www.nacdl.org](http://www.nacdl.org)**

This publication is available online at

**[www.nacdl.org/EnforcementMaze](http://www.nacdl.org/EnforcementMaze)**



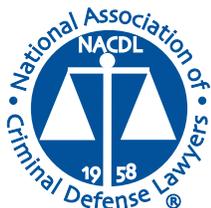
# The Enforcement MAZE

## Over-Criminalizing American Enterprise

**REPORTER, Lucian E. Dervan,**

**Associate Professor of Law, Belmont University College of Law**

On May 26, 2016, NACDL co-hosted a free law and policy symposium with the U.S. Chamber of Commerce's Institute for Legal Reform entitled *The Enforcement Maze: Over-Criminalizing American Enterprise* in Washington, D.C. The day-long symposium featured key leaders from industry, academy, law, and policy across the political spectrum. Together they addressed the rise of over-criminalization, the inappropriate criminalizing of civil and regulatory matters, why laws need criminal intent requirements, fundamental flaws with the plea bargaining process, criminal discovery abuses and inadequacies of the grand jury process, as well as the use of certain pressures associated with enforcement against business and corporate individuals. This compendium contains original scholarship authored by symposium panelists.



The National Association of Criminal Defense Lawyers (NACDL) and the Foundation for Criminal Justice (FCJ) are the preeminent organizations in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. Founded in 1958, NACDL members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to safeguarding due process rights and promoting a rational and humane criminal justice system.



**U.S. CHAMBER  
Institute for Legal Reform**

The U.S. Chamber Institute for Legal Reform (ILR) is the country's most influential and successful advocate for civil justice reform, both in the U.S. and abroad. ILR shines a light on what is wrong in the legal system. We conduct cutting-edge research, advance pragmatic solutions, and tirelessly advocate for those solutions with Congress, state legislatures, federal regulators, international policymakers, and the courts to effect meaningful change. ILR is a 501 (c)(6) tax-exempt, separately incorporated affiliate of the U.S. Chamber of Commerce.

**JULY 2018**

# SYMPOSIUM PROGRAM AGENDA

Panels available for viewing at:

<https://www.nacdl.org/EnforcementMaze/>

and

<http://www.instituteforlegalreform.com/events/the-enforcement-maze>

- 8:55 — 9:10 a.m.**     **Morning Keynote Address: The Honorable Bob Goodlatte**, U.S. House of Representatives (R-VA 6th District) and Chairman, House Committee on the Judiciary\*
- 9:10 — 9:20 a.m.**     **Opening Remarks: Norman L. Reimer**, Executive Director, National Association of Criminal Defense Lawyers
- 9:20 — 10:25 a.m.**     **The Rise of Over-Criminalization:** This panel discussed the inappropriate criminalization of what are truly civil or regulatory/administrative problems/disputes as well as inadequate criminal intent requirements and the problem with strict liability crimes.
- Reginald J. Brown**, Partner and Chair, Financial Institutions Group, Wilmer Cutler Pickering Hale and Dorr LLP  
**John F. Lauro**, Principal, Lauro Law Firm  
**Kate C. Todd**, Senior Vice President and Chief Counsel, U.S. Chamber Litigation Center  
*Moderated by: John D. Cline*, Principal, Law Office of John D. Cline
- 10:25 — 11:30 a.m.**     **Bearing Down:** This panel addressed over-charging/overzealous enforcement and the pressures on businesses and individuals under investigation and engaging in plea bargaining, including collateral consequences for companies (debarment, exclusion) and for individuals (jail, loss of licenses).
- John H. Beisner**, Partner, Skadden, Arps, Slate, Meagher & Flom LLP  
**Beth J. Hallyburton**, Assistant General Counsel, GlaxoSmithKline  
**Kurt Mix**, Former Deepwater Drilling Engineer, BP America  
**Barry J. Pollack**, Member and Chair, White Collar & Internal Investigations Practice, Miller & Chevalier  
*Moderated by: Harold H. Kim*, Executive Vice President, U.S. Chamber Institute for Legal Reform
- 11:30 — 11:50 a.m.**     **The Symbiotic Relationship Between Over-Criminalization and Plea Bargaining:** This TED Talk-inspired presentation discussed the manner in which these two phenomena relied on each other to come to dominate our modern criminal justice system.
- Lucian E. Dervan**, Associate Professor of Law, Belmont University College of Law
- 12:00 — 1:00 p.m.**     *Special Remarks: Lisa A. Rickard*, President, U.S. Chamber Institute for Legal Reform
- Keynote Address: The Honorable David W. Ogden*, Partner, Wilmer Cutler Pickering Hale and Dorr LLP and Former Deputy Attorney General of the United States

**1:15 — 2:00 p.m.**     **A Lack of Balance in the System: Criminal Discovery & Grand Jury Inadequacies & Abuses:**  
This discussion featured two legal experts and explored the inadequacies and abuses of two important facets of criminal procedure that combine to create an unfair playing field for persons and entities.

**Ross H. Garber**, Partner, Shipman & Goodwin LLP  
**Timothy P. O’Toole**, Member and Chair, Pro Bono Committee, Miller & Chevalier

**2:00 — 2:20 p.m.**     **The Shadow Regulatory State: A Look at Federal Deferred Prosecution Agreements:**  
This TED Talk-inspired presentation discussed the ways in which federal prosecutors have increasingly pressured corporations to enter into deferred or non-prosecution agreements that entail not only hefty fines but significant changes to business practices, with no showing of wrongdoing or judicial supervision.

**James R. Copland**, Senior Fellow and Director, Legal Policy, The Manhattan Institute

**2:20 — 3:20 p.m.**     **The New Prosecutorial Focus: Individuals in the Age of Over-Criminalization:** This panel explored the impact of the recent “Yates Memorandum” — a directive from Sally Quillian Yates, Deputy Attorney General of the United States, regarding individual accountability for corporate wrongdoing.

**Lisa A. Mathewson**, Principal, The Law Office of Lisa A. Mathewson  
**Matthew S. Miner**, Partner, Morgan, Lewis & Bockius LLP  
**Ellen S. Podgor**, Gary R. Trombley Family White-Collar Crime Research Professor and  
Professor of Law, Stetson University College of Law  
*Moderated by:* **Barry Boss**, Co-Chair, Criminal Defense & Internal Investigations,  
Cozen O’Connor

**3:20 — 4:20 p.m.**     **The Public Policy Consequences and the Road to Recovery:** This panel addressed the erosion of respect for criminal law, costs incurred by taxpayers, over-incarceration, and the squashing of business ingenuity and growth, and explored solutions to these problems.

**Christopher Bates**, Counsel to Senator Orrin Hatch, Senate Committee on the Judiciary  
**Douglas A. Berman**, Robert J. Watkins/Procter & Gamble Professor of Law,  
The Ohio State University Moritz College of Law  
**Joseph Luppino-Esposito**, Policy Analyst, Center for Effective Justice & Right on Crime  
**Shana-Tara O’Toole**, Director of White Collar Crime Policy, National Association of  
Criminal Defense Lawyers  
*Moderated by:* **Jonathan Bunch**, Vice President & Director of External Relations,  
The Federalist Society

**4:20 — 4:30 p.m.**     **Afternoon Keynote Address: The Honorable Orrin Hatch**, U.S. Senate (R-UT), Chairman,  
Senate Finance Committee and Former Chairman, Senate Judiciary Committee

## ACKNOWLEDGEMENTS

This program and its accompanying compendium of articles are the results of a collaborative project between the National Association of Criminal Defense Lawyers (NACDL) and The U.S. Chamber Institute for Legal Reform (ILR). Many individuals contributed invaluable assistance for these projects, but the organizations wish to specifically thank Shana-Tara O’Toole, Nicole Nichols, and Oriana Senatore for their vision and leadership. These organizations also wish to thank the following additional people for their inspiration and guidance in the planning stages: Barry Boss, Josh Cohen, Lucian Dervan, John Lauro, Timothy O’Toole, and Norman Reimer.

\*All affiliations as of the May 2016 symposium.

# TABLE OF CONTENTS

<b>Lucian E. Dervan</b> , <i>Introduction: Reflections on the Enforcement Maze</i> . . . . .	5
<b>Chairman Bob Goodlatte</b> , <i>Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”</i> . . . . .	11
<b>John D. Cline</b> , <i>Reforming the Federal Criminal Code Will Restore Fairness to the American Criminal Justice System.</i> . . . . .	14
<b>John H. Beisner</b> , <i>Excerpt: Enforcement Gone Amok: The Many Faces of Over-Enforcement in the United States</i> . . . . .	20
<b>Barry J. Pollack</b> , <i>A Long Strange Trip through the Criminal Justice System.</i> . . . . .	22
<b>John F. Lauro</b> , <i>Over-Criminalization and Its Consequences: Yes, It’s Personal.</i> . . . . .	27
<b>Lucian E. Dervan</b> , <i>The Symbiotic Relationship between Over-Criminalization and Plea Bargaining.</i> . . . . .	31
<b>James R. Copland</b> , <i>The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements in America</i> . . . . .	37
<b>David, W. Ogden</b> , <i>Keynote Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”</i> . . . . .	42
<b>Ellen S. Podgor</b> , <i>The Yates Memo: Another Example of Using Prosecutorial Shortcuts.</i> . . . . .	52
<b>Lisa A. Mathewson</b> , <i>Individual Interests Versus Law Enforcement Policy: Will the Yates Memo Undermine Its Own Efficacy?</i> . . . . .	56
<b>Matthew S. Miner</b> , <i>Excerpt: DOJ’s New Threshold for “Cooperation”: Challenges Posed by the Yates Memo and USAM Reforms</i> . . . . .	60
<b>Barry Boss, Rebecca Brodey &amp; Emily Gurskis</b> , <i>Half-Baked: The Yates Memo Calls for Charging More Offenders, But How Do We Sentence Them?</i> . . . . .	62
<b>Ross H. Garber</b> , <i>NACDL’s Common Sense Grand Jury Reform Proposals (Plus Two)</i> . . . . .	65
<b>Timothy P. O’Toole</b> , <i>The Five Areas in Which Discovery Reform Is Most Needed</i> . . . . .	68
<b>Christopher Bates</b> , <i>Over-Criminalization and Mens Rea Reform.</i> . . . . .	72
<b>Joe Luppino-Esposito</b> , <i>Criminal Justice Reform Through a Focus on Federalism: The need to stay engaged at the state level and to pull back the bounds of federal power.</i> . . . . .	74
<b>Shana-Tara O’Toole</b> , <i>Confronting the “See What Sticks and Who Flips” Perils of Federal Conspiracy Law</i> . . . . .	78
<b>Senator Orrin G. Hatch</b> , <i>Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”</i> . . . . .	82



## INTRODUCTION

On May 26, 2016, the National Association of Criminal Defense Lawyers and the U.S. Chamber of Commerce's Institute for Legal Reform hosted a law and policy symposium entitled *The Enforcement Maze: Over-Criminalizing American Enterprise*. The day-long symposium featured key leaders from industry, academia, and law and policy groups across the political spectrum. Together, the participants explored the issue of over-criminalization, its impact, and the need for corrective reform measures.

Following the symposium, many of those who participated in the event submitted written works detailing the issues discussed during the day. Those pieces have now been compiled in this volume to serve as a resource for those with an interest in the issues addressed during the day. In considering both the discussions that occurred at the symposium and the pieces contained herein, several important themes emerge and are worthy of contemplation before journeying into the individual articles.

**The first theme that emanates from the materials is a clear and unanimous agreement across the political spectrum and across policy orientations that over-criminalization has risen to become an epidemic in our society and in our criminal justice system.**

The first theme that emanates from the materials is a clear and unanimous agreement across the political spectrum and across policy orientations that over-criminalization has risen to become an epidemic in our society and in our criminal justice system. This point was made clearly by House Judiciary Chairman Bob Goodlatte's introductory remarks, published herein as his *Talking Points*. In these *Talking Points*, Chairman Goodlatte addresses over-criminalization and the important work of the House Judiciary Committee's Over-criminalization Task Force in examining and

addressing this phenomenon. His remarks included a discussion of the various important steps taken by the Judiciary Committee in recent years to enact meaningful reforms. At the conclusion of his piece, Chairman Goodlatte makes an important statement about the importance of returning to our core values regarding the mission of the criminal justice system.

As the Committee moves forward to address over-criminalization as part of our larger criminal justice reform initiative, we will be guided by the principle that criminal justice is about punishing law-breakers, protecting the innocent, the fair administration of justice, and fiscal responsibility in a manner that is responsive to the needs of all of our communities.

The rise of over-criminalization during the last century has caused our nation to drift away from the fundamental tenets of the criminal justice system, and it is heartening to see a unified effort to return us to a more just and balanced system.

The first panel of the day at the symposium focused on *The Rise of Over-Criminalization* and this discussion highlights the second theme that emerges from the materials — over-criminalization is a large and diverse issue. Traditionally, discussions of over-criminalization focus on the idea that some statutes are vague and overly broad. While this is true, this limited description fails to capture the magnitude of the problem. Through listening to the discussion during the first panel and reading the articles contained in this volume, one begins to understand how many areas of the law are clouded by over-criminalization. Yes, there are many federal and state statutes that are vague and overly broad; but there are also over 300,000 regulatory crimes, there are crimes without adequate or any *mens rea* requirements, there are a myriad of draconian sentencing provisions, there are countless overlapping criminal statutes, and there is a trend of over-federalization. When considered together, all of these

issues combine to create a complex web of over-criminalization in its various forms that needs addressing.

In his article, *Reforming the Federal Criminal Code Will Restore Fairness to the American Criminal Justice System*, John Cline proposes that Congress make a comprehensive revision to the federal criminal code to address these issues. Specifically, he focuses on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of *mens rea* and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population. Through examination of these various proposals, Mr. Cline presents a compelling argument that revisions are necessary and possible in the current climate of bipartisan support of criminal justice reform efforts.

When the complex web of over-criminalization is contemplated, it leads naturally to the third theme to emerge from the symposium — over-criminalization in its various forms has created an imbalance in the criminal justice system. Though this theme is found throughout the materials in this volume, this idea was particularly pronounced during the second panel discussion of the symposium, entitled *Bearing Down*, and the articles from those panelists herein.

During this portion of the symposium, Kurt Mix, former Deepwater Drilling Engineer for BP America, spoke about his indictment and eventual acquittal related to the 2010 Deepwater Horizon oil spill. During that discussion, Mr. Mix spoke about the enormous pressures that came to bear after his indictment. This led the panel to more broadly consider the manner in which over-criminalization in its many forms creates an imbalance that pressures many individuals and corporations to settle, rather than challenge the government's case, as Mr. Mix was able to do. These themes are developed further in the panelists' written submissions.

In his article entitled *Enforcement Gone Amok: The Many Faces of Over-Criminalization in the United States*, John H. Beisner offers us an excerpt from a longer piece on over-enforcement. In his excerpt, Mr. Beisner explains that sometimes multiple government agencies prosecute the same wrongdoing either at the same time or shortly one after another. In his opinion, this has the net effect of pressuring the targeted company to agree with whatever settlements those agencies provide. Through this piece, Mr. Beisner offers the reader a glimpse into the negative

consequences of over-criminalization for American businesses and society generally.

Barry J. Pollack, also a member of this panel, offers a personal perspective on a criminal case in his article entitled *A Long Strange Trip Through the Criminal Justice System*. In this article, Mr. Pollack combines a series of situations from his criminal defense practice to show the reader what lies behind the curtain for a criminal white-collar defendant. Told as a narrative, the story is a compelling one that transports the reader into the situations, choices, and dilemmas faced by defendants as they navigate a criminal investigation and prosecution. As the story culminates at the verdict, Mr. Pollack reflects on the inherent flaws in an imbalanced criminal justice system, the need to ensure as much justice as possible is dispensed, and the important role of defense counsel.

John F. Lauro's article, *Over-Criminalization and Its Consequences: Yes, It's Personal*, also focuses on the personal impact of over-criminalization on entrepreneurs and employees who are swept up in what he describes as "enforcement frenzies." Mr. Lauro argues that current criminal statutes make it particularly difficult to determine what conduct is criminal. He goes on to discuss the manner in which the government uses this ambiguity to create the leverage necessary to compel otherwise law-abiding citizens into cooperating against other targets. Finally, Mr. Lauro examines some of the collateral consequences for business employees who are targeted by an investigation. Through a very personal recounting of the challenges faced by his clients, Mr. Lauro brings clarity to the true impact of over-criminalization on everyday people.

As the above articles note, over-criminalization in its many forms leads not only to an imbalance in the criminal justice system, but also to a critical issue regarding leverage. This brings us to the fourth theme from the symposium and related articles — over-criminalization allows for the creation of potentially coercive incentives for individuals and corporations to plead guilty or otherwise settle. I focused on this idea during my TED Talk inspired presentation at the symposium entitled *The Symbiotic Relationship Between Over-Criminalization and Plea Bargaining*. During my presentation, which remarks are reflected in my piece by the same name in this volume, I discussed the manner in which a symbiotic relationship exists between over-criminalization and plea bargaining. As detailed through various examples, "these two concepts have not merely occupied the same space in our justice system; they have, in fact, relied on each other for their very existence... [P]lea bargaining and over-criminalization perpetuate each other in our current

system because plea bargaining shields over-criminalization from scrutiny and over-criminalization helps create the incentives that have led to plea bargaining's rise." In concluding, I argue that we must carefully examine the manner in which over-criminalization and plea bargaining have worked together over the decades and strive for the creation of a system where defendants have a real choice regarding how to proceed once indicted.

The other TED Talk inspired presentation of the day focused on the related issue of deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). During this talk, James R. Copland of The Manhattan Institute discussed the manner in which DPAs and NPAs have become common tools in resolving criminal investigations of entities and the manner in which these agreements are used to create leverage. In his enclosed piece on the topic, Mr. Copland writes, "DPAs and NPAs give government attorneys tools to modify, control, and oversee corporate behavior that they would never achieve by taking the companies to court. Notwithstanding these extraordinary powers, these agreements lack transparency and judicial oversight." He terms this phenomenon the "shadow regulatory state" and crafts a compelling story of incentives and imbalance in his piece documenting the rise and use of these tools.

Following the discussion of over-criminalization and plea bargaining at the symposium, we paused to hear remarks from David W. Ogden, former Deputy Attorney General of the United States. Though his remarks, reproduced herein, covered much ground, they also expressed concern regarding the theme of leverage discussed above. In particular, he discussed his concerns regarding the use of leverage to resolve cases in a manner that may not be reflective of justice. Mr. Ogden stated:

I thought I would speak today about a feature on the landscape that — as a former DOJ official and a long-time admirer of that institution — deeply concerns me: my perception that the Department [of Justice] and perhaps other enforcement agencies have moved away from traditional notions of prosecutorial discretion, founded in self-discipline about the facts and the law, a search for proportionality and acknowledgment of the need for restraint in negotiating pleas and settlements, and moved toward a greater

willingness to use leverage to negotiate maximum fines and penalties.

During his remarks, reprinted in this volume, Mr. Ogden examines this perceived problem and offers ideas regarding how we might respond to these issues and advance the interests of justice.

As the symposium moved into the afternoon, one panel, entitled *The New Prosecutorial Focus: Individuals in the Age of Over-Criminalization*, examined the much-discussed *Yates Memo* through the lens of over-criminalization. From this discussion emerged another important theme from the day — over-criminalization can influence policy as much as law. In the context of the *Yates Memo*, over-criminalization created the imbalance that enabled the Department of Justice to use its leverage through the Memo to induce entities to provide evidence against employees.

Ellen S. Podgor begins this discussion herein in her article entitled *The Yates Memo: Another Example of Using Prosecutorial Shortcuts*. Professor Podgor focuses on what she describes as the "current climate of prosecutorial shortcutting." Looking specifically at the impact of the *Yates Memo* and its relationship to prosecutorial shortcutting, Professor Podgor argues that the memo fails to consider two important points: 1) having the corporate entity do the investigative work of the government is a form of "prosecutorial laziness;" and 2) prosecutorial shortcutting harms the criminal justice process and in this context it fails to recognize the importance of the corporate entity and individual employee working together to combat misconduct within a company. The end result, argues Professor Podgor, is that the *Yates Memo* will not lead to more factual development in anticipation of prosecution, but less. Employees will become reluctant to cooperate and the prosecution of culpable individuals and entities will become more challenging.

Lisa A. Mathewson continued the discussion in her article entitled *Individual Interests Versus Law Enforcement Policy: Will the Yates Memo Undermine Its Own Efficacy?* In her piece, Ms. Mathewson first addresses how the *Yates Memo* intensifies the potential underlying conflict between individual and corporate interests. Second, she illustrates how this driving of individual and corporate interests in different directions will negatively impact the range of options available to the corporation and shift decision-making in a way that the DOJ did not intend.

Matthew S. Miner offers an excerpt of a longer piece in *DOJ's New Threshold for "Cooperation": Challenges Posed by the Yates Memo and USAM Reforms*. The excerpt

focuses on the impact the *Yates Memo* will have on a company's management of internal investigations and decisions regarding disclosure and cooperation. In considering this issue, Mr. Miner argues that the *Yates Memo* has established an "all-or-nothing" approach to cooperation credit that diminishes the importance of the other factors contained in the *Principles of Prosecution of Business Organizations*. He believes this will make it challenging for corporations to determine whether to cooperate. Mr. Miner's piece offers a revealing view of the manner in which the *Yates Memo* might actually negatively impact the incentives for corporate cooperation.

Finally, Barry Boss, Rebecca Brodey, and Emily Gurskis place the *Yates Memo* and over-criminalization into the larger context of enforcement and sentencing in *Half-Baked: The Yates Memo Calls for Charging More Offenders, But How Do We Sentence Them?* In this article, the authors argue that if an increase in individual prosecutions results from the release of the *Yates Memo*, this is likely to exacerbate the current crisis regarding "disproportionate and irrational" sentencing of white collar offenders. To address this problem, the authors advocate for sentencing reform. In particular, they discuss the "Shadow Guidelines" set out by the ABA as a starting point and suggest that less focus in white collar sentencing should be placed on the loss amount. Instead, loss should only be one of several factors considered, shifting the focus to overall offender culpability. As this and the other articles from this panel illustrate, over-criminalization can significantly impact policy decisions and result in varied negative consequences.

The sixth and final theme to emerge from the symposium builds on a concept discussed earlier in this introduction and found throughout the presentations and written pieces. As noted towards the beginning of this introduction to the collection, one of the key themes from this project was a realization that over-criminalization is a large and diverse issue. It should come as no surprise, therefore, that when turning to possible solutions, a similar theme emerged — we must consider a wide variety of reforms to successfully address the over-criminalization phenomenon.

During the first afternoon panel entitled *A Lack of Balance in the System: Criminal Discovery & Grand Jury Inadequacies & Abuses*, the panelists discussed reform through the lens of two key points in the criminal process — the grand jury and the discovery process. During an engaging discussion, the panelists offered insights into the manner in which over-criminalization influences these two critical stages of the criminal process and the methods by which we might offer meaningful reforms for the

future. These concerns and proposals are contained in the panelists' pieces for this volume.

In his article, entitled *NACDL's Common Sense Grand Jury Reform Proposals (Plus Two)*, Ross H. Garber focuses on the proposed NACDL Grand Jury Bill of Rights, which includes proposals for the establishment of a right to be accompanied by counsel for witnesses who must testify before a grand jury, a requirement that prosecutors present exculpatory evidence that might exonerate the target of an investigation to the grand jury, a requirement that 72 hours of advance notice should be provided to witnesses who are to testify before a grand jury, and the creation of a right of a grand jury witness to obtain a transcript of his or her testimony. In addition, Mr. Garber's piece proposes two additional reforms. First, a narrow tailoring requirement for document subpoenas together with allowing a reasonable time for responding to those requests. Second, that absent compelling reasons to the contrary, when the government directs a grand jury subpoena to a corporation, the government should specify whether the corporation itself or any of its officers or directors are the actual targets of an investigation or whether, instead, the entity is simply in possession of relevant documents as a third party custodian. Through these various proposals, Mr. Garber argues that the grand jury process can be made more fair and just without hindering law enforcement's ability to continue effectively using the grand jury system.

In his article, entitled *The Five Areas in Which Discovery Reform Is Most Needed*, Timothy P. O'Toole addresses the significant issues surrounding the application of *Brady* discovery rights and prosecutors' obligations. In discussing the challenges in this area, Mr. O'Toole proposes five reforms. First, he argues that the materiality requirement should be removed from the analysis of a potential *Brady* violation. Second, he argues that concrete timing requirements should be placed on when *Brady* disclosures must be provided. Third, he proposes the creation of a process by which the prosecution must document and provide justification to the court why any favorable evidence should be withheld. Fourth, he proposes a reform that would require that any evidence disclosed be provided in a format readily usable by the defense. Finally, he argues for an expansion and standardization of the powers extended to the courts to remedy *Brady* violations. Through the discussion of the reasons for each proposed reform in the article, Mr. O'Toole guides the reader through the challenges and importance of ensuring the rights established in *Brady* are meaningful in today's enforcement environment.

During the final panel, entitled *The Public Policy Consequences and the Road to Recovery*, the panelists continued offering a wide variety of additional reforms to curb over-criminalization and restore balance to the criminal justice system. As was clear from the prior panel on discovery and grand jury reform, the panelists discussing the *Road to Recovery* recognized the breadth of over-criminalization's impact and the resulting need for creative and far-reaching solutions.

In his piece, entitled *Over-Criminalization and Mens Rea Reform*, Senate Judiciary Committee Counsel Christopher Bates proposes three basic postulates as a starting point for discussing over-criminalization: criminal laws should be knowable, we should not use criminal laws to trap people, and there should be a distinction between civil and criminal law. After introducing these concepts, Mr. Bates argues that each of these concepts is under assault. In identifying the manner in which these tenets are being violated, Mr. Bates explores the manner in which our current criminal regime fails to distinguish between "criminal" conduct and behavior that is better regulated through civil mechanisms. In concluding his piece, Mr. Bates proposes that *mens rea* reform is a vehicle for correcting each of the concerns identified in his piece. This piece succinctly lays forth the *mens rea* issue and clarifies the importance of these reform efforts.

Joe Luppino-Esposito offers an article entitled *Criminal Justice Reform Through a Focus on Federalism: The need to stay engaged at the state level and to pull back the bounds of federal power*. In his article, Mr. Luppino-Esposito discusses two concepts related to federalism and the over-criminalization debate. First, he proposes that the states can serve as vital testing grounds for criminal justice reform in the areas of sentencing, corrections, and criminal intent. Not only does this role for states lead to important reforms on the state level, Mr. Luppino-Esposito also argues that this role can provide important modeling for future federal reform. Second, he proposes that over-federalization of criminal law remains a problem and that the continued expansion of federal power is unjustified. While Mr. Luppino-Esposito concedes that leaving everything to the states is a problem as well, he contends that a more balanced approach that considers the role of federalism more closely will provide better results. Through a better appreciation of the role states can play and a greater understanding of federalism, Mr. Luppino-Esposito argues that advocates will be in a stronger position to implement successful reforms.

In her piece, entitled *Confronting the "See What Sticks and Who Flips" Perils of Federal Conspiracy Law*,

Shana-Tara O'Toole begins with an examination of the concerns regarding the ever-broadening application of conspiracy law in the United States. In confronting these concerns, she offers the reader three approaches to reform for consideration. First, Ms. O'Toole argues for the adoption of an "overt act" requirement in all federal conspiracy law to ensure someone actually "did something" before they can be convicted of the charge. Second, she argues that the *Pinkerton* rule, which permits the extension of liability for substantive offenses committed by one of the conspirators in furtherance of the conspiracy to co-conspirators, should be abolished. Third, Ms. O'Toole argues that Congress should mandate the merger of multiple conspiracy counts where only one agreement-in-fact exists. This piece makes an important contribution to the ongoing discussion regarding over-criminalization and the critical role conspiracy law plays in this phenomenon.

The symposium closed with remarks from Senator Orrin G. Hatch. Those remarks also close this collection of written works. Senator Hatch's remarks serve as a fitting end to our discussion of over-criminalization as they encapsulate many of the themes from the event. In the opening lines of his remarks, Senator Hatch discusses the agreement that exists across the political spectrum and across policy orientations that over-criminalization has risen to become an epidemic in our society and in our criminal justice system. Specifically, he states, "Democrats and Republicans in both houses of Congress are pushing for it, and there's been a great deal of ink spilt in the press on the issue." Senator Hatch also makes mention in his remarks that over-criminalization is a large and diverse issue. In discussing criminal justice reform, Senator Hatch states, "the discussion has been too narrow — far too narrow."

[C]riminal justice reform is about much more than sentencing. Those of you who have been involved in the anti-overcriminalization effort know that. From the earliest days of the effort, when groups on the right and the left first came together to find areas of common ground, there was broad recognition that Congress was criminalizing too much conduct, was federalizing too many crimes, and was paying inadequate attention to criminal intent requirements.

Finally, Senator Hatch explores creative remedies to over-criminalization, including *mens rea* reform, a

proposal also discussed by various other speakers during the symposium.

In recognizing the phenomenon of over-criminalization, reflecting on its breadth, and proposing solutions, Senator Hatch embraces the need for reform. As discussed in this introduction, these reforms are vital because over-criminalization in its various forms has created an imbalance in the criminal justice system. This imbalance has a large reach, including allowing for the creation of potentially coercive incentives and negatively influencing a wide array of policy decisions. This symposium and its accompanying collection of writings are a vital step forward in addressing over-criminalization and restoring balance to our criminal justice system. They shed light on an issue that impacts every American. We hope you will enjoy the articles that follow and use the information and proposals contained herein to educate others to the dangers of over-criminalization and advance the mission of implementing solutions to this problem.

### **Lucian E. Dervan**

Reporter, Enforcement Maze Symposium  
Associate Professor of Law  
Belmont University College of Law

## Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”

### Chairman Bob Goodlatte

- Thank you for the warm introduction. I am pleased to be here today to discuss the important issue of over-criminalization.
- During my chairmanship, the House Judiciary Committee has led the way in evaluating and addressing over-criminalization.
- In the 113th Congress, the Committee established the Over-Criminalization Task Force, which conducted a two-year-long, comprehensive review of the problem of over-criminalization, and held ten separate hearings.
- Those hearings focused on issues including criminal intent requirements, regulatory crime, criminal code reform, over-federalization, the penalties associated with a criminal conviction, collateral consequences of a conviction, and the views of the various federal criminal justice agencies.
- At the Task Force’s first hearing, the bipartisan witness panel unanimously agreed that the erosion of the mens rea requirement in federal criminal law was the most pressing issue facing the Task Force. Indeed, during the remaining hearings held before the Task Force, we heard time and time again about the problem of inadequate criminal intent requirements.
- During the Task Force’s review, we asked the Congressional Research Service to count the number of crimes in the federal code. They did so diligently, and reported that there are just shy of 5,000 separate federal statutes that carry criminal penalties.
- We also asked CRS to count the number of federal regulations whose violation can be prosecuted criminally. They laughed at us, because the number of regulations that can result in criminal penalties has been estimated at 300,000 — **sixty times** the number of statutory criminal offenses.



Photo by Koichi Take | 1:57 Pictures

- The erosion of mens rea requirements, along with the huge expansion of the number of federal regulatory crimes, has created a significant problem for Mr. and Mrs. John Q. Taxpayer — namely, that they could not possibly be expected to read and understand exactly what is prohibited by law and what is not.
- As a result, the news is replete with stories of Americans who have been convicted of crimes — and sometimes, sentenced to prison terms — when they had no intent to break the law. All I have to do is mention a Honduran lobsterman, a custodian at a military home, or a little girl who rescued a woodpecker, and everyone here knows their stories.
- And I also have to admit that one of the main culprits here is Congress itself. Over the last five decades, Congress has enacted regulatory statutes that impose criminal sanctions for not just violation of the statute but of regulations promulgated thereunder. Many of these statutes lack an adequate — or any! — criminal intent requirement or define the criminalized conduct in vague, overbroad terms.
- However, under the Judiciary Committee's leadership, Congress has taken steps to fix this problem.
- First, earlier this year, the Judiciary Committee sought and received a change to its jurisdiction under Rule Ten of the House Rules. This change adds the word "criminalization" to Judiciary Committee jurisdiction. This will ensure that this Committee is able to receive a sequential referral for a bill, whenever the bill amends the conduct associated with a criminal offense, or the penalty.
- This change has already enabled the Judiciary Committee to work with other committees to ensure that proposed criminal provisions in active legislation are necessary, appropriately drafted, and that the prohibited conduct is clear.
- Secondly, once the Task Force completed its review, we worked diligently on legislation to address some of the issues that were raised during the hearings.
- The flagship bill produced by the Judiciary Committee is H.R. 4002, the Criminal Code Improvement Act. This legislation, which was sponsored by Task Force Chairman Jim Sensenbrenner, was drafted with considerable participation and input from many people in this room today, including staff from ILR and NACDL, the sponsors of this event. I thank you very much for your partnership.

**[C]riminal justice is about punishing law-breakers, protecting the innocent, the fair administration of justice, and fiscal responsibility in a manner that is responsive to the needs of all of our communities.**

- H.R. 4002 makes a number of changes to the federal criminal code. Most importantly, it provides a default mens rea standard that applies for all crimes prosecuted in federal courts, unless another mens rea standard has been provided by law, including statutory and well-established case law.

- H.R. 4002 also provides that, in situations where a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, that his conduct was unlawful, the Government must prove that the defendant knew, or had reason to believe, the conduct was unlawful. This provision will address the problem of inadequate criminal intent requirements in crimes created by agency regulation — or *malum prohibitum* crimes.
- H.R. 4002 is a very carefully constructed bill. Its intent is not to impose a “knowingly” requirement for every element of every statute. Its intent is to impose a mens rea provision where none currently exists, to protect American citizens who did not know or have reason to know that they were violating federal law, and to curb strict liability criminalization.
- In addition to H.R. 4002, the Committee produced three other bills in response to the Over-Criminalization Task Force’s work.
- H.R. 4003, the Regulatory Reporting Act, was introduced by Congresswoman Mimi Walters of California. This legislation requires every federal agency to submit a report to Congress listing each rule of that agency that, if violated, may be punishable by criminal penalties, along with information about the rule.
- H.R. 4001, the Fix the Footnotes Act, was introduced by Congressman Ken Buck of Colorado. This legislation fixes the footnotes in the current version of the Criminal Code to address errors made by Congress in drafting the laws.
- And H.R. 4023, the Clean Up the Code Act, was introduced by Congressman Steve Chabot of Ohio. This bill eliminates several statutes in the U.S. Code that subject violators to criminal penalties, such as the unauthorized use of the “Smokey Bear” emblem, or the interstate transportation of dentures.
- All four of these bills moved through Committee markup by voice vote last year. They are, and will remain, vital cogs in whatever criminal justice package comes to the House floor.
- These are complex issue areas, and there is a great deal of interest from a wide array of groups surrounding each issue. Rightly so, because over-criminalization has important repercussions for innocent American citizens.
- As the Committee moves forward to address over-criminalization as part of our larger criminal justice reform initiative, we will be guided by the principle that criminal justice is about punishing law-breakers, protecting the innocent, the fair administration of justice, and fiscal responsibility in a manner that is responsive to the needs of all of our communities.
- We cannot do this without support from the public and from leading members of the legal and policy community like you. As we move forward with these initiatives, I strongly encourage all of you to make your concerns known to me, to my staff, and to other Committee Members.

Thank you for your support on this critical issue.

**Representative Bob Goodlatte**

serves as the Chairman of the House Judiciary Committee and since 1993 has proudly represented the Sixth Congressional District of Virginia in the United States House of Representatives, working diligently to protect the freedoms and civil liberties enshrined in the United States Constitution.\*



\*All authors’ bios and affiliations are as of the May 2016 symposium.



## Reforming the Federal Criminal Code Will Restore Fairness to the American Criminal Justice System

**John D. Cline**

Congress has revised the federal criminal code a handful of times over the last century and a half, most recently in 1948. It is past time for another comprehensive revision. That effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of *mens rea* and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.

### **I. Reducing the Number of Federal Crimes**

The list of federal crimes has grown from a handful in the Crimes Act of 1790 to thousands today — how many thousands? No one is quite sure. This growth has occurred in part because the country has become more technologically sophisticated, more complex, and more interconnected — and thus the need for offenses that can address crime that occurs in multiple states and even overseas has expanded. But the number of federal crimes has also increased because every national crisis seems to breed new federal crimes to address the problem. This has often occurred, regrettably, without sufficient inquiry into whether a criminal sanction is necessary at all — as opposed to civil and administrative remedies — and, if so, whether existing federal criminal statutes, many of which are broadly worded, suffice to punish the conduct at issue. This process functions like a ratchet, going only one way: statutes are regularly added to the federal criminal code, but they are almost never removed.

The result of the urge to enact federal criminal

legislation in response to each new crisis is a morass of often overlapping statutes. For example, there are more than two dozen different false statement and fraud statutes in Chapter 47 of Title 18.<sup>1</sup> There are eight different fraud statutes in Chapter 63 of Title 18.<sup>2</sup> And there are at least nineteen different obstruction offenses in Chapter 73 of Title 18.<sup>3</sup> Of course, these are just some of the federal offenses addressing these topics; there are other false statement, fraud, and obstruction offenses scattered throughout Title 18 and still more in other titles of the federal code.

**It is past time for another comprehensive revision. That effort should focus on five main points: (1) reducing the number of federal crimes; (2) ensuring that the revised federal criminal code strikes a proper balance between federal and state criminal enforcement; (3) clearly defining the different levels of mens rea and applying those definitions in a fair and rational way to federal offenses; (4) establishing uniform rules of construction; and (5) revising the overly harsh punishment system that has produced an excessive federal prison population.**

Federal offenses lurk as well in regulations promulgated by various agencies. These regulatory crimes are especially pernicious because they rarely, if ever, receive careful scrutiny from Congress. They represent a dangerous confluence of power: the Executive Branch that prosecutes these crimes also creates and defines them.

From the perspective of a criminal defense lawyer, the proliferation of federal offenses has two main practical consequences. First, the sheer number of crimes creates a notice problem. Justice Holmes declared long ago that “fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”<sup>4</sup> But with the statutory scheme that now exists, “fair warning” is a fiction. Not even the most sophisticated and experienced criminal practitioner can say, without extensive research, whether certain courses of conduct violate federal law; pity the non-lawyer who must make that determination. If we are to presume that everyone knows the law — a maxim courts repeat with some regularity — we must make the law knowable.

Second, the existence of multiple federal statutes that address the same conduct encourages federal prosecutors to overcharge. The Antitrust Division, to its credit, typically brings a one-count indictment in criminal price-fixing cases, charging a violation of the Sherman Act. That commendable practice gives the jury a clear choice: guilty or not guilty. Unfortunately, this example is the exception and not the rule.

Instead, many federal prosecutors take advantage of overlapping federal criminal offenses to charge the same course of conduct under two, or three, or more different statutes or regulations. Instead of a one-count indictment charged under a single statute, the jury might have ten or twenty or a hundred counts charged under several different statutes. The result is often jury compromise. Jurors cannot agree unanimously whether the defendant is guilty, so, as a compromise, they convict on some counts and acquit on others.

What jurors are not told — and cannot be told in the federal system — is that for sentencing purposes a conviction on even one count is often the same as conviction on all counts.<sup>5</sup> When jurors compromise, they likely think they are giving each side a partial victory. But they are wrong; in practical terms, a guilty verdict on even one of a hundred counts is often the same as a guilty verdict on all counts.<sup>6</sup> Prosecutors know this, and some take advantage of it by unfairly overcharging defendants. Pruning the federal criminal code will reduce this practice and help to ensure fairness.

The process of reducing and making rational the federal criminal code affords the opportunity to address other troublesome areas, beyond the sheer

number of federal offenses. For example, the law of conspiracy is long overdue for careful examination. As it stands now, the federal criminal code has a number of conspiracy provisions. Some require an overt act, as well as a criminal agreement.<sup>7</sup> Others do not.<sup>8</sup> None of the conspiracy statutes clearly defines the *mens rea* necessary for conviction. The offense of conspiracy to defraud the United States is particularly amorphous; that statute has been interpreted to encompass almost any effort to interfere with a function of the federal government through deceit.<sup>9</sup>

Justice Jackson warned many years ago about the “elastic, sprawling, and pervasive” conspiracy offense, which he described as “so vague that it almost defies definition.”<sup>10</sup> A revision of the federal code affords an opportunity to rethink conspiracy and ensure that only those truly deserving of criminal punishment are swept up in its net.

As part of the reconsideration of conspiracy law, it is worth examining the so-called *Pinkerton* rule. In *Pinkerton v. United States*,<sup>11</sup> the Supreme Court held that a conspirator is criminally liable for the foreseeable substantive crimes of his co-conspirators in furtherance of the conspiracy, even if the conspirator himself played no part in the substantive offense and did not intend that it occur. *Pinkerton* thus expands the already vast sweep of conspiracy to include substantive offenses as well. The case stands alone in the federal system as a common-law, judge-made theory of criminal liability. If such a basis for conviction is to exist, it ought to be based on a careful legislative judgment and not on the decree of federal judges.

Another example of a statute in need of reform is 18 U.S.C. § 793, the principal statute used to prosecute improper disclosures of classified information. Section 793 has been criticized for decades because of its convoluted language and uncertain scope.<sup>12</sup> The statute has gained heightened prominence of late, with the prosecution of alleged leakers undertaken by the Department of Justice. Recent judicial decisions have underscored the uncertainty surrounding the *mens rea* necessary for conviction and the scope of the key phrase “information relating to the national defense.”<sup>13</sup> Here too a revision of the federal criminal code affords an opportunity to fix a long-festering problem.

Of course, there are still other such troublesome parts of the federal criminal code; the two examples above are merely illustrative. A comprehensive

reform of the code affords an opportunity to think through these problems and resolve them in a rational, systematic, and fair way.

## II. Restoring the Federal-State Balance

Reform of the code affords another, closely related opportunity: To restore the balance between federal and state law enforcement.

Our federalist system initially contemplated that law enforcement would be primarily a state function. There were only a few federal offenses, and those offenses focused on the protection of clearly federal interests. Although the Supreme Court has recognized the need to exercise caution in altering this traditional federal-state balance in law enforcement,<sup>14</sup> federal criminal jurisdiction has expanded so voraciously that now almost any culpable conduct can be brought within the federal ambit, through a wiring, a mailing, or a potential effect on interstate or foreign commerce.<sup>15</sup>

As a result, we see — to cite examples from my own practice — vote-buying in local elections, punishable under state law with a short prison term, being charged as a federal RICO violation, with a potentially massive prison term and forfeiture. We see nondisclosure under state campaign finance laws, punishable as a misdemeanor offense or through civil penalties, being charged as a federal wire or mail fraud offense, felonies that carry a loss of civil rights, in addition to draconian punishment. And we see violation of state and local anti-patronage laws, with relatively modest potential punishments, being charged as federal honest services fraud, again with a lengthy prison term, stiff financial penalties, and the disabilities of a federal conviction.

Some may argue — though I would disagree — that federal interests justify treating these essentially local matters as federal crimes. Regardless of where Congress ultimately strikes the federal-state balance in law enforcement, the issue deserves careful, systematic consideration. Reform of the federal criminal code affords that opportunity.

## III. Reforming *Mens Rea*

A comprehensive reform of the federal criminal code affords an ideal opportunity to establish uniform terminology for different levels of *mens rea* and to assign to each offense in the revised federal criminal code an

appropriate mental state.<sup>16</sup> Two areas in particular are worthy of attention as part of a reform of the federal criminal code.

First, it is important to determine when the government must prove that the defendant knew his conduct was illegal, and with what degree of specificity. Federal courts routinely recite the old maxim that ignorance of the law is no excuse, and no federal criminal statute of which I am aware expressly requires proof that the defendant knew his conduct was illegal. But given the extraordinary complexity of federal crimes and the constitutional imperative of fair notice, courts have interpreted the *mens rea* element of certain federal offenses to require knowledge of illegality. These cases do not typically require proof that the defendant knew the precise statute he was violating, or even that his conduct violated a criminal statute — but they do require proof that he knew what he was doing was unlawful.<sup>17</sup>

Courts generally find the requirement of knowledge of illegality in the statutory term “willfully.”<sup>18</sup> But, as the Supreme Court has observed, “willfully” is a word of many meanings, ranging from mere intentional conduct to an intentional violation of a known legal duty.<sup>19</sup> Because “willfully” has no clear definition, and because there is rarely legislative history illuminating its meaning in specific statutes, courts are left to decide for themselves what the term means in any given context.

This comes close to the common-law crime creation that the Supreme Court long ago forbade,<sup>20</sup> and it creates serious notice problems as well. Reform of the federal criminal code affords the opportunity to decide, in a reasoned and systematic way, when knowledge of illegality should be required and how specific that knowledge must be.

A second area that deserves comprehensive reform is the judge-created doctrine of willful blindness — also known as deliberate ignorance or conscious avoidance. According to this doctrine, when Congress requires the government to prove that the defendant acted with knowledge of a particular fact, the government can satisfy that burden by showing that, although the defendant did not have the required knowledge, he was aware of a high probability that the fact existed and took deliberate actions to avoid learning the truth.<sup>21</sup>

This judicially created substitute for knowledge was originally used in drug cases — where, for example, mules caught driving cars with drugs hidden in secret compartments would deny knowing

that the drugs were there.<sup>22</sup> Courts insisted that the doctrine was to be rarely used.<sup>23</sup> But as the years passed the courts threw caution to the wind.<sup>24</sup> Now federal district courts routinely give a willful blindness instruction in almost any case where the defendant does not expressly concede knowledge, and courts even let the government argue actual knowledge and willful blindness in the alternative.<sup>25</sup>

The widespread use of willful blindness instructions creates grave danger for defendants. In many — perhaps most — federal criminal cases, *mens rea* is the only element that is seriously disputed. Any instruction that waters down the required *mens rea* has the inevitable effect of tilting the playing field in the prosecution's favor. Willful blindness instructions are especially pernicious because, despite cautionary language, they may cause lay jurors to blur the line between negligence or recklessness, which typically are not criminal, and knowledge, which can be.<sup>26</sup>

The decision to permit conviction based on something less than actual knowledge is a quintessentially legislative one; in our federal system, where common law crimes are anathema, that decision should not be made by judges. Congress has on occasion chosen to include willful blindness provisions in criminal statutes — in the Foreign Corrupt Practices Act, for example.<sup>27</sup> But the question of when, if ever, a conviction can rest on a deliberate lack of knowledge, rather than on knowledge itself, should be resolved comprehensively and systematically as part of an overall reform effort.

#### **IV. Establishing Uniform Rules of Construction**

Courts have adopted certain rules of construction to interpret criminal statutes, the most prominent of which is the rule of lenity. Because these rules are judge-made, however, their application can seem random. And they may conflict with other rules of construction, such as the admonition in the RICO statute that its terms are to be liberally construed to effect its remedial purposes.<sup>28</sup> Reform of the federal criminal code affords an opportunity to establish uniform rules that courts can apply in construing federal criminal statutes.

Two such rules are worth highlighting. First, the rule of lenity — that doubts about the scope of a criminal statute should be resolved in the defendant's

favor — should be codified and made applicable to all federal crimes. The rule of lenity, especially in conjunction with a strong *mens rea* requirement, gives meaning to the basic constitutional requirement of “fair warning.”

Second, courts often struggle to determine the reach of a criminal statute's *mens rea* element. Does the requirement that the defendant act “knowingly,” for example, extend to all aspects of the conduct that makes up the offense? Does it extend to jurisdictional elements, such as the use of interstate commerce? Does it extend to circumstances that make the conduct criminal, such as the age of a victim of sexual misconduct? Does it extend to elements that affect punishment, such as the quantity of drugs involved?<sup>29</sup> Many of these difficult questions of interpretation can be resolved with a simple, generally applicable rule that the specified *mens rea* applies to all elements of the offense unless the statute creating the offense specifically provides otherwise.

These and possibly other straightforward rules of construction will increase uniformity — and thus fairness — in the interpretation of federal criminal statutes. They will also conserve judicial resources that are now devoted to interpreting federal criminal statutes on a case-by-case, ad hoc basis.

#### **V. Establishing a Rational System of Punishment**

Finally, revision of the federal criminal code affords an opportunity to rethink punishment. Most significantly, the use of mandatory minimum sentences should be carefully reviewed and, in my view, abandoned or greatly restricted. Mandatory minimum sentences are a harsh, blunt tool that leads to the prolonged incarceration of many men and women who could be punished and returned to society through less draconian means.

It is worth considering as well other means of reducing the bloated federal prison population without diminishing deterrence or jeopardizing public safety. Among the possible reforms worth considering are: the re-institution of federal parole, expanding the amount of “good time” a federal prisoner can earn, and increasing the power of federal judges to reduce or alter the conditions of federal prison terms in light of certain hardships. Through these means or others, federal

prisoners who have received just punishment and present no danger can return to their families and become productive members of society, rather than a burden on taxpayers.

## VI. Conclusion

For the first time in my 30 years as a criminal defense lawyer, the political climate has shown signs of favoring reform of the federal criminal code. Republicans and Democrats, liberals and conservatives, in Congress and on the bench, recognize that the federal criminal code has drifted far from its moorings in federalism and fair notice. The reforms proposed here mark a starting point for returning the federal code to its proper, limited role in the criminal justice system. We must not let this opportunity pass.

## Notes

1. 18 U.S.C. §§ 1001-1007, 1010-1033, 1035-1040.
2. 18 U.S.C. §§ 1341-1344, 1347-1348, 1350-1351.
3. 18 U.S.C. §§ 1501-1513, 1516-1521.
4. *McBoyle v. United States*, 283 U.S. 25, 27 (1931).
5. This is largely, although not exclusively, a result of the relevant conduct rules under the federal sentencing guidelines. *See, e.g.*, U.S. Sentencing Guidelines Manual, § 1B1.3 (2016).
6. For example, when a New York jury acquitted Mohamed Ghailani on 284 out of 285 counts a few years ago, many — possibly including the jurors — viewed the outcome as a victory for the defense and a repudiation of the prosecution case. But Ghailani received a life sentence on the single count of conviction — the same sentence, in practical terms, he would have received had he been convicted on all counts.
  7. *E.g.*, 18 U.S.C. § 371.
  8. *E.g.*, 18 U.S.C. § 1956(h); *Whitfield v. United States*, 543 U.S. 209 (2005).
  9. *See, e.g.*, *United States v. Coplan*, 703 F.3d 46, 59-62 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 71 (2013); Abraham S. Goldstein,

*Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959).

10. *Krulewitch v. United States*, 336 U.S. 440, 446 (1949) (Jackson, J., concurring).

11. 328 U.S. 640 (1946).

12. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1085-86 (4th Cir. 1988) (Phillips, J., concurring); *United States v. Rosen*, 445 F.2d 602, 613 & n.7 (E.D. Va. 2006); Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 998 (1973).

13. *E.g.*, *United States v. Kim*, Case No. 1:10-cr-225-CKK, Memorandum Opinion (Docket No. 137) at 6-12 (D. D. C. July 24, 2013).

14. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2086-90 (2014); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Rewis et al. v. United States*, 401 U.S. 808, 812 (1971).

15. In a handful of cases, the Supreme Court and the courts of appeals have attempted to place limits on the vast sweep of federal criminal power. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *Waucaush v. United States*, 380 F.3d 251, 256-57 (6th Cir. 2004). But these cases mark only brief interludes in the steady expansion of federal criminal jurisdiction. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 23-33 (2005) (reading *Morrison* and *Lopez* narrowly).

16. Sections 2.02 through 2.05 of the Model Penal Code represent an effort to establish and define a hierarchy of *mens rea* requirements. The MPC *mens rea* provisions may work well for a typical state criminal code, but they are inadequate for the more complex offenses that appear in the federal code. Among other deficiencies, the MPC does not adequately address the need for proof of knowledge of illegality in the context of broadly worded federal offenses.

17. *See, e.g.*, *Bryan v. United States*, 524 U.S. 184, 196 (1998); *United States v. Bishop*, 740 F.3d 927, 932-34 (4th Cir. 2014).

18. *E.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 143-49 (1994); *Cheek v. United States*, 498 U.S. 192, 198-99 (1991).

19. *E.g.*, *Ratzlaf*, 510 U.S. at 141; *Spies v. United States*, 317 U.S. 492, 497 (1943).

20. *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415

(1816); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

21. *E.g.*, *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

22. *See, e.g.*, *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc).

23. *E.g.*, *United States v. Hilliard*, 31 F.3d 1509, 1514 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992).

24. *E.g.*, *United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (overruling prior decisions stating that the willful blindness instruction is “rarely appropriate” and “should be used sparingly”).

25. *See, e.g.*, *United States v. Carlo*, 507 F.3d 799, 802 (2d Cir. 2007).

26. *See United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1990) (Posner, J.); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990) (discussing legal and philosophical flaws in use of conscious avoidance as a substitute for actual knowledge); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 772-74 (2011) (Kennedy, J., dissenting) (criticizing conscious avoidance doctrine); *United States v. Heredia*, 483 F.3d 913, 930-33 (9th Cir. 2007) (en banc) (Graber, J., dissenting) (same).

27. 15 U.S.C. § 78dd-2(h)(3)(B).

28. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576, 587, 587 n. 10 (1981); *United States v. Banks*, 514 F.3d 959, 967-68 (9th Cir. 2008).

29. For examples of the Supreme Court struggling with this interpretive task, see *Fowler v. United States*, 563 U.S. 668 (2011) (analyzing intent element of federal witness tampering statute) and *Staples v. United States*, 511 U.S. 600 (1994) (analyzing mens rea for 26 U.S.C. § 5861(d)).

## John Cline

is an attorney in San Francisco, California.



He tries criminal cases in federal district courts nationwide, and he has argued appeals in the United States Supreme Court and nine federal circuits. He writes and

speaks widely on criminal law issues.



## Enforcement Gone Amok: The Many Faces of Over-Enforcement in the United States

John H. Beisner

*The following is an excerpt published by the U.S. Chamber Institute for Legal Reform. The full report can be found at <https://www.instituteforlegalreform.com/research/enforcement-gone-amok-the-many-faces-of-over-enforcement-in-the-united-states>.<sup>1</sup>*

“One of the first purposes of government identified in the Preamble [to the United States Constitution] is to establish Justice through the offices of government. Our Bill of Rights and subsequent amendments to our Constitution reflect a strong tradition of guaranteeing due process and affording the equal protection of our laws to all citizens.”<sup>2</sup>

All elements of American society benefit when the legal system is used as intended by our Founders — namely, to prosecute and punish genuine wrongdoers whose actions have violated the law and caused injury or damage, guided by due process and the Eighth Amendment principle that the punishment should fit the crime. However, recent events have shown that government enforcement actions increasingly overstep reasonable bounds.

Over-enforcement occurs when individual government agencies exercise unfettered discretion to rely on novel or expansive interpretations of laws to coerce settlements. Companies that are targets of this practice cannot be certain that the courts will set aside these actions, given the often vague and broad statutory language that confers authority on these agencies.

Over-enforcement also occurs when the prosecution of wrongdoing is carried out by multiple regulators conducting duplicative investigations and

legal actions, either simultaneously or in succession, which are directed at the very same conduct. Faced with these multiple assaults, companies often have little choice but to agree to whatever settlements those various government officials demand, even if the company has meritorious arguments against the underlying charges.

One consequence of both coercive and “piling-on” over-enforcement is large and duplicative fines and penalties that too often are disproportionate to the alleged wrongdoing. The fact that over-enforcement targets are typically corporations and not individuals does not excuse the abusive nature of the practice — “justice for all” must apply across the board.

Over-enforcement abuses have plagued businesses that run the gamut of American industry. This paper highlights examples, drawing in particular from the financial services, pharmaceutical, and insurance industries, to shine much needed light on the wide-ranging and often interrelated ways in which the government has taken advantage of those who find themselves in the cross-hairs of an enforcement action.

From overreach and coercion employed by unbridled federal and state prosecutors, to “piling-on” by multiple federal and state government entities seeking their piece of the settlement pie, to punishment in the form of excessive fines and penalties, this paper examines the ways in which the enforcement process is being misused to the detriment of business and society as a whole.

## Note

1. This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

2. Richard C. Baldwin, *Rethinking Professionalism — And Then Living It!*, 41 EMORY L.J. 433, 436 (1992).

### John Beisner

A white icon of a person in a suit carrying a briefcase, standing in the center of a white maze. The maze is composed of multiple concentric, rectangular paths that eventually lead to the person.

is a partner at Skadden Arps Slate Meagher & Flom. He chairs Skadden's mass torts, insurance, and consumer litigation group. Over his 35-year career, he has represented defendants in a wide range of high-visibility litigation and enforcement matters at both the trial and appellate court level.

A person is walking through a complex, multi-level maze. The maze is constructed from light-colored, possibly stone or concrete, walls and paths. The person is in the upper right quadrant of the maze, moving towards the center. The lighting is soft, creating a somewhat ethereal and challenging atmosphere.

## A Long Strange Trip through the Criminal Justice System<sup>1</sup>

**Barry J. Pollack**

No one ever really knows what it is like to walk a mile in someone else's shoes. But as a criminal defense lawyer, I have spent my career walking many miles next to someone who is taking the most unfamiliar and difficult journey of his or her life. I am talking about someone who becomes the target of a federal criminal investigation, becomes a criminal defendant, and ultimately goes on trial, knowing that when the jury comes back whether the jury places the word "not" before the word "guilty" will profoundly alter the remainder of his or her life. Recently, watching yet another client go through this experience made me think about the behind-the-scenes vantage point I have to observe a process that most people never see — and could never imagine. The purpose of this article is to lift that curtain so that others may get a glimpse of this heart-wrenching ordeal I have seen so many times.

As you are about to sit down to dinner with your family, there is a knock on the front door of your house. It is a couple of FBI agents who say they want to interview you about some business practices at the government contracting company where you have been employed for the past 10 years. Of course, you speak with them. What law-abiding citizen wouldn't be willing to assist the FBI? You usher them into your living room. One of the agents begins asking questions. The other has a notepad on which he jots down an occasional note. As the interview progresses, you realize that the questioning seems to be focusing on your involvement in particular transactions. The transactions were, to you, perfectly appropriate and routine. But as you try to explain them, it is clear to you that the agents think there was something fraudulent or otherwise unlawful about these transactions. The agents seem dissatisfied with your explanations. Finally, they tell you that they have no more questions.

They then hand you a piece of paper. It is a letter addressed to you, informing you that you are the

target of a federal grand jury investigation. The agents had this letter with them the whole time, but had not told you that you were the target of their investigation until after the interview concluded.

After explaining to your wife what has just occurred, you immediately call the company's lawyer. The company's lawyer says that she will get you the name of a good, experienced white collar criminal defense lawyer. You arrive at work the next day at the regular time. Within minutes, scores of FBI agents arrive, explaining that they are executing a search warrant. You are asked to give them your laptop computer and your cell phone.

Later in the day, you meet with a lawyer whose name the company's lawyer had given you. Over the next few days, you learn that the company's by-laws (you did not even know that the company had by-laws) only provide for the payment of attorney's fees for officers. You are on the list for promotion to vice president, and believed this was the year you would finally receive that promotion, but you are not yet an officer. You learn that the company's directors' and officers' insurance policy will also not cover your fees. Your lawyer explains to you that if you are charged and want to defend yourself at trial, the attorney's fees will run hundreds of thousands of dollars. How can that possibly be, you ask. Your attorney explains that with all of the electronic documents the government has seized, millions of pages will need to be reviewed by counsel to competently prepare your defense. In addition to spending countless hours reviewing these voluminous documents, your lawyer will need to do his own investigation of the facts of the case, research, write and argue motions in court, and hire expert witnesses and other experts, all of whom themselves will charge fees on top of your attorney's fees.

You learn that if indicted, you will likely be suspended from government contracting. Your entire

career has been built on government contracting. The company will have no choice but to let you go. You will lose your only source of income at precisely the time you will be facing crippling attorney's fees.

And, you learn that if you are convicted at trial, you may be facing decades in prison. Decades? You have never previously had so much as a traffic offense. This is a non-violent white collar crime. But your attorney is quite clear, the federal sentencing guidelines call for decades. While the judge may deviate from the guidelines to some degree, she is unlikely to deviate from them by enough that you will get out before your young children have graduated college, gotten married, and had their own children.

There must be an alternative. You don't think you did anything wrong, but maybe you could plead to a minor offense, one that guarantees no jail time. Your attorney explains that pleading guilty would mean standing up in court and saying under oath that you intentionally committed fraud. And, the prosecutor is insisting on a felony plea. But, if you did plead guilty, you wouldn't serve nearly as much time as you would if you went to trial and got convicted. Your lawyer thinks he can get you a deal that caps your exposure at five years in prison and gives you a shot at even less than that. It is a long shot, but you might even get probation. Your lawyer also explains that winning these cases at trial is very difficult, regardless of how strong the defense may be.

Door number one. Go to trial. Get suspended from government contracting. Lose your job. Deplete your life savings and then some, while putting your family through an excruciating ordeal. And spend the next year of your life knowing that if the jury doesn't believe you, you will be spending most of your remaining good years in prison and, when you come out, you will be completely unemployable.

Door number two. Plead guilty to a felony that you do not believe you committed. Get debarred from government contracting, permanently losing the only livelihood you have known. Be a convicted felon for life. Ruin the sterling reputation you have spent a lifetime building, bring shame and embarrassment to yourself and your family. And, maybe still end up going to jail.

You ask your attorney repeatedly about other options. But, there is no door number three.

As ugly as door number two is, in the worst case scenario, you are out in five years (really just over

four years after you receive good time credits). You will be there when your kids go to high school. You will have most of your life ahead of you. Maybe you won't even have to be away from your wife and kids at all.

How many of us have the fortitude to pick door number one? Even if in your heart of hearts, you did not believe for a second that you did anything wrong, would you have what it takes to pick door number one? Not many do.

I recently completed a trial with someone who did. Here is what he learned after he was indicted and the government started providing discovery. Unbeknownst to him, he had been under investigation for eight years before that knock on his front door by the two FBI agents. They had gone through his trash, read his mail, and had people whom he believed to be his colleagues and friends surreptitiously record conversations they had had with him.

Millions of pages of discovery turned out to be optimistic. There were 8.5 terabytes of discovery. This is the equivalent of the entire Library of Congress.

He learned that every time I tried to interview someone who might be helpful to the defense, that person had his own lawyer. Since the government would not give that person immunity, that person's lawyer had advised him not to speak about the case to anyone, including me.

He learned that even people he thought were dear friends would not agree to be character witnesses. They too made their living doing business with the government and simply didn't believe they could afford to alienate the government.

He learned that most of the government witnesses had committed a crime unrelated to him and had cut a deal with the government. In return for their testimony against him, they would get a break on their sentences. He learned that the FBI agents had taken the notes from their interview of him and typed up a report of what it was they believed he had said. The report was never shown to him to verify its accuracy. In many respects it was inaccurate or incomplete. But it was his word against two FBI agents and their official FBI memorandum of the interview. He learned that the federal government wins upwards of 90% of the cases it brings, more in the district in which his case had been charged. The judge set the trial date six months from the date of indictment, an unusually long period of time for this district, but months less than what was desirable

to be able to adequately prepare his defense.

My client had always been good with numbers. He could put together a budget forecast, no matter how complex, and be dead on. But he was not an accomplished public speaker. Indeed, he had always gotten nervous making even a minor presentation at a sparsely attended meeting. Now, I tell him that his best chance of acquittal is if he takes the stand to testify. There simply aren't enough other witnesses willing to speak to me that I could assure him that all of the points needed to lay out the defense could be made through witnesses other than him. While the jury would be told he was not required to testify, the jury would want to hear from him. The outcome of the trial would largely depend on whether or not the jury believed his testimony.

As the trial gets closer, the pressure on my client seems to grow exponentially. He has had more arguments with his wife in the last two months than in the first 18 years of their marriage combined. He has lost his temper with his children. He cannot forgive himself for that. How will he forgive himself if he misses the rest of their childhood?

Finally, the trial is upon us. A jury is seated. What are they thinking? Are they open minded? Are they sympathetic? Are they assuming he would not be here if he had done nothing wrong? Each day they come in. Poker-faced. Who knows what they are thinking. The government witnesses testify one by one. Does the jury believe them? The government rests.

I move for a judgment of acquittal. Even if the jury believes all of the government witnesses, I argue, my client has committed no crime. The judge disagrees. It is possible, he says, the jury could conclude otherwise. He is not going to take this case away from the jury.

His defense begins. A government contracting expert witness disagrees with some of the things one of the government's key fact witnesses had said. A couple of fact witnesses, who were willing to testify for the defense, contradict certain aspects of the government's witnesses' testimony. A character witness talks about the 35 years he has known the defendant and how my client has always conducted himself with the utmost integrity. Finally, it is the defendant's turn.

As I stand up to call him to the witness stand, I am thinking, "what is going through *his* head right now?" What gave him the courage to get to this point?

And how will he get through the next several hours? He is visibly nervous, but he does well. He finally has the chance to tell what happened from his perspective, a year after the FBI agents, sitting in his living room, handed him a target letter. He answers all of the prosecutor's questions. Some answers are more articulate than others, but the prosecutor has scored no direct hits. Like that, his testimony is concluded.

It is time for the closing arguments. The prosecutor finishes his initial closing argument. It is my turn.

I have poured my heart and soul into this case, working evenings and weekends, immersing myself in the facts and the applicable law, taking time away from my own family. I have grown to respect and like my client. I realize how much we have bonded over the past few months, particularly the last couple of weeks. My experience in this process is vastly different than his, but we have been in the foxhole together.

**What if he wasn't able to accept the risk? Many clients do not and make the rational decision to plead guilty, even if they believe they are innocent, even if their case should have been tried. Most of the public does not believe an innocent person would ever plead guilty. Unquestionably, people do. More than 10% of the people exonerated by DNA evidence were exonerated of an offense to which they had pled guilty.**

**A client who knows he is innocent and has the financial resources and emotional fortitude to go to trial and is willing to accept the risk, is the exception, not the rule.**

I realize I am now not merely arguing for my client. I am arguing for my friend. I am arguing for my friend's freedom. I am arguing for the rest of my friend's life. If he is convicted, I will be devastated. The stress is intense. The burden I feel can only be but a tiny fraction of the weight that is on him.

I finish my argument and listen helplessly to the government's rebuttal argument. The prosecutor

makes points that I think I could easily answer, but I won't have that chance. The government gets to speak first and last.

The judge instructs the jury for 90 minutes. The legalese is so thick that even as an experienced criminal defense lawyer, I find the instructions often difficult to follow.

The jury is deliberating. Hours pass. Days pass. My client and I try to maintain a semblance of normalcy. We go to lunch. Three jurors sit a couple of tables over. These are three of the people who are taking a break from their task of deciding the fate of my lunch partner — my client and my friend. While we pretend this is a normal day and a normal lunch, we could not be more conscious of the fact that we are pretending. The day ends. The next day begins. More of the same. Finally, we get the call. The jury has a verdict.

How to describe that walk over to the courthouse? How to describe waiting for the verdict to be announced? I can't. I cannot describe what I am thinking and feeling as my heart is pounding. I can't even imagine what my client is experiencing. The jury foreperson, expressionless, hands the verdict to the judge. She reads it to herself. Her face also offers no clue what the verdict is.

Finally, in a monotone, she says, "The verdict is not guilty on all counts." My stoic client has tears in his eyes. He goes to shake my hand and it quickly turns into a hug. As we walk out of the courtroom, someone congratulates my client. "That must be a monkey off your back," he says. Without missing a beat, my client responds, "Monkey? It was an entire zoo."

The sense of relief is enormous. Now my client must pick up the pieces of his life. How does he find employment? How does he start to replenish his savings? How does he re-connect with his family? These are all extraordinarily daunting questions. But he faces them only because he had the inner strength to go forward in the belief that he was right, and he was willing to stare down the awesome power of the federal government. That is some door, door number one.

If only walking through that door was a guarantee of a just result. It is not. This client was innocent, yet he and his family suffered catastrophic financial loss and unimaginable emotional distress. Is that a just result?

And not all cases get to the jury — even when the defendant is innocent. What if my client did not have the wherewithal, financial and emotional, to take the case

through trial? What if he wasn't able to accept the risk? Many clients do not and make the rational decision to plead guilty, even if they believe they are innocent, even if their case should have been tried. Most of the public does not believe an innocent person would ever plead guilty. Unquestionably, people do. More than 10% of the people exonerated by DNA evidence were exonerated of an offense to which they had pled guilty.

A client who knows he is innocent *and* has the financial resources *and* emotional fortitude to go to trial *and* is willing to accept the risk, is the exception, not the rule. This client had all of the above. And he was lucky. The jury got it right. That is not always the case.

In the dozens of times I have walked down this path with a client, I believe the jury has gotten it right more often than not. But that is not to say that the jury always gets it right. I have won a couple of cases I expected to lose. I have lost more than a couple of cases I thought I should have won. Juries are generally good. They are not infallible. Or even close.

As a criminal defense lawyer, the cases you win take a toll on your mind and your body, but they are ever so sweet. The cases you lose take a greater toll, and are ever so bitter. The sting lasts longer than the joy.

But I cannot think of anything in the world I would rather do for a living than be a criminal defense lawyer. Winston Churchill said, "Democracy is the worst form of government, except for all the others." I firmly believe the same is true of our criminal justice system.

We must recognize its flaws. We must be ever vigilant in our efforts to improve our criminal justice system. We must constantly work to make sure that every protection for the criminally accused is in place and operating as it should. Every time I stand up in court, it is a true honor and a privilege to represent my client and to do everything in my power to make sure that an inherently flawed system dispenses as much justice as it is capable of providing.

Chief Justice Roberts may have summarized the role of a criminal defense lawyer the best when, in *Kaley v. United States*, he wrote:

A person accused by the United States of committing a crime is presumed innocent until proven guilty beyond a reasonable doubt. But he faces a foe of powerful might and vast resources, intent on seeing him behind bars. That individual has the right to choose the

advocate he believes will most ably defend his liberty at trial ....

Federal prosecutors, when they rise in court, represent the people of the United States. But so do defense lawyers — one at a time.

It is an amazing journey I take each time a client goes to trial. I hope this article opened a small window on what that journey is like for the defense lawyer, and more importantly, the client.

### Note

1. The events portrayed in this article all occurred. However, the author has used events from multiple actual cases to draw a composite portrait of the people and events described.

### **Barry Pollack**

chairs Miller & Chevalier's White Collar & Internal Investigations practice and is President of the National Association of Criminal Defense Lawyers. Barry represents individuals and corporations in investigations and trials. He is a Fellow in the American College of Trial Lawyers and the American Board of Criminal Lawyers.



A person is walking through a complex, multi-level maze. The maze is constructed from light-colored, possibly stone or concrete, walls and paths. The person is in the upper right quadrant of the maze, moving towards the center. The lighting is soft, creating long shadows and highlighting the textures of the maze walls.

## Over-Criminalization and Its Consequences: Yes, It's Personal

**John F. Lauro**

The issues of over-criminalization and overuse of incarceration drive the national debate about reforming our criminal justice system. For years, the United States has imprisoned more individuals than any other country in the world. Recently, a broad bi-partisan consensus developed challenging the underpinnings of this policy and suggesting better solutions to deal with crime problems. The Obama administration, joined by conservative advocates such as the Koch brothers and the Heritage Foundation, provided a leadership role addressing these issues, particularly with respect to alternatives to incarceration for non-violent drug offenders.

Similarly, outstanding authors and scholars such as Harvey Silverglate<sup>1</sup>, Professor Lucian E. Dervan<sup>2</sup>, and Professor Ellen Podgor<sup>3</sup> examined the causes and effects of over-criminalization with respect to ambiguous and broadly-written statutes criminalizing what should otherwise be civil or moral wrongs. The U. S Chamber of Commerce has also examined how over-criminalization affects business decision-making.<sup>4</sup> Perhaps no organization has taken a more effective and principled position on over-criminalization issues than the National Association of Criminal Defense Lawyers.<sup>5</sup> Of course, white-collar criminal defense lawyers deal with these realities every day. Our clients face long prison terms for routine business practices that can be spun as criminal “fraud” by aggressive prosecutors. We have all seen run-of-the-mill breach of contract cases morph into criminal cases where our clients face disproportionate punishment under the federal sentencing guidelines — the federal government’s primary tool for mass incarceration.

Indeed, the dual phenomena of over-criminalization and over-incarceration go hand-in-hand. One leads to the other. Sadly, the Obama administration never developed a consistent policy towards criminal justice reform. Although advocating for alternatives to prison for drug and other offenders, the administration

refuses to address over-criminalization in the white-collar arena. Incomprehensibly, the administration is heading in the opposite direction from reform. Recently, the Department of Justice (“DOJ”) issued new guidelines calling for corporations to identify individuals who can be blamed and imprisoned for collective corporate decision-making.<sup>6</sup> The administration opposed reforming criminal laws to require a strict criminal intent (*mens rea*) element.<sup>7</sup> Finally, the administration has done nothing to lessen the impact of the draconian sentencing guidelines upon white-collar offenders.<sup>8</sup> Clearly, this inconsistency cannot possibly be based on the merits of public policy — why are incarceration and over-criminalization unacceptable for drug offenses, but the weapons of choice for purported white-collar offenses? Obviously, we all know that putting business people in jail scores points with certain segments of the political spectrum. One can only conclude that the administration’s policies are driven by political considerations rather than upon the merits of criminal justice reform.

We can debate these policy implications at a very high level, but what are the consequences of over-criminalization upon ordinary people’s lives? Whenever I tell someone that I’m a white-collar defense lawyer, the following question invariably follows: “How can you represent someone like Bernie Madoff?” Well, of course, we sometimes represent the Bernie Madoffs of the world. More times than not, however, we represent white-collar workers and entrepreneurs who get swept up into an enforcement frenzy, usually to advance the goals of elected or bureaucratic officials. It is critical in this discussion that we also examine those who are most affected by over-criminalization in white-collar enforcement. In other words, who must deal with the consequences of these issues on a very personal level? From my perspective as a criminal practitioner, they share certain characteristics and life experiences.

Undoubtedly, those affected most by over-criminalization pursue otherwise law-abiding and productive lives. They have jobs and families; in a word they are our neighbors, friends, and members of our families. A prosecutor has little incentive to stretch the bounds of criminal law to ensnare a predatory white-collar criminal. However, where criminal conduct is not that clear — or indeed absent entirely — it requires creative prosecutorial theories to go after otherwise law-abiding individuals. How many of our clients are white-collar workers simply doing their jobs or skilled entrepreneurs engaging in profit driven decision-making consistent with industry-wide practices? These are the people who are the prime targets of over-criminalization.

Often clients work in highly regulated industries awash in ambiguous and contradictory laws and rules. White-collar workers are usually subject to promulgations of government authority that deal with complex subject matters far beyond questions of common morality. Yet those in the business world confront an incomprehensible array of regulations and statutes that fail to clearly define conduct. Most often, our clients are trying to interpret and understand complicated legal authorities, while at the same time running a profitable business. Their practical experiences differ from those of a prosecutor who has absolutely no connection to the business world and who has no understanding of the judgment calls that business people have to make. As government regulation becomes omnipotent and more complex, white-collar workers face competing values-based choices. For example, should business people interpret ambiguous regulations in a way to maximize profit or should they adopt a more defensive posture to avoid even the slightest possibility of scrutiny. Even a logical and principled position could lead to disastrous consequences when a prosecutor can turn a civil dispute into a federal criminal case.

Many of my clients have no idea they did anything wrong. This does not emanate from any moral shortcoming, but from criminal laws that lack even a fundamental jurisprudential mooring. I challenge anyone to give me a clear definition of fraud under the federal criminal fraud statutes dealing with mail and wire fraud, bank fraud, securities fraud, healthcare fraud, etc.<sup>9</sup> Although these statutes require false representations, they read as mere tautologies —

fraud is defined as fraud and you are guilty of fraud if you commit fraud.<sup>10</sup> So, how can anyone conform conduct to some identifiable standard when he or she makes a decision without any bad intent, but which is later characterized as “fraudulent?” Moreover, is it fair to punish conduct that is not understood as unlawful? Criminal fraud is not circumscribed by the clear elements of fraud found in civil law. Rather, the scope of criminal “fraud” depends on the allegations of a prosecutor and the subjective whims of twelve people in a jury box.

**Over-criminalization devastates real lives. Many white-collar workers are fired during investigations, especially if prosecutors designate them as “targets.” Entrepreneurs often lose their businesses when investigations become public. Our clients are stigmatized as criminals where there has been no clear violation of an accepted norm. Extended unemployment is another consequence as these cases drag on for years because of their complexity. Families are placed under enormous strain by the uncertainty of the ultimate outcome, and the financial costs of dealing with even an accusation of wrongdoing are enormous.**

Too often the subjects of over-criminalization function as mere pawns in a wider chess game. In making a case against bigger targets or in pursuing industry-wide enforcement actions, prosecutors need witnesses who will testify consistent with the government’s theories and narratives. These individuals usually need to be pressured into going along with what the prosecutor wants them to say. The only way to get that result is to threaten criminal prosecution using flexible criminal statutes that put otherwise law-abiding people in harm’s way. Once again, the breadth and ambiguity of criminal statutes provide prosecutors with unlimited power to use otherwise innocent individuals in making cases against others.

Just as pernicious is the use of over-criminalization to make broader political statements.

In every economic or regulatory crisis, those in power will declare criminal enforcement as a chief priority, using combat-like terminology. In order to show results, prosecutors need statistics and body counts. Finally, law enforcement agents and prosecutors advance their careers by bringing cases against high-profile business people. Over-criminalization gives them the tools to get these bodies ultimately publicized in well-distributed press releases and win accolades from their bureaucratic superiors; to say nothing of how such prosecutions lead to a prominent position in the private sector or the launching of a political career.

Over-criminalization devastates real lives.<sup>11</sup> Many white-collar workers are fired during investigations, especially if prosecutors designate them as “targets.” Entrepreneurs often lose their businesses when investigations become public. Our clients are stigmatized as criminals where there has been no clear violation of an accepted norm. Extended unemployment is another consequence as these cases drag on for years because of their complexity. Families are placed under enormous strain by the uncertainty of the ultimate outcome, and the financial costs of dealing with even an accusation of wrongdoing are enormous. Children’s lives are deeply affected when the resources to care for them are no longer present. Finally, over-criminalization takes some of society’s most productive lives — usually at their very prime — and puts them on a shelf when they are most needed to deal with pressing problems, all the while diverting resources from social problem-solving to the criminal justice system.

In sum, it is crucial in this discussion to understand that real lives are affected by criminal laws and prosecutorial decisions. As lawyers, we need to do more to bring to life the stories of those caught in an over-criminalization nightmare. Political leaders and the public should understand the personal implications of over-criminalization. The reality is that over-criminalization potentially affects everyone. Or, framed somewhat differently, in an era of over-criminalization, everyone is a criminal.

## Notes

1. Harvey Silverglate, *Three Felonies A Day: How the Feds Target the Innocent* (2009) (in our over-criminalized society

the average American does something about three times a day that could be construed as a federal crime by an overzealous prosecutor).

2. Lucian Dervan, *White Collar Over-Criminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 543 (2013).

3. Ellen S. Podgor, Essay, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?*, 109 PENN ST. L. REV. 1059 (2005).

4. See U.S. Chamber Litigation Center, *Over-Criminalization*, available at <http://www.chamberlitigation.com/cases/issue/overcriminalization>, (last visited May 18, 2016).

5. See Ellen S. Podgor, *Overcriminalization 2.0: Developing Consensus Solutions October 21, 2010: Foreword*, 7 J. L. ECON. & POL’Y 565 (2011) (discussing the key role NACDL has played in the fight against over-criminalization); Brief for National Association of Criminal Defense Lawyers, et al. as Amici Curiae Supporting Respondents, *United States v. Clay*, No. 14-12373 (11th Cir. Sep. 26, 2014).

6. Sally Quillian Yates, Memorandum re: Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at <http://www.justice.gov/dag/file/769036/download>.

7. See Kelly Cohen, *Mens Rea’ Fight Threatens to Derail Criminal Justice Reform*, Washington Examiner, Jan. 11, 2016, available at <http://www.washingtonexaminer.com/mens-rea-fight-threatens-to-derail-criminal-justice-reform/article/2581135> (discussing opposition from the Obama administration and DOJ to adding *mens rea* to the criminal justice reform bills).

8. The recent Federal Sentencing Guidelines amendments, which went into effect on November 1, 2015, failed to incorporate important reform measures. Indeed, the DOJ did not support the very thoughtful amendments advanced by the ABA. See American Bar Association, Criminal Justice Section, *A Report on Behalf of The American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, (Nov. 10, 2014), available at [http://www.americanbar.org/content/dam/aba/uncategorized/criminal\\_justice/economic\\_crimes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf).

9. See 18 U.S.C. §§ 1341 (defining mail fraud as “[w]hoever, having devised or intending to devise any scheme or artifice to defraud . . .”); § 1343 (defining wire fraud in the same manner as mail fraud with the additional element of wire transmission); § 1347 (defining healthcare fraud as “(a) [w]hoever knowingly and willfully executes, or attempts to execute, a scheme or artifice — (1) to defraud any health care benefit program . . .”).

10. Before his judicial appointment, U.S. District Court Judge Jed S. Rakoff candidly stated the obvious: “[t]o federal prosecutors of white-collar crime, the mail fraud statute is our

Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart — and our true love. We may flirt with other laws and call the conspiracy law ‘darling,’ but we always come home to the virtues of [mail fraud], with its simplicity, adaptability, and comfortable familiarity.” Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771 (1980).

11. See NACDL, *The Face of Over-criminalization*, <http://www.nacdl.org/faceofovercrim/>, (last visited May 18, 2016) (providing personal stories of the individuals affected by over-criminalization).

## John F. Lauro

represents clients around the country in complex criminal litigation. He graduated from Georgetown University Law Center and was an AUSA in the Eastern District of New York. He is also a member of the American College of Trial Lawyers.





## The Symbiotic Relationship between Over-Criminalization and Plea Bargaining

Lucian E. Dervan<sup>1</sup>

In 2002, a company called Computer Associates was approached by the Department of Justice and the Securities and Exchange Commission. The government was interested in the company's accounting practices and requested that Computer Associates retain outside counsel to perform an internal investigation of the matter. The Company's counsel conducted employee interviews as part of its inquiry and, eventually, the information from these interviews was transmitted to the government. Some time later, the government alleged that certain of the employees had lied during their conversations with company's counsel, an offense the government considered criminal. As a result, the employees were charged with obstruction of justice under 18 U.S.C. § 1512(c).

Was this novel and heavily criticized expansion of criminal law scrutinized by the appellate courts? Did the Second Circuit Court of Appeals or the U.S. Supreme Court examine whether a corporation's private counsel may be "deputized" by the government without employees realizing they could be indicted for lying to them? The answer is no, because three of the five defendants pleaded guilty immediately. Two others gave in to the pressures of plea bargaining two months after filing an unsuccessful motion to dismiss with the district court. As might be expected, not even the corporation challenged the government in the matter. Computer Associates entered into a deferred prosecution agreement, which included admissions regarding obstruction of justice.<sup>2</sup>

The Computer Associates case teaches us an important lesson about the evolution of over-criminalization in the United States — it did not happen alone. Rather, a symbiotic relationship has existed between over-criminalization and plea bargaining since the rise of these two phenomena beginning in the early 20<sup>th</sup> century. During this time, these two concepts have not merely occupied the same

space in our justice system; they have, in fact, relied on each other for their very existence. In the Computer Associates case, over-criminalization created a situation in which these defendants could be charged with obstruction of justice and presented with significant incentives to plead guilty. At the same time, plea bargaining ensured these novel legal theories would go untested by the courts.

To understand further what I mean when I say that there is a symbiotic relationship between plea bargaining and over-criminalization, 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. And the significant costs of trying individuals with creative, tenuous, or technical charges would not be an abstract possibility used in determining how much of an incentive to offer a defendant in return for pleading guilty, but would be real considerations in determining whether justice is being served by bringing a prosecution at all.

Similarly, consider the ramifications of there being no over-criminalization. The law would be refined and clear regarding conduct for which criminal liability may attach, and novel legal theories and overly broad and vague statutes would not be used to create potentially staggering sentencing differentials to induce defendants, perhaps even innocent ones, to falsely confess in return for leniency.

As our opening story and these hypothetical considerations demonstrate, plea bargaining and over-criminalization perpetuate each other in our current system because plea bargaining shields over-criminalization from scrutiny and over-criminalization helps create the incentives that have led to plea bargaining's rise. Today, 95% of state convictions and 97% of federal convictions are the result of a plea of

guilty. But it was not always the case that over-criminalization permeated our society or that plea bargaining dominated our criminal justice system. To understand the manner in which they grew together over time, we must trace their historic rise.

If we look back to English common law in the 1700s, we would find that plea bargaining as we know it today was impermissible. Pleas of guilt in court at this time were simply considered confessions, no different from a confession one might give in a police station, and the law in England required that such confessions be made voluntarily and without any inducement.

In the 1783 British case of *Rex v. Waricksall*, the court summarized the law by saying, “[A] confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape... that no credit ought to be given to it.”<sup>3</sup> At this time, even the offer of a glass of gin was considered by the courts to be a promise of leniency capable of coercion.

As we move through history and cross the Atlantic Ocean, we find a similarly strict standard regarding confessions, including for in-court confessions, having originally been adopted in the United States. In the 1897 case of *Brahm v. United States*, the Supreme Court concluded that the “true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.”<sup>4</sup>

Despite these early precedents, beginning around the time of the American civil war, appellate courts started seeing bargains between prosecutors and defendants in return for pleas of guilt. As might be expected based on earlier precedent, the appellate courts of the time looked with great disfavor upon such bargains and case law demonstrates they were struck down with great uniformity. Some examples of the language used by the appellate courts during this period include:

No sort of pressure can be permitted to bring the party to forego any right or advantage however slight. The law will not suffer the least weight to be put in the scale against him.

When there is reason to believe that the plea has been entered through inadvertence... and mainly from the hope that

the punishment to which the accused would otherwise be exposed may thereby be mitigated, the Court should be indulgent in permitting the plea to be withdrawn.

[Plea bargaining is] hardly, if at all, distinguishable in principle from a direct sale of justice.<sup>5</sup>

**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.**

Nevertheless, plea bargaining continued to operate in the shadows of the criminal justice system and one of the main reasons was the growth of another force that would change our country drastically in the 20<sup>th</sup> century — over-criminalization.

By the turn of the twentieth century, plea bargaining was on the rise as over-criminalization flourished and courts became weighed down with ever-growing dockets. 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>6</sup> The challenges presented by the growing number of criminal laws and prosecutions in the early twentieth century accelerated with the passage of the Eighteenth Amendment and the beginning of the Prohibition Era. To cope with the strain on the courts, the symbiotic relationship between over-criminalization and plea bargaining was born.

In 1931, the Wickersham Commission, convened by President Herbert Hoover to examine the causes of criminal activity and make recommendations for public policy, noted what was occurring in the trenches of the American criminal justice system and wrote: “[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>7</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%. By 1925, the number had reached 90%.<sup>8</sup>

By 1967, the relationship between plea bargaining and over-criminalization 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 criminal codes. The ABA stated in that year: “[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... Moreover, 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>9</sup>

Interestingly, although plea bargaining had gained widespread approval by the 1960s, the U.S. Supreme Court had yet to directly rule on the constitutionality of bargained justice. Finally, in 1970, the Court took up *Brady v. United States*, a case decided with the backdrop of a criminal justice system that had grown reliant on a force that convinced scores of defendants to waive their right to trial and confess their guilt.<sup>10</sup> In 1970, 90% of criminal cases were being resolved through pleas of guilty.

*Brady* involved a defendant who pleaded guilty because the statute under which he was charged permitted the death penalty only if recommended by a jury. By pleading guilty, he avoided that possibility and assured that he would live. The incentives to plead were so large, he later argued, that his plea was involuntary. Many believed the Court would use this case as an opportunity to put a stop to plea bargaining, particularly given the earlier case law. To the surprise of many, however, the Court determined that the defendant’s plea was voluntary and went on to state

that offers of leniency and threats of punishment are permissible, as long as they do not overbear the will of the defendant.

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 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, a stance strikingly similar to the ABA’s at the time. According to the Court, plea bargaining was not to be used to overwhelm defendants and force them to plead guilty where guilt was uncertain. In the words of Justice White:

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* (emphasis added).

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:

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* (emphasis added).

And with these words, the U.S. Supreme Court gave its blessing to plea bargaining and the symbiotic relationship between bargained justice and over-criminalization continued.

In 2011, Gibson Guitars' Tennessee factories were raided by federal authorities alleging the company had violated the Lacey Act. The Lacey Act was originally passed in the early 1900s to ban the importation of illegal wildlife. In 2008, that Act was amended to apply to plants and plant products. According to the government, Gibson had imported wood from Madagascar and India in violation of the laws of those countries. Gibson vigorously denied the allegations and argued that the law in each country permitted the export of these particular pieces of wood. As is often the case under the Lacey Act, the proper interpretation of a foreign law or regulation was at the heart of the case and there was, to use the words of the Supreme Court in 1970, "a substantial issue of the defendant's guilt."

As the Gibson case proceeded unresolved into the next year, the guitar maker was unable to import traditional guitar woods from any of its major suppliers, and customers began to complain about the substitute materials. In 2012, therefore, the company took the path so frequently walked by individuals and corporations today — they settled and entered into what was described as a "criminal enforcement agreement." The agreement required the company to pay a \$300,000 fine and donate \$50,000 to the National Fish and Wildlife Foundation. The agreement also led to the government's return to Gibson of seized woods from India and an agreement that future imports from India were, in fact, permissible.<sup>11</sup> After the settlement, Gibson's Chief Executive stated, "We felt compelled to settle as the costs of proving our case at trial would have cost millions of dollars and taken a very long time to resolve. This allows us to get back to the business of making guitars."<sup>12</sup>

As illustrated in the Gibson Guitar case, one of the reasons for the success of plea bargaining in

shielding over-criminalization from scrutiny is the incredible incentives that are offered in return for defendants giving up their right to trial. Research I conducted in 2011 and 2012 with my colleague Dr. Vanessa Edkins revealed that factually innocent people are willing to falsely plead guilty in much greater numbers than we might have previously recognized. In our study, 56% of the factually innocent participants were willing to falsely confess to something they had not done in return for the benefits of the bargain. In this study, these participants' innocence was definitive. For the majority of innocent participants, however, accepting the deal simply made more sense.<sup>13</sup>

If individuals who know with certainty that they have not committed an offense are willing to falsely confess in return for leniency, what impact do you think the power of plea bargaining has had on shielding from challenge vague, overly broad statutes that are unclear and confusing? In March of 2006, Dr. Peter Gleason was surrounded by half a dozen men in a Long Island train station and handcuffed. He was a Maryland psychiatrist who served poor and underserved populations and who had delivered a series of lectures at medical conferences regarding off-label use of certain pharmaceuticals. Dr. Gleason's arrest in 2006 was in direct response to those speeches. According to the government, while the off-label use of pharmaceuticals by doctors is perfectly legal, Dr. Gleason had gone a step further and conspired with the drug manufacturers to promote off-label uses that could be dangerous. According to Dr. Gleason, his prosecution was more directly related to his refusal to assist prosecutors in building a case against the drug manufacturer, an assertion the *New York Times* stated was supported by Court documents.<sup>14</sup>

Regardless of the motivation of the government, Dr. Gleason was unable to afford to mount a defense to the charges. Instead, he did what so many others do when faced with broad and confusing federal laws with uncertain applications; he pleaded guilty in return for leniency. Rather than face felony charges, he pleaded guilty to a misdemeanor, was placed on one year's probation, and paid a \$25 fine. Unfortunately for Dr. Gleason, even this conviction led to a determination by the Department of Health and Human Services that he was no longer eligible to participate in medical programs, despite that fact that most of his patients were on Medicare

or Medicaid. He later committed suicide. A co-defendant, however, decided to do what is so rare today. He decided to reject the offer of leniency and test whether his conduct was actually a crime. In 2012, the United States Court of Appeals for the Second Circuit ruled that the First Amendment protects one's right to make truthful statements about the benefits of drugs. Dr. Gleason, as he originally asserted, had done nothing wrong.<sup>15</sup>

While challenging over-criminalization head on is difficult, it is exactly what we need to break the symbiotic relationship between this phenomenon and plea bargaining. When we see individuals and corporations challenge over-criminalization and resist the temptation to surrender, we often see the system doing the work for which it was created.

**To offer individuals and corporations a real choice in how to proceed with their defense — to see a greater number of defendants challenge over-criminalization and seek clarity from the courts regarding what is prohibited — we must consider how much pressure is too much in our current system.**

In 2007, John Yates was fishing with his crew off the shores of Florida. When a state Fish and Wildlife Officer boarded his vessel to inspect his catch, the officer discovered that 72 of the 3,000 fish caught that day were slightly undersized. Yates was issued a citation and returned to port a few days later. At port, however, when the catch was re-inspected, fewer undersized fish were found, and the officer determined that Yates had replaced some of the fish from the initial inspection. As a result, Yates was charged with obstruction of justice under 18 U.S.C. § 1519, a federal law that was enacted as part of Sarbanes-Oxley to address the types of massive document shredding that occurred during the Enron scandal that carried a maximum sentence of 20 years in prison. To his credit, Yates fought the charge and appealed his conviction under Sarbanes-Oxley all the way to the U.S. Supreme Court. And he won. The Supreme Court concluded that a fish is not a “tangible object” subject to 18 U.S.C. § 1519.<sup>16</sup>

Yates' victory is more than just a personal

vindication. The case is a symbol of what might be if the symbiotic relationship between over-criminalization and plea bargaining is broken. Though the dissent in *Yates* disagreed about the meaning of the Sarbanes-Oxley law, it did agree that there is a problem in our country. In the dissenting opinion, Justice Elena Kagan wrote: “I tend to think, for the reasons the plurality gives, that section 1519 is a bad law — too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And I'd go further: In those ways section 1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code.”<sup>17</sup>

We wait for a day when the *Yates* case is not an outlier, not an anomaly in a sea of bargained justice. To achieve this end, however, part of our path forward must include looking back. Looking back to the words of the Supreme Court in 1970 when the Justices wrote, “We would have serious doubts about this case if the encouragement increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.”

To offer individuals and corporations a real choice in how to proceed with their defense — to see a greater number of defendants challenge over-criminalization and seek clarity from the courts regarding what is prohibited — we must consider how much pressure is too much in our current system. How large an incentive should we be able to offer a defendant to confess before we overbear their free will to make a voluntary decision? How much punishment should we exert on those who exercise their constitutional right to be proven guilty at trial? We must strive to return to the plea bargaining system envisioned in *Brady*, one where the incentives are sufficient to lead the clearly guilty to plead, but are not permitted to be so large as to convince even the innocent or those for whom we aren't sure that the costs of trial are simply too great. When that day comes, perhaps we will be well on our way to breaking the protective bonds between plea bargaining and over-criminalization and, as a result, creating a system that better resembles the search for the truth our Founder's envisioned.

## Notes

1. © Lucian E. Dervan, 2016. All rights reserved. My

thanks to NACDL for their assistance in this project. This piece reflects the remarks I made during my TED Talk-Inspired Presentation at the NACDL and U.S. Chamber Institute for Legal Reform Law & Policy Symposium in May 2016. The comments made during my presentation and reflected herein are based on my work in the field of over-criminalization and plea bargaining, including the articles *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 THE JOURNAL OF LAW, ECONOMICS, AND POLICY 645 (2011) and *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH LAW REVIEW 51 (2012). Therefore, certain sections contained herein previously appeared in those published works. Those portions previously appearing in the *Over-Criminalization 2.0* and *Bargained Justice* articles were first published by the *Journal of Criminal Law and Criminology*, Volume 103, Issue 01, and the *Utah Law Review*, Volume 2012, Issue 01.

2. *United States v. Kumar*, 617 F.3d 612, 618 (2d Cir. 2010).

3. *Rex v. Waricksall* (1783) 168 Eng. Rep. 234, 1 Leach 263.

4. *Bram v. United States*, 168 U.S. 532 (1897).

5. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 20-21 (1979).

6. See *id.* at 32 (“Dean Pound observed that ‘of one hundred thousand persons arrested in Chicago in 1912, more than one half were held for violation of legal precepts which did not exist twenty-five years before.’”).

7. *Report of the National Commission on Law Observance and Enforcement Relative to the Facts as to the Enforcement, the Benefits, and the Abuses Under the Prohibition Laws, Both Before and Since the Adoption of the Eighteenth Amendment to the Constitution*. House Document No. 722, 71st Cong., 3d Sess (1931).

8. *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 THE JOURNAL OF LAW, ECONOMICS, AND POLICY 645, 650 (2011).

9. Am. Bar Ass’n Project on Minimum Standards for Criminal Justice, *Standards Relating to Pleas of Guilty 2* (Approved Draft, 1968).

10. See *Brady v. United States*, 397 U.S. 742 (1970).

11. At the time of the raid in 2011, Gibson had not imported woods from Madagascar in two years.

12. *Gibson Settles with Department of Justice*, Gibson Guitar Corp. Press Release (Aug. 6, 2012), available at <http://archive.gibson.com/absolutenm/templates/FeatureTemplatePressRelease.aspx?articleid=1359&zoneid=6>.

13. See Lucian E. Dervan and Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 JOURNAL OF CRIMINAL LAW

& CRIMINOLOGY 1 (2013).

14. See *Indictment of Doctor Tests Drug Marketing Rules*, NEW YORK TIMES (July 22, 2006), available at <http://www.nytimes.com/2006/07/22/business/22drugdoc.html>.

15. See *Ruling is Victory for Drug Companies in Promoting Medicine for Other Uses*, NEW YORK TIMES (Dec. 3, 2012), available at <http://www.nytimes.com/2012/12/04/business/ruling-backs-drug-industry-on-off-label-marketing.html>.

16. See *Yates v. United States*, 574 U.S. — (2015).

17. *Yates v. United States*, Slip Opinions at 19 (Kagan, J., dissenting).

**Professor Lucian E. Dervan**  
teaches at Belmont University College of Law and focuses on domestic and international criminal law. The author of two books and dozens of book chapters and articles, he is the recipient of numerous national and international awards for his teaching and scholarship.





## The Shadow Regulatory State: The Rise of Deferred Prosecution Agreements in America

James R. Copland

Each year, the U.S. Department of Justice (DOJ) and other federal agencies enter into scores of deferred prosecution agreements (DPA) and non-prosecution agreements (NPA) with businesses. DPAs and NPAs are pretrial diversion programs that the federal government has increasingly used to resolve criminal allegations against large publicly traded companies. NPAs are entered into before a charge is formally levied and DPAs after a charge has been filed. Although DPAs may generally be more complex and involve higher fines and penalties, the principal distinction between the two types of agreements is nomenclature and procedure, rather than substance.

My Manhattan Institute colleagues and I have dubbed the new federal practice of controlling corporate behavior through DPAs and NPAs “the shadow regulatory state.” DPAs and NPAs give government attorneys tools to modify, control, and oversee corporate behavior that they would never achieve by taking the companies to court. Notwithstanding these extraordinary powers, these agreements lack transparency and judicial oversight.

Federal DPAs and NPAs with corporations were unheard of for most of American history. The first was entered into between the DOJ and Salomon Brothers in 1992, the last year of the George H.W. Bush administration. Since then their numbers have grown dramatically. Eleven DPAs and NPAs were entered into during the first Clinton administration, 130 during the George W. Bush administration, and 290 during the first seven years of the Obama administration.

Since the beginning of 2010, the federal government has entered into DPAs or NPAs with the parent companies or subsidiaries of 17 of the 100 largest U.S. companies by revenues, as ranked by *Fortune* magazine: Archer Daniels Midland, CVS Caremark, Fannie Mae, Freddie Mac, General Electric, General Motors, Google, Hewlett-Packard, Johnson & Johnson, JPMorgan Chase, Merck, MetLife, Pfizer, Tyson Foods, United Parcel Service, United

Technologies, and Wells Fargo.<sup>1</sup> In 2015, the federal government entered into 100 such agreements, a record, and companies paid out more than \$6 billion under their terms without any guilty plea or adjudication. The three largest agreements in 2015 were DPAs with General Motors, Commerzbank, and Deutsche Bank, which involved total fines of \$900 million, \$1.5 billion, and \$2.4 billion, respectively.

The fines are the least-unusual parts of these agreements. Were DPAs and NPAs limited to extracting monies from the corporate coffers, they would approximate normal criminal-law practices in which defendants regularly agree to avoid prosecution through paying civil penalties or various other types of trial diversion or plea arrangements. DPAs and NPAs that the government reaches with companies, however, involve significant oversight and supervision, even dramatic restructurings of business practice. Among the changes the DOJ has required of companies through DPAs and NPAs are:

- Firing key employees, including chief executives and directors
- Hiring new corporate officers
- Hiring corporate “monitors” independent of the company and reporting to the prosecutor
- Modifying existing compensation plans
- Redesigning sales and marketing practices
- Implementing new training programs
- Adopting exhaustive reporting requirements to the prosecutor
- Limiting corporate speech and litigation strategies

No such changes to business practice are authorized by statute. Nor would they be a punishment available to the government after a corporate conviction.

Why do corporations “agree” to give over so much power to government prosecutors? Essentially, like Don Corleone in the *Godfather* books and movies, the DOJ is making companies “an offer they can’t refuse.”<sup>2</sup> Various federal statutes contain serious collateral consequences for a company in the event of a corporate criminal conviction, or even an indictment. These include loss of rights to enter into government contracts, to be reimbursed by government-run health programs, or to maintain licenses required to operate.<sup>3</sup> Such prospective penalties give prosecutors enormous leverage, since an unsuccessful criminal defense would in many instances constitute an effective corporate death sentence. Even without statutory collateral consequences, criminal prosecutions distract senior management, pummel stock prices, and can inhibit companies’ capacity to obtain credit.

Government prosecutors have incredible leverage in these “negotiations,” and they bring heavy pressure to bear on companies that choose to resist. Consider United Parcel Service (UPS) and FedEx, competing package-delivery services that came under the government’s crosshairs for the same alleged conduct: delivering packages that contained pharmaceuticals illegally ordered from Internet pharmacies. Some might argue — I certainly would — that it’s hard to hold a package-delivery company liable for the contents of the packages it delivers, at least if the government has not put the company on notice not to do business with certain lenders. Despite the thinness of the government’s theory, UPS in 2013 agreed to an NPA with the U.S. Attorney for the Northern District of California. Under its terms, the company forfeited \$40 million to the federal government and agreed (1) to hire a new executive officer focused on compliance, reporting to the chief executive and board of directors; (2) to develop an extensive new training program for employees; and (3) to hire an “independent” auditor paid by the company but reporting to the U.S. Attorney.

FedEx, in contrast, decided not to settle with the same U.S. Attorney on essentially the same theory of wrongdoing and instead to test the government’s theory at trial. In June 2016 — two years after the government had sought and obtained an indictment of the company and one week into the trial — the government made the

unusual decision to drop its charges. The judge in the case, Charles R. Breyer, had expressed skepticism, calling it a “novel prosecution;” and he observed that the government had failed to show any ill intent, nor gone after the U.S. Postal Service for the same conduct.

What is striking about the FedEx case is not what the government was able to get out of the company — nothing, save legal defense bills — but what the government sought. In its prosecution of FedEx, the government sought fines of \$1.6 billion — 4,000% more than it negotiated with UPS — in addition to forfeiture of property related to the “crimes.” This for an indictment that alleged specifically \$600,000 in shipping payments over a ten-year period. The government lost the FedEx case, but it sent a clear message to the stakes involved for companies that refuse to deal with the Justice Department.

**Various federal statutes contain serious collateral consequences for a company in the event of a corporate criminal conviction, or even an indictment. . . . Even without statutory collateral consequences, criminal prosecutions distract senior management, pummel stock prices, and can inhibit companies’ capacity to obtain credit.**

FedEx was able to take the government to court because its case was somewhat the perfect storm. The company is not similarly positioned to many other businesses that face collateral consequences from a criminal conviction. Moreover, the criminal charges levied against it were fairly ludicrous, and the case was easy to understand for the public and unlikely to provoke customer blowback. More or less, the shipping company took its customers’ side. As Judge Breyer suggested, the government was essentially asking FedEx to snoop on its customers and open their packages — which has privacy-law implications, in addition to being bad for business. In the ordinary case, which involves complicated fact patterns and generates less-customer-friendly news stories, management’s ability to roll the dice on massive fines is far more constrained.

The government’s current use of DPAs and NPAs generates numerous policy concerns, including:

- Legal Appropriateness and Due Process.** The inordinate pressure that the government places on companies to settle makes it next-to-impossible for them to test novel theories of prosecution at trial — or in at least some cases, to avail themselves of defenses that are likely to prevail. For example, the Foreign Corrupt Practices Act,<sup>4</sup> which creates civil and criminal penalties for businesses and individuals who pay bribes to foreign officials, contains an express exemption for “facilitating payments” designed “to expedite or secure the performance of a routine governmental action by a foreign official”<sup>5</sup> — essentially, routine customs bribes and the like that do not involve major corruption. But after Ralph Lauren discovered and self-disclosed to the Justice Department that its Argentine subsidiary had been bribing customs officials, it entered into a 2013 NPA that included both punitive penalties and a two-year term of Justice Department supervision.
- Effectiveness and Compliance.** In a 2009 report, The Conference Board openly worried that federal prosecutors’ practices were potentially undermining deterrence of law breaking by inadequately crediting companies’ pre-existing compliance programs: “From an ethics and compliance incentives perspective, publicly recognizing settlement-based programs (but not preexisting ones) in enforcement decisions is hardly optimal. In essence, it sends a message that the companies need not be concerned with compliance/ethics programs until after a violation, and thereby undercuts the important law enforcement policy of deterrence.”<sup>6</sup> For example, in 2014, the Justice Department and Securities and Exchange Commission hit Hewlett-Packard and its foreign subsidiaries with an array of DPAs and NPAs for conduct the company had itself discovered and self-disclosed. The conduct was expressly forbidden by company rules, and the company employees had gone to extraordinary lengths to cover it up. The conduct described in HP Poland’s DPA sounds like the plot of a John Grisham novel or a modern-day spy film: the company employee delivered bags of cash to a Polish government official personally, over the course of several years, dropping them off at random locations to avoid being discovered; he communicated “through anonymous e-mail accounts and prepaid mobile telephones”; and the company employee and government official would drive to a “remote location [and] would type messages in a text file, passing the computer between themselves . . . to avoid possible audio recording of the discussions by hidden devices, and to circumvent [HP’s] internal controls.”<sup>7</sup>
- Social Costs and Global Sweep.** Congress clearly has an interest in combatting crimes committed under corporate auspices, but it makes little sense to give broad powers to reshape businesses, without statutory authorization or judicial oversight, to English majors with law degrees in the federal Department of Justice. For an example of the extraordinary powers assumed by federal prosecutors, consider that in 2013, the Justice Department entered into an agreement with the Royal Bank of Scotland — which is 82-percent owned by the British government — over allegations that the foreign bank had been involved in a scheme to manipulate the London Interbank Office Rate. The DOJ assumed sweeping powers of prior restraint over the foreign sovereign-owned bank’s speech — including aggressive oversight of interest rates embedded in hosts of international commercial contracts, thus putting a critical international monetary-policy instrument under the forceful regulatory thumb of government lawyers with limited financial and economic expertise. In its 2012 DPA with the UK-based HSBC, the Justice Department in essence offered the bank a Hobson’s choice between losing its license to practice as a bank in the United States and pulling out of hosts of emerging-market countries — exerting a dramatic influence over the course of global development policy.
- Lack of Judicial Oversight and Transparency.** A significant difference between the DOJ’s shadow regulation through DPAs and NPAs and the normal administrative process is that the latter, traditional form of regulation utilizes carefully defined rulemaking, with notice and comment periods, and clear channels for judicial review. The modifications to corporate conduct enabled through DPAs and NPAs, by contrast, accord prosecutors powers they would lack were they able to convict a company at

trial — and lack any mechanism for judicial oversight to the agreements’ substantive terms.

Two recent developments in the government’s DPA and NPA practice warrant mention. On September 9, 2015, U.S. Deputy Attorney General Sally Quillian Yates issued a “clarifying memorandum” purporting to define the Justice Department’s use of DPAs and NPAs.<sup>8</sup> This was the latest in a series of directives since 1999, when then-Deputy Attorney General Eric Holder set in motion the DOJ’s modern DPA practice.<sup>9</sup> Yates’s memo emphasized that “criminal and civil corporate investigations should focus on individuals from the inception of the investigation” and that “corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct” before they are eligible for entering into a DPA.<sup>10</sup> It is too soon to assess the full impact of the Yates memorandum, but the possibility that the threat of corporate prosecution could be used as an even stronger lever to deputize company resources to make out cases against the company’s individual employees is very real.

On April 5, 2016, the D.C. Circuit Court of Appeals granted a *writ of mandamus* vacating a district court order that had rejected a DPA between the government and Fokker Services B.V.,<sup>11</sup> a Dutch aerospace services provider that had voluntarily disclosed to U.S. authorities that it may have violated federal sanctions and export control laws concerning Iran, Sudan, and Burma. Although the company fired its president and demoted or reassigned other employees who had been involved in the transactions, the district court judge had objected that its 18-month DPA term was too short and its \$21-million monetary penalty (the gross income from all the involved transactions) was too lenient. The appellate decision determined that the Speedy Trial Act’s review power “did not empower the district court to disapprove the DPA based on the court’s view that the prosecution had been too lenient,”<sup>12</sup> and the court emphasized the “constitutionally rooted principles” that protected the executive branch’s “exercise of discretion over the initiation and dismissal of criminal charges.”<sup>13</sup>

Notwithstanding the strong constitutional language in *Fokker* that would appear to leave little scope for judicial oversight for DPAs, the case was one in which the reviewing judge thought the terms of the agreement were *too lenient*; but if the judge thought the terms *too harsh* the logic might come out differently —

especially given that sentencing decisions, unlike charging decisions, are clearly the province of the judiciary.<sup>14</sup> Moreover, given that DPAs and NPAs both regularly involve terms that would be *unavailable* at sentencing, there is clearly some scope for Congress to pass legislation providing for judicial oversight and transparency whenever the Justice Department’s preferred agreements exceed statutory bounds. Legislation introduced in the House of Representatives to reform DOJ’s DPA practice in each congressional session since 2008 — The Accountability in Deferred Prosecution Act of 2014, sponsored by Representative Bill Pascrell, Jr. — would require that DOJ adopt public written guidelines for DPA practice, mandate substantive judicial review and oversight to determine that a DPA is “consistent with the guidelines for such agreements and is in the interests of justice,” and require public disclosure of the agreements’ terms.<sup>15</sup>

In summary, with little fanfare, over a period spanning only a little more than a decade, the widespread use of DPAs and NPAs has emerged as the new normal in federal regulation of business — what might be deemed a “shadow regulatory state.” Government attorneys often only a few years out of law school have been prompting major shifts in business practices to some of our nation’s largest companies, and indeed entire industries, based on vague criminal laws, with minimal congressional guidance or judicial oversight. It’s time to bring the shadow regulatory state out of the shadows.

## Notes

1. Compare Brandon L. Garrett & Jon Ashley, Federal Organizational Prosecution Agreements, University of Virginia School of Law, *available at* <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/browse/browse.html> with Fortune 500 2015, <http://fortune.com/fortune500/>.

2. THE GODFATHER (Paramount Pictures 1972).

3 See, e.g., 7 U.S.C. § 252; 42 U.S.C. § 1320a-7; 48 C.F.R. § 9.406-2.

4. 15 U.S.C. § 78dd-1(a)(1)(B), (2)(B), 3(B).

5. See 15 U.S.C. § 78dd-1(b), 78dd-2(b), 78dd-3(b).

6. Ronald E. Berenbeim & Jeffrey M. Kaplan, *Ethics and Compliance Enforcement Decisions — the Information Gap*, The Conference Board Executive Action Series, No. 310, 3, June 2009.

7. Deferred Prosecution Agreement, U.S. Dep’t of Justice, Hewlett-Packard Polska, SP. Z.O.O., Attachment A (Apr. 9, 2014),

available at <http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-polska/hp-poland-dpa.pdf>.

8. Sally Quillian Yates, Memorandum Re: Individual Accountability for Corporate Wrongdoing (Sep. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download>.

9. See Eric Holder, Memorandum Re: Bringing Criminal Charges Against Corporations (June 16, 1999), available at [http://federalevidence.com/pdf/Corp\\_Prosec/Holder\\_Memo\\_6\\_16\\_99.pdf](http://federalevidence.com/pdf/Corp_Prosec/Holder_Memo_6_16_99.pdf); Larry D. Thompson, Memorandum Re: Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://federalevidence.com/pdf/Corp\\_Prosec/Thompson\\_Memo\\_1-20-03.pdf](http://federalevidence.com/pdf/Corp_Prosec/Thompson_Memo_1-20-03.pdf); Paul J. McNulty, Memorandum Re: Principles of Federal Prosecution of Business Organizations, available at [http://federalevidence.com/pdf/Corp\\_Prosec/McNulty\\_Memo12\\_12\\_06.pdf](http://federalevidence.com/pdf/Corp_Prosec/McNulty_Memo12_12_06.pdf); Mark Filip, letter to Sens. Patrick J. Leahy and Arlen Specter (July 9, 2008), available at [http://federalevidence.com/pdf/Corp\\_Prosec/Filip\\_Letter\\_7\\_9\\_08.pdf](http://federalevidence.com/pdf/Corp_Prosec/Filip_Letter_7_9_08.pdf).

10. Yates, *supra* note 9.

11. *United States v. Fokker Services*, 14-cr-121 (RJL) (D.D.C., Feb. 5, 2015) (Memorandum Opinion), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2014cr0121-22](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2014cr0121-22).

12. *United States v. Fokker Services*, 818 F.3d 733, 746 (D.C. Cir. 2016).

13. *Id.* at 740.

14. See Mark Chenoweth, *DC Circuit's 'Fokker' Decision Preserves the Separation of Powers, But Raises a Concern About DPAs*, FORBES.COM, Apr. 11, 2016, available at [https://www.forbes.com/sites/wlf/2016/04/11/dc-circuits-fokker-decision-preserves-the-separation-of-powers-but-raises-a-concern-a-bout-dpas/#6de16fe4651e](https://www.forbes.com/sites/wlf/2016/04/11/dc-circuits-fokker-decision-preserves-the-separation-of-powers-but-raises-a-concern-about-dpas/#6de16fe4651e).

15. See H.R. 4540, 113th Cong. (2014).

## James R. Copland



is a senior fellow with and director of legal policy for the Manhattan Institute. A former management consultant and member of many corporate and non-profit boards, he holds a J.D. and an M.B.A. from Yale.



## Keynote Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”

David W. Ogden

### I. Thanks and Introduction

Thank you, Lisa, for those kind words. As some of you know, I have worked with Lisa and her colleagues at the Institute for Legal Reform on some of the problems addressed by today’s panels, and very much appreciate the opportunity she has given me to be part of a creative team working seriously these important issues. Thanks, also to Norm and Shana and their team and NACDL, whom I have very much enjoyed working with as well. I thought I would speak today about a feature on the landscape that — as a former DOJ official and a long-time admirer of that institution — deeply concerns me: my perception that the Department and perhaps other enforcement agencies have moved away from traditional notions of prosecutorial discretion, founded in self-discipline about the facts and the law, a search for proportionality and acknowledgment of the need for restraint in negotiating pleas and settlements, and moved toward a greater willingness to use leverage to negotiate maximum fines and penalties. As I will explain, I believe that shift damages the reputation of law enforcement, drives a wedge between good businesses and the government, and sets back the cause of justice.

But before turning to those thoughts, and some modest ideas about what to do about it, I want to start with first principles, what I hope to be largely common ground. As a society, we need to ensure that U.S. businesses do everything they can to comply with the law, that culpable individuals and companies are appropriately punished, and that victims of corporate crime are fully compensated. Corporate crime hurts people, businesses, and the economy. I am sure no one

here disagrees with any of that. Much of what we have worked on together at ILR over recent years has involved looking for creative new approaches to law enforcement meant to incentivize more effective prevention efforts, better internal protection and encouragement of whistleblowers, increased cooperation with law enforcement in event of violations, and greater alignment of the interests of both business and government to favor prevention of crime before the fact over enforcement after the fact.

**The Department and perhaps other enforcement agencies have moved away from traditional notions of prosecutorial discretion,... and moved toward a greater willingness to use leverage to negotiate maximum fines and penalties.**

At the risk of belaboring the obvious, it is important, as we express concern about “over-criminalization,” to start with the recognition that business has at least as great a stake in legal compliance and good business ethics as the Government does, and an acknowledgment of the important role of law enforcement in the business realm. Of course, retribution against true wrongdoers and compensation of real victims of crime are central goals of law enforcement. But its goal should also be in significant part to find ways our laws and law enforcement can better incentivize the best compliance practices and business ethics that prevent crime from happening in the first place. And ways law enforcement can build on the common interests of business and government to

ensure that corporate crime is not just detected and punished when it occurs, but that it does not occur in the first place.

I believe that this is where we should start. And I am increasingly concerned that lawmakers and law enforcement today aren't really asking themselves those basic questions, or at any rate, not asking them enough. As a Justice Department official, both as Deputy Attorney General and as Assistant Attorney General for the Civil Division at DOJ, I did not shrink from enforcing the law in the business space. But I am increasingly concerned that a new and unbridled leverage-based way of doing law enforcement bears significant blame for the eroding faith of the American people in critically important institutions, both private and governmental, by which I mean both our country's business community on the one hand, and the United States Department of Justice and other law enforcement agencies, on the other.

On the business side, we have a corrosive perception by much of the American public and a great deal of political rhetoric to the effect that corporate crime is rampant and that it is the cause of most of America's economic unfairness and social ills. The thesis is that companies would prefer to go on breaking the law so long as doing so is profitable; and that laws against corporate crime are not effectively enforced and corporate wrongdoers are never brought to justice, and so it just goes on and on, and we are all getting ripped off. That popular conception is vexing, not because we imagine that there is no such thing as corporate crime — to the contrary — but because so many at American companies of all sizes today are investing more in compliance and ethics than at any time in history, and as a result, by most accounts, American companies are the most law abiding businesses in the world. A great many in our business community highly value compliance and good business ethics. That gets lost in the cynicism out there. And of course, the popular perception is also vexing because many in the business community believe that far from getting a pass, they are subjected to over-enforcement and over-criminalization.

That popular perception is deeply damaging to law enforcement, too, and that damage is really just the other side of the same coin. There is a growing perception by many in the electorate (and much political rhetoric) that federal law enforcement is

feckless and regularly “bought off” through resolutions of corporate investigations — civil settlements and plea agreements — that are mere “slaps on the wrist” or “costs of doing business” while it allows the real wrongdoers to go free. The government responds to this critique with higher and higher dollar settlements and plea bargains, and now with an announced policy to emphasize enforcement against corporate executives — the so-called Yates Memo. Yet I would submit to you that the government's perception problem is getting worse, not better.

Now there are doubtless many contributing causes to this miserable state of affairs. I want to focus on one: a subtle but marked shift in DOJ's enforcement approach from one largely grounded on considerations of fact, law and proportionality — and one that recognized the proper role of self-restraint given the Department's outsized bargaining power — to a new one based more on *leveraging* that outsized bargaining power to maximize the number and size of settlements and pleas.

My concern is that this leverage-based approach sometimes yields large-dollar plea agreements and settlements and accompanying press releases and headlines about criminal behavior despite weak underlying evidence — including often very weak evidence of *mens rea* — or very aggressive or unclear theories of liability and damages. Because the leveraged settlements and pleas can be obtained despite weak factual predicates and uncertain legal grounds, credible prosecutions of individuals on the same theories are often not practicable or, if prosecutions are pursued, the government loses them. Whereas the government has enormous bargaining power over companies and thus can leverage corporate pleas, individuals have more to lose and less to gain from a plea and will often litigate weaker allegations where their companies have settled. The resulting huge settlements and lack of individual prosecutions or convictions help drive the popular perceptions of widespread corporate criminality and supine or incompetent law enforcement unwilling or unable to take on powerful interests.

So this leverage-based approach not only yields unjust and disproportionate outcomes, but it is also counterproductive from almost every perspective. I will talk a bit more about what I mean by a “leverage-based” approach, but first I want to contrast it with what I believe was once the prevailing approach at DOJ.

## II. The Problem

### A. The Justice-Based Approach

Traditionally, prosecutorial discretion at DOJ was largely governed by the principle of proportionality and a discipline of restraint. One reason for this was that in many statutory schemes Congress has given the enforcement agencies the power to seek potential penalties that in many actual instances could far exceed a reasonable result. Not all offenders are deserving of the full force of the harshest penalties Congress has authorized. Of course, in litigated outcomes, courts (or juries) are entrusted with fitting the punishment to the crime. But most corporate crime matters are settled, resulting in a bargain between the company and the government without involvement from the court, and thus the question arises how the government should approach establishing its initial demand and its bottom line.

My experience at the Civil Division in the 90s — and as a lawyer in private practice in that era — was that government lawyers generally recognized the need for a proportionate result, one where the facts and law truly supported liability, and the agreed-upon penalty was proportionate to the offense. That was the principle of proportionality. And government lawyers also realized that to get to that outcome, they often needed to observe a practice of restraint. The fundamental reason for that, although perhaps not immediately obvious, was straightforward: factors beyond a corporate defendant's guilt or innocence affect how a corporation reacted to an investigation or complaint. Where potential penalties are extreme — for example, where the civil monetary penalties triggered by potential False Claims Act allegations total hundreds of times the size of the alleged fraud and far exceed a company's total asset value — even a low probability of a company-destroying outcome can

compel that company to capitulate to weak charges. And there are, of course, external pressures on corporate defendants to resolve investigations — pressures from capital markets or reputational effects — that have little to do with culpability and can compound willingness to plead, settle or pay more than the facts and law would justify.

Generally, the enforcement agencies felt a responsibility to account for these realities in their charging decisions and in their settlement and plea demands. They understood that it is not only the final adjudication or settlement that will affect a company's business, but also the initial charging decision, and so prosecutorial discretion must play a role from the very beginning stages of an investigation. And in my experience, government lawyers typically checked themselves and supervisors checked prosecutors — not only to be sure the United States got a *sufficient* deal that vindicated the law, vindicated victims, and vindicated the interests of the United States, but also to be sure that their overweening bargaining power did not drive an unjust or unduly punitive one.

I suppose what I am calling this traditional approach to be in the spirit of the Justice Department's official motto, which reads: "Qui Pro Domina Justitia Sequitur," which DOJ's website explains means "Who Prosecutes on Behalf of *Lady Justice*." The motto, which is on the Departmental flags that stand in the office of every Senate-confirmed DOJ official, has an interesting history. According to the DOJ website, until the reign of Henry II, legal proceedings in England were conducted in Latin, and the English Attorney General would traditionally introduce himself (it surely always was a man) as "Qui Pro *Regina* Sequitur," or he "who prosecutes on behalf of *the Queen*" or King. In DOJ's motto, Lady Justice ("Domina Justitia") — not the sovereign — is identified as the client. What I am calling the traditional approach is also in the spirit of

the Department's *unofficial* motto, the words that ring the alcove outside the Attorney General's office and for me give still more meaning to the official one: "The United States wins its point whenever justice is done its citizens in the courts."

Justice and not the sovereign is the client. Justice and not victory is the goal. Of course, pursuing victory for the sovereign very often coincides with the cause of justice. But the facts and law must support it. And the punishment should fit the crime.

## B. The Leveraged-Bargaining Approach

But over the course of years, I have sensed that the Department has moved away from this proportionality- and restraint-based approach toward what I will call a leveraged-bargaining model. More government lawyers appear to take the view that whatever penalty the government can extract from a company is presumptively fair, that the outcome is self-justified by the defendant's willingness to agree to it. Indeed, I have heard it suggested by some in the enforcement community that it would be wrong for government lawyers to leave money on the table; if they took less than they could get, then they would be depriving the Treasury of money that could have been recovered. Who am I, they implicitly ask, to give away the people's money?

Thus, instead of asking what (if any) penalty would be fair and proportionate in the light of the facts and law, the enforcement agencies seem increasingly to be asking themselves "how can we maximize what this company pays?" And because the new goal is the *maximal* outcome, the government like any good plaintiffs' lawyer will (perhaps even thinks it *should*) bring to bear all of the tools in its arsenal, press every point of leverage, and make demands designed to drive the highest number. And in the end, if a defendant is unhappy with the result of the process or believes it to be unjust, the thinking goes, the company has only itself to blame for agreeing.

Of course, the demand and push-back of the bargaining process are and were always part of a settlement dynamic. By the same token, considerations of fairness and proportionality continue to inform the government's positions in many cases. Many government lawyers in many cases still employ rigorous self-discipline and seek just rather than maximal outcomes. I am speaking here of a movement along a spectrum, but it

seems to me there has been a marked shift. And the fallacy in the new approach is that it fails to recognize the significance of the reality that the parties are not on an equal playing field. The government has the power to compel *disproportionate* outcomes and compel settlements in cases that it probably could never win in litigation. Now, to be clear, the government should never fail to proceed out of fear of losing a righteous case in court. I am talking about the government's ability to settle a *non-righteous case out* of court.

### 1. Enormous Penalties

There are several factors that confer outsized leverage on prosecutors. Ultimately, the biggest source is the powerful arsenal of potential punishments and sanctions Congress has given the enforcement agencies. Many companies look at the potential consequences of losing in court — astronomical potential fines and penalties, with almost limitless adverse collateral consequences — and feel they have no choice. They will push back in negotiation and develop their defenses of course — but in the end the pressures to capitulate and seek the best deal they can are hydraulic. Unpacking the elements of the leverage,

- There is the simple fact of potential indictment or other public disclosure of an investigation, each of which can have a harmful impact on a company, regardless of the ultimate resolution of a case.
- Then there are statutes like the False Claims Act that bring with them the threat of multiple damages plus civil monetary penalties where damages can be calculated in ways to generate truly unfathomable numbers.
- As to the civil monetary penalties — it is worth mentioning that all such penalties are going up this year, many of them going up a lot. There will be an adjustment for inflation in accordance with a provision included in last year's federal budget. According to a rule recently promulgated by the Railroad Retirement Board, False Claims Act penalties for example will nearly double. The minimum per-claim penalties would rise to over ten thousand dollars from \$5,500. That's the new *minimum*. The maximum per-claim penalty would rise to over \$21,000, from \$11,000. The government

interprets the law to mean that a number in that range must be applied per every prescription or item or service, depending on how contractors or providers bill the government. And so the mandatory minimum statutory penalties will double what are often already absurd levels.

- Yet, these monetary or criminal penalties may not even provide the most leverage. Instead, the threat of debarment or exclusion often provides the biggest stick. Debarment means that a company cannot enter into contracts with the government for a period of years — for a defense contractor, for example, this could literally end the business. Exclusion means that so-called indirect providers such as pharmaceutical and medical device companies cannot receive reimbursement from federal health care programs for a period of years. Given the market share of those programs, exclusion is viewed as a corporate death sentence.

Faced with such prohibitive consequences of litigating, companies have considered it imperative in most cases to engage with the government, cooperate, where appropriate to seek to persuade that no violation occurred or that any harmful effects were small, but ultimately capitulate to almost any government bottom line. The risks of losing are too high. It is worth a great deal to every company in this situation to resolve the enforcement action as soon as possible, to obtain closure and certainty. The value of that closure and certainty is government leverage.

## 2. Piling On

Beyond the extreme potential penalties applicable to any given investigation or case and the value of closure, dysfunction on the government side compounds the pressure and therefore perversely the leverage. It has been the case for some time that news of a possible corporate law violation can set off something of a feeding frenzy on the enforcement side. Multiple federal and state agencies with overlapping jurisdiction each open an investigation of the same conduct, often publicly. Where one agency starts an investigation, other agencies pile on. DOJ, the SEC, CFPB, the FTC, etc. etc. may each join the fray. And when a federal enforcement agency gets involved, one

or many state attorneys general or other state regulators are likely to follow.

Of course, some investigations warrant the involvement of multiple agencies or multiple sovereigns. Different agencies have different areas of expertise and different interests to safeguard. Where multiple agencies share information and coordinate enforcement efforts, outcomes can actually improve. Unfortunately, though, we often see investigations where agencies are not sharing information and are not coordinating their efforts. This wastes the resources of both the government and the target of the investigation. And because each agency seeks its own penalty, its own headlines, even if each agency is trying for a proportionate result (which, I fear, many are not) there is obvious potential for enormous total penalties that far exceed the seriousness of the violation.

At the beginning of the Obama Administration, when I was at the Department of Justice, the President established the Financial Fraud Enforcement Task Force. We tried to put together a structure that would better coordinate efforts among the various enforcement agencies and between the federal and state governments — goals other Administrations had tried to achieve and failed. Unfortunately, this one, too, appears to have failed. We continue to see multiple agencies running their own investigations, sometimes withholding information from other investigators, seeking to extract their own headlines and their own large dollar resolutions. This reality of uncoordinated and redundant investigations adds pressure on defendants to accept aggregate or global settlements out of proportion to any actual culpability.

The existence of large and destructive potential penalties, collateral consequences, the costs of multiple and uncoordinated investigations — none of these are new, though the piling on may be more egregious than ever in many areas and potential penalties are going up. The imperative that companies feel in these situations to find a way to resolve them quickly, with accompanying leverage for the government, is also not new. What is new in the last fifteen years, in my view, is the government's greater willingness to exploit that leverage, and to abdicate to the bargaining process what it had previously seen as its own obligations of ensuring proportionality through the exercise of careful self-scrutiny and appropriate restraint. As I said, it seems many in government think the bargain itself, given the defendant's willingness to agree, becomes self-justifying. Even worse in my view,

the failure to extract the last possible penny is seen by some as a derogation of a government lawyer's duty to maximize the return to the federal Treasury. Seemingly lost in the shuffle is the sightline to what should be — what I have always understood to be — the enforcement lawyer's polestar: the idea that it is *justice* for citizens, not *victory* for its own sake, that government lawyers are supposed to pursue.

### III. The Consequences

As frustrated as we are in the business community, I believe that this shift in enforcement approach has hurt the government almost as much. Without question fines and settlements are through the roof. To pick one measurement, according to a recent study by a University of Virginia Law professor, corporate criminal penalties alone grew from well under \$1 billion dollars in 2001 to more than \$15 billion in 2015 alone. The trend line shows a steady year-over-year increase resulting in this fifteen-fold annual increase in just fifteen years. This is not a statistical blip.

There is reason to believe some of these settlements and pleas come even where the government's case is weak — indeed, where the government would have profound difficulties proving a case in court. In a significant number of matters that have resulted in corporate pleas, the government *has* sought to prosecute individuals and the prosecutions cratered. More often, the government has not even tried to pursue prosecutions of individuals. Those failures call into doubt the prior corporate pleas, because corporate liability generally follows only if an individual or individuals acting within the scope of their job duties violate the law. Corporations are *not* in fact “people too,” but are instead legal entities *made up* of people. And thus some agent of the corporation, some individual person, must have the requisite culpable mental state. Therefore, if the government does not have enough to prosecute any individual, it generally doesn't have enough to prosecute the corporation. Prosecutors do not want to let the bad guys off and they are not incompetent. The more plausible explanation in the mine run of cases is that when it comes down to it, the prosecutors recognize, before or after they secure a corporate plea, that they do not have a prosecutable case against any individual.

But we have these corporate plea deals anyway,

often with very large penalties, at least in part because one of the Department's central goals appears to have become generating the most dollars and lining up the most pleas and settlements. Perhaps that is because big dollars and lots of pleas drive the “metrics” in a metrics-driven world. The enforcement agencies, including especially DOJ and DOJ components, make annual announcements about new aggregate records of fines and penalties. We see almost daily headlines about record-setting plea deals. And one has to concede, if you like efficiency, that big dollar pleas and settlements are very efficient. The Department recently bragged that its \$23.1 billion in civil and criminal recoveries in the fiscal year ending September 30, 2015 “represent more than seven and a half times the approximately \$2.93 billion of the Justice Department's combined appropriations for the 94 U.S. Attorneys' offices and the main litigating divisions in that same period.” 750% annual ROA is very good, looked at through a P&L lens, which the Department expressly invites us to do. Prosecutorial leverage is generating balance-sheet leverage. But because this is law enforcement, that should be cause for concern, not celebration, not only because the establishment of such metrics is in serious tension with the goal of pursuing justice in every case, but also because that phenomenon coincides with a growing perception among defense attorneys and in-house counsel — anecdotal to be sure but very widespread — that these large corporate settlements and pleas increasingly come in cases with weak facts or weak legal theories.

Now, it may be obvious why this is bad for the targets of investigations, but why is it bad for the government? Because as mentioned the leverage that generates all those dollars and all that efficiency doesn't work as well with individuals. Their incentives are different and individuals will more often insist on their day in court. And frankly, appreciating the devastating personal dimensions of an unsuccessful criminal prosecution, I suspect many prosecutors — though by no means all, sadly — are more inclined to exercise restraint in weak cases where individuals are concerned. But in such cases — big corporate settlement and no individual prosecution — the public's presumption is not that the corporate case was weak. After all, the public asks, why would the corporation have agreed to that massive settlement and why would the government have demanded it if there was not a strong

case? The settlement or plea is seen as proof that a crime has been committed and the perception is that the government has simply let individuals off the hook, that it has folded because it feared losing a righteous case it should have brought, or that it has allowed companies to buy their executives' freedom through the large settlements.

Although I believe that picture is largely or entirely wrong, it has become a real political narrative, almost as bad for the Department as any narrative could be.

How bad is it? Well, earlier this year, Senator Elizabeth Warren issued a report entitled *Rigged Justice: How Weak Enforcement Lets Corporate Offenders Off Easy*. The report touches on two central themes: first, it criticizes the federal agencies for settling cases rather than pursuing harsher punishments for corporations and individuals in court. It says:

[F]ederal agencies rarely pursue convictions of either large corporations or their executives in a court of law. Instead, they agree to criminal and civil settlements with corporations that rarely require any admission of wrongdoing and they let the executives go free without any individual accountability.

Second, Senator Warren's report faults the corporations for buying their way out of trouble through these settlements:

These corporations paid millions — or billions — of dollars to make these cases disappear before any public hearing.... [B]ecause the prosecutors never took any of these corporations or their executives to trial, there was never a need for anyone to answer in court under oath for their actions.

Former Labor Secretary Robert Reich sounds many of these same themes in his recent book.<sup>1</sup> He writes:

Government officials like to appear before TV cameras sounding indignant and announcing what appear to be tough penalties against corporate lawbreakers. But the indignation is for the public, and the penalties are often tiny relative to corporate earnings. The penalties emerge from settlements, not trials. In those settlements, corporations do not concede they've done anything wrong, and they agree, at most, to vague or paltry statements of fact. That way, they avoid possible lawsuits from shareholders or other private litigants who have been harmed and would otherwise use a conviction against them. . . .

Corporate executives who ordered or turned a blind eye to the wrongdoing, meanwhile, get off scot-free. . . .

Lest you think this is exclusively a Democratic theme, let me assure you it is not. Senator Richard Shelby at one recent hearing said:<sup>2</sup>

No one in the financial sector or elsewhere should be "able to buy their way out from culpability when it's so strong it defies rationality . . . . Ultimately, it seems like the Justice Department seems bent on money rather than justice and that's a mistake."

And Senator and Presidential candidate Bernie Sanders is surely right when he articulates the impression held by many Americans:<sup>3</sup>

The average American sees kids being arrested and sometimes even jailed for possessing marijuana or other minor crimes. But when it comes to Wall Street executives, some of the wealthiest and most powerful people in this country, whose illegal behavior caused pain and suffering for millions — somehow nothing happens to them. No police record. No jail time. No justice.

**Congress should consider adjusting the limits on potential penalties to reflect the potential for them to drive leveraged and bargain-justified outcomes rather than just and proportionate outcomes.**

So after years of aggressive enforcement and huge settlements, no one is happy. We seem to have only losers. No winners. We have corporate pleas and we don't have corresponding convictions of individuals. The credibility of business and government alike has suffered. America's standing with its own citizens and in the world is undermined by this perception of widespread corporate criminality paired with feckless enforcement agencies. And the tendency to leverage large settlements in weaker cases is a big part of the problem.

#### **IV. Some Reflections on Deputy AG Yates' Individual Accountability Policy**

Before I share some modest thoughts about finding a way forward, I want to mention one more reason why DOJ's shift from a justice, proportionality and restraint-based law enforcement model toward a leveraged-bargaining model has hurt the public interest, and that comes back to the first principles I talked about when I began. As I said, I think pretty much every thoughtful person would agree that a guiding objective of the law and law enforcement should be aligning the interests of the business community squarely and unambiguously with the government's interest in *preventing* violations of the law before they occur. The public wins when companies are compliant and ethical; it loses when crimes occur. With human beings involved, some crimes will always occur, and so another

prime objective of the law and law enforcement should be to align those interests so that companies unambiguously benefit when they share information about possible violations with law enforcement; and to align them so that businesses help make sure that responsible persons are held accountable. The deterrence generated by the threat of after-the-fact penalties obviously has an important role to play in reducing violations in the first place. Deterrence is a core purpose of proportionate punishment. But if the business community loses confidence that it will be treated in a just and proportionate way — which is a highly problematic side-effect of a leverage-bargaining approach to law enforcement — then the perceived interests of the business community and the government become distinctly misaligned, and the important objective of securing full cooperation in reporting potential violations and convictions of the wrongdoers is dramatically disserved.

Excessive penalties and vigorous pursuit of factually or legally marginal prosecutions will inevitably push information underground. It is lamentable, but it only stands to reason that if companies fear, based on experience, that the government is likely to use every point of leverage to drive highly punitive outcomes, they will be less willing to disclose violations to the government. Companies will be less incentivized to fully investigate allegations or to create detection and prevention mechanisms that might trigger obligations to disclose. Justice-based and proportionate law enforcement — and concrete incentives for those who cooperate — beget cooperation. Leverage-based law enforcement suggests to business that no good deed will go unpunished, and thus pushes in the other direction.

Which brings me to the controversial memorandum issued by Deputy Attorney General Sally Yates, the so-called Yates Memorandum. Let me say that I sympathize with Deputy AG Yates on several levels. First, she has made clear she very much would prefer the memo to be known as the "Individual Accountability Policy," rather than bear her name. As someone saddled with several "Ogden Memos" from my time at Justice, I do feel her pain. To the extent people like the memo, the credit is likely due to others. And to the extent people don't like it, well, then you might *really* wish it had another name. But more seriously, the Yates Memo is clearly an effort by the Department to respond to the criticisms and concerns

I have been talking about, specifically the widespread popular and political perception that the government is failing to hold corporate executives accountable for criminal acts, even while companies are paying billions of dollars in fines for those supposed criminal acts.

And at many levels, I find myself in sympathy with the goals and at least three of the premises of the Yates Memo. First, where an individual has committed a crime, where that person has caused his company to commit a crime, then that individual should be prosecuted and punished. Second, the Department has a problem that is caused by its leveraging of that \$3 billion in resources into \$23 billion in penalties. To do it, it needs to spread its troops pretty thin. Leveraging a settlement is a lot less resource-intensive than actually building a prosecutable case. But in the process, it may be that in some cases the settlement comes and the Department moves on to the next case before it has figured out whether it has a case or not. That is bad if it leverages an unjust settlement from a company. But it is also bad if it results in an individual who really committed a crime escaping accountability. And third, I agree with the premise that when a company knows about criminal behavior by its own employees, government policy (as I said earlier) should do what it can to encourage the company to align itself with law enforcement and against the violation and violator, and self-report and cooperate.

So far so good. But the devils here are in the details. I know DAG Yates has said she considers the early returns on the policy encouraging. But what I have said to this point today should reflect what I think are substantial obstacles to the Yates Memo accomplishing its goals of greater cooperation and more individual accountability.

What are those obstacles? First, the leveraged bargaining model will continue to discredit the Department so long as it generates huge settlements and pleas on marginal facts and law. Unless the Yates Memo by mandating more thorough investigation moves the Department away from leveraged-bargaining with corporate defendants and back toward a justice-based model — and I harbor some faint hope it might do so at least marginally — it won't solve the problem if I am right that the problem is the product of the leveraged deals themselves far more than a systematic failure to focus on individuals.

Second, the leveraged-bargaining model

**The government needs to discipline itself to avoid piling on and seek a single just and proportionate outcome with respect to every alleged violation.**

undermines the confidence of the business community and the defense bar that disclosures of individual involvement will yield proportional and just outcomes. That lack of confidence deters full disclosure. The Department is asking companies, in effect, to trust it to treat their most valued employees and leaders fairly, and often to do so even when the company thinks that neither it nor they have done anything wrong. The leveraged bargaining approach makes it a lot harder to trust. And the incentive for companies to cooperate — while often real — are not concrete. All of which means that by demanding *all* information as a condition of getting *any* cooperation credit, the policy may yield less information, not more.

## V. Way Forward

It has taken many years to create this set of problems and there is no easy fix. But I would suggest a few specific approaches:

- First, given these concerns, Congress should consider adjusting the limits on potential penalties to reflect the potential for them to drive leveraged and bargain-justified outcomes rather than just and proportionate outcomes.
- Second, we should encourage discussion about how the Department can reemphasize the time-honored justice focused, restraint- and proportionality-based approach to law enforcement. I hope that the Department of Justice will consider what policies it can put in place to ensure that prosecutors are exercising their discretion with the goal of achieving justice rather than maximizing monetary outcomes. The Department should look at its metrics and its systems of rewards, and consider whether focusing on aggregate dollars and returns on investment sets a proper tone. I think it does not. Leaders should remind government lawyers to check their flag: the

Department prosecutes on behalf of Lady Justice, not the Queen's Treasury, and wins its point only when justice is done its citizens in the courts. As I said, many government lawyers subscribe to and implement that traditional ethos even now, and these better angels should be strengthened and incentivized.

- Third, the government should create appropriate mechanisms to coordinate when various agencies or multiple sovereigns are involved in an investigation. This includes information-sharing, a clear division of responsibilities, and coordination of the ultimate enforcement goal. The government needs to discipline itself to avoid piling on and seek a single just and proportionate outcome with respect to every alleged violation.
- And, fourth, we should be looking for new ways to align the interests of corporations, the government, and the public in *prevention* — moving away from a too-singular focus on after-the-fact enforcement.

I have written and spoken on one particular concept that I would like to raise again here, and that is the notion of focusing on the development of state-of-the-art ethics and compliance programs across industry — programs that are designed to identify, mitigate, reduce, punish, and prevent fraud — with accompanying recognition by the government of companies that are trying to do the right thing with these types of programs. There are many voices within corporations — the better angels on the business side — arguing for compliance and ethics and cooperation with the government. The point is that we need to strengthen and incentivize those better angels by ensuring that doing the right thing really will prove to be in the best interest of the company.

We have recently seen significant advances in determining what constitutes a state-of-the-art program, and with those advances, we should be able to move toward a system in which we incentivize companies to adopt and maintain these programs by offering specific and concrete benefits for doing so. A House Judiciary subcommittee recently held a very interesting hearing on the False Claims Act, where one of the major takeaways was a recognition that we now know how to identify and implement what works in

ethics and compliance programs. I would recommend to you a report by the Ethics & Compliance Initiative Blue Ribbon Panel that goes into detail on this score, as well as former Deputy Attorney General Larry Thompson's insightful testimony.

The goal is to find concrete ways to strengthen and incentivize the better angels of our nature, in business and in government. And I believe we can move the needle in the right direction, not by going back to the future, but by emphasizing our core values of justice and proportionality and finding creative new paths that enhance prevention, appropriate compensation of the victims of crime, and individual accountability.

Thank you for your attention.

## Notes

1. Robert Reich, *Saving Capitalism: For the Many, Not the Few* (2015) (excerpt) available at <http://economics.com/capitalism-the-enforcement-mechanism/>.
2. Ryan Tracy & Victoria McGrane, *Senators Say Billion-Dollar Settlements Not Enough Punishment for Banks*, Wall Street Journal, Sept. 9, 2014, available at (<http://blogs.wsj.com/moneybeat/2014/09/09/senators-say-billion-dollar-settlements-not-enough-punishment-for-banks/>)
3. Bernie Sanders, *Speech on Wall Street and the Economy* (Jan. 2016) available at <http://www.marketwatch.com/story/text-of-bernie-sanders-wall-street-and-economy-speech-2016-01-05>

### David W. Ogden

is a partner at WilmerHale and chairs the Government and Regulatory Litigation Group. He is a nationally recognized litigator with over thirty years' experience handling complex financial disputes. He served as the U.S. Deputy Attorney General from 2009 to 2010 and as Assistant Attorney General for the DOJ's Civil Division from 1999 to 2001.





## The Yates Memo: Another Example of Using Prosecutorial Shortcuts

Ellen S. Podgor

### Introduction

Corporate criminality is a problem that has been at the forefront of public concern and clearly it needs attention. In recent years, Attorneys General and their immediate deputies have advocated through different memoranda how best to curtail corporate misconduct. In this regard, we have seen initiatives such as the Holder Memo (1999), the Thompson Memo (2003), the McNulty Memo (2006), the Filip Memo (2008), and most recently the Yates Memo (2015), or as Deputy Attorney General Sally Yates prefers to call it — the “Individual Accountability Policy.”<sup>1</sup> On its face, the Yates Memo portrays an aggressive government policy that aims to eradicate corporate criminality. Despite the fact that this most recent memo has laudable goals, it fails to recognize that it furthers the current climate of prosecutorial shortcutting and has long-term consequences that will defeat its aim of combatting corporate misconduct.

The Yates Memo’s attempt to react to the current outcry against corporate misconduct fails to consider two important points: 1) having the corporate entity do the investigative work of the government is a form of prosecutorial laziness; and 2) prosecutorial shortcutting harms the criminal justice process and in this context it fails to recognize the importance of the corporate entity and individual employee working together to combat misconduct within a company.

### I. Prosecutorial Shortcuts

In a growing number of cases, prosecutors have selected “short-cut” offenses<sup>2</sup> to proceed against individuals and entities. Thus, instead of proceeding with a complicated case such as insider trading, we see the government charging crimes of perjury, obstruction of justice, and false statements.<sup>3</sup> Likewise, the

destruction of documents often becomes the focus in a white collar case as opposed to prosecuting the fraudulent conduct that might have been the impetus of the investigation.<sup>4</sup> The tailored charges that look at the “cover-up” conduct<sup>5</sup> avoid the necessity to investigate and prove complicated white collar conduct, with a benefit of an increased ability to secure a conviction through a plea negotiation or a shorter trial. This approach may be seen as focusing on efficiency in that it allows for an increased number of prosecutions with lower costs.

**The Yates Memo’s attempt to react to the current outcry against corporate misconduct fails to consider [that]. . . . prosecutorial shortcutting harms the criminal justice process[.]**

But by using “short-cut” offenses, the correlation of the initial wrongdoing to the charged crimes is tenuous. The general deterrent sought in prosecuting the conduct is lost because the crimes being prosecuted do not reflect the conduct that the government seeks to eliminate. Thus, a prosecution of obstruction of justice lets the public know of the impropriety of destroying documents during an investigation, but fails to deter the fraudulent conduct that was reflected within the documents. Financial improprieties are never fully recognized to provide the stigma for future conduct, because the government failed to fully investigate and prosecute the real criminality.

The Yates Memo is but another example of this prosecutorial shortcutting. In justifying her *Individual Accountability Policy*, Deputy Attorney General Sally Yates speaks to the prosecution

challenges saying, “[i]t is not easy to disentangle who did what within a huge corporate structure — to discern whether anyone had the requisite knowledge and intent.”<sup>6</sup> The solution offered in this Yates Memo, however, is to place the onus on the company, with the requirement that the entity “provide all the facts about individual conduct in order to qualify for any cooperation credit.”<sup>7</sup> Although the Yates Memo does state that DOJ attorneys “should be proactively investigating individuals at every step of the process — before, during, and after any corporate cooperation,” it also states that “[d]epartment attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case.”<sup>8</sup> Thus, in this form of prosecutorial shortcutting, we see the government placing greater reliance on companies to do the work for them.

In the short-term, this carrot and stick approach appears to provide a benefit to entities trying to avoid prosecution or obtain a deferred (DPA) or non-prosecution (NPA) agreement.<sup>9</sup> The Yates Memo appears to encourage the entity to throw its employees under the bus,<sup>10</sup> and offers benefits of not only diminished entity criminal liability, but reduced collateral consequences such as public exposure and civil private party actions that might be an outgrowth of a criminal investigation or prosecution.

Thus, the Yates Memo gives the benefit to the wealthier and more powerful party — the entity, in return for it sacrificing corporate constituents. It targets the individual for prosecution, while placing less emphasis on the corporate culture that may have instigated, encouraged, and allowed the misconduct.<sup>11</sup> In the process it undervalues corporate criminal liability by prioritizing individual liability over that of the entity.

## II. Long-Term Consequences

The problem with government shortcutting is that it has the corporate entity being a key player in investigating and reporting misconduct while failing to consider the long-term effect when one pits the entity against its individual employees. The 1981 *Upjohn*<sup>12</sup> decision had the company and its employee constituents aligned.<sup>13</sup> In *Upjohn*, the pharmaceutical company investigated the alleged wrongdoing and then refused to produce the documents sought by the

government. The Supreme Court, emphasizing the importance of the attorney-client privilege and work-product being extended to lawyer’s communications with company employees, rejected a “control group” test for a broader analysis.<sup>14</sup> *Upjohn* provided companies with a certain safety in conducting internal investigations. Absent consent, the communications with employees would not be subject to government intrusion. Likewise, individual cooperation with the internal investigation was not impeded as the entity and individual were protected.

By incentivizing the entity to work against its constituents, the Yates Memo places the entity and individual in adverse positions. The entity has the control of the privilege,<sup>15</sup> and the information provided by the individual to the entity may find its way into the indictment of, or evidence against, the corporate employee.<sup>16</sup> Saying that the Yates Memo does not require waiver of the attorney-client privilege,<sup>17</sup> a claim made by DAG Sally Yates, misses the fact that a carrot is being offered by the government to provide any evidence that might reduce the criminal liability and collateral exposure of the corporation.

In the short-term, the government obtains individual indictments and convictions by conscripting the corporation to provide its evidence. But their failure in not conducting the investigation themselves has a long-term consequence that eliminates the trust between the corporation and its constituents. The *Upjohn* era with the alliance between the entity and individual in rooting out internal misconduct will end, as individuals recognize the repercussions of cooperating with the entity when the entity may later turn against them to secure a benefit for themselves.

Individuals currently faced with being fired if they fail to cooperate in the corporation’s internal investigation will soon recognize that the firing for lack of cooperation may be a lesser evil than the evidence ultimately being the source of a criminal indictment against them. So too, employees may be less anxious to seek advice from corporate counsel on the legality or illegality of prospective conduct, and may be less forthcoming with information when they do consult with corporate counsel. Knowing that any information may later be provided to the government has a chilling effect on individual employees working with the entity in the internal investigative process.

The long-term consequence of prosecutorial

shortcuts, in asking the corporate entity to be its government agent,<sup>18</sup> is that it diminishes the entity and individual working together to curtail corporate misconduct. The Yates Memo is just another example of the government focusing on efficiency without recognizing the long-term consequences of using an easier path to secure a criminal conviction.

## Conclusion

Over-criminalization has provided a wealth of statutes, allowing prosecutors a wide breadth in their discretionary charging role. With over 4,500 federal statutes,<sup>19</sup> the government has increased choices in proceeding against corporations and individuals committing criminal acts.

Yet the reality is that prosecutors are often selecting “short-cut” offenses for quick convictions. Adding to this prosecutorial practice is the latest development provided by the Yates Memo. This time the government is using the corporate entity as its investigative tool for developing individual prosecutions. But in taking this easy route, prosecutors need to consider the ramifications that result from using corporations as the source of information against the individual constituents. Pitting the entity against the individuals will eventually result in a decrease in information as corporate constituents realize that what they say in an internal investigation will be the testimony against them at their criminal trial. In the end corporate misconduct will be buried as opposed to incentivizing the entity and individuals to work together to achieve compliance with the law.

## Notes

1. Sally Quillian Yates, Memorandum re: Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), available at <https://www.justice.gov/dag/file/769036/download>.

2. See Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1580 (2010)(discussing how prosecutors will select charges that require less proof than fraudulent conduct).

3. See, e.g., *United States v. Stewart*, 433 F.3d 273 (2d Cir.

**The long-term consequence of prosecutorial shortcuts, in asking the corporate entity to be its government agent, is that it diminishes the entity and individual working together to curtail corporate misconduct.**

2006) (using false statements and obstruction types of statutes).

4. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)(prosecutors proceeded with an obstruction of justice charge for shredding documents arising from the Enron debacle); Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 WASHBURN L.J. 583, 601 (2005).

5. See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9 (2005)(discussing the government’s use of cover-up statutes and its relation to moral blameworthiness).

6. Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference, May 10, 2016, available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

7. Yates, *supra* note 1.

8. *Id.*

9. See generally Paul J. Larkin, Jr. and John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7 (2016).

10. See Ellen S. Podgor, *It’s Official- Throw the Employees Under the Bus*, White Collar Crime Prof Blog, Sept. 9, 2015, available at <http://lawprofessors.typepad.com/>

whitecollarcrime\_blog/2015/09/its-official-throw-the-employees-under-the-bus.html.

11. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991) (discussing a corporate ethos standard for determining corporate criminal liability).

12. *Upjohn v. United States*, 449 U.S. 383 (1981).

13. See Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013).

14. *Upjohn*, 449 U.S. at 386

15. Courts typically follow the approach taken in *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986), which requires an individual to prove five factors in a claim for the privilege. “This test places a near-insurmountable burden on the individual employee seeking to show that he or she is entitled to assert attorney-client privilege.” Green and Podgor, *supra* note 13 at 101.

16. *United States v. Norris*, 419 Fed. Appx. 190, 195 (3d Cir. 2011) (unpublished).

17. Yates, *supra* note 6.

18. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C.L. REV. 23 (2010)(discussing how corporations have to routinely assist prosecutors in their investigations).

19. John G. Malcolm, *Hook, Line & Sinker: Supreme Court Holds (Barely!) That Sarbanes-Oxley’s Anti-Shredding Statute Doesn’t Apply to Fish*, 2015 CATO SUP. CT. REV. 227, 248 (citing Brief of Eighteen Criminal Law Professors as Amici Curiae Supporting Petitioner, *Yates v. United States*, 135 S.Ct. 1074 (2015)(No. 13-7451).

## Professor Ellen S. Podgor

is the Gary R. Trombley Family White-Collar Crime Research Professor at Stetson University College of Law. She is the co-author of the *Hornbook on White Collar Crime*, editor of the *White Collar Crime Prof Blog* and a past recipient of NACDL’s Heeney Award.





## Individual Interests Versus Law Enforcement Policy: Will the Yates Memo Undermine Its Own Efficacy?

Lisa A. Mathewson

When evaluating the efficacy of any policy pronouncement that relates to corporate wrongdoing, it's essential to remember two principles: the interests of individual corporate officers and directors may differ from those of the corporation; but at the same time, the corporation acts only through individual decision-makers. The interplay of these principles means that when the interests of the individuals and the corporation diverge sufficiently, the corporation's course of action may shift as a result.

The Department of Justice ("DOJ") Memorandum on Individual Accountability for Corporate Wrongdoing (that is, "the Yates Memo") is heavy on the first of these principles, but light on the second. Thus the question arises whether the Yates Memo will — by deepening the divide between individual and corporate interests — ultimately work against the DOJ's interests in deterring, detecting, and punishing corporate wrongdoing.

This paper addresses this issue in two parts. First, it addresses the ways in which the Yates Memo deepens the divide between individual and corporate interests. Second, it addresses the ways in which that divide will limit the range of options available to the corporation and shift decision-making in a way that the DOJ did not intend.

### I. Deepening the Divide

In a sense, the Yates Memo breaks little new ground in defining the interests of individuals and corporations. Practitioners who represent individuals in enforcement matters have long been accustomed to gently informing their corporate executive clients that the corporation to which they are loyal may eventually become an adversary as formidable as the government itself. Whether one calls the corporation's actions

"scapegoating" or "assigning responsibility to individual wrongdoers" depends upon where one sits. The idea that corporations may "buy" the government's goodwill with individual hides is not new.

In another sense, however, the Yates Memo makes important changes. It does so largely by narrowing the path to cooperation credit for corporations, foreclosing the possibility of "cooperating" while attempting to shield key individuals. The Yates Memo thus forces the corporation's decision point — whether to point fingers at, or lock arms with, the individuals involved — earlier in the corporation's decision-making process. Before the Yates Memo, corporate counsel could coherently tell an individual's lawyer "the corporation is cooperating but we will make every effort to keep the focus off of individuals, and part ways only if forced to do so; in the meantime, let's work together." The Yates Memo makes that statement internally inconsistent; now cooperation is "all or nothing."<sup>1</sup> From the instant that the corporation announces its "cooperative" posture — an announcement often driven more by public and investor relations than by legal strategy — it has committed to putting individuals in its internal investigative crosshairs.

**[T]he question arises whether the Yates Memo . . . will ultimately work against the DOJ's interests[.]**

This is true even though it is often questionable whether any individual had the knowledge and intent required for individual liability, even when a corporate failure has occurred.<sup>2</sup> Nonetheless, lawyers representing corporations may be

forgiven for assuming that the DOJ is unlikely to receive with enthusiasm the report “we’ve examined the facts thoroughly and believe this was a corporate failure only, not an individual one.” The practical reality is that a commitment to “cooperating” is now a commitment to identifying individual wrongdoers to the government. And often the commitment to cooperating is what prompts the internal investigation to begin with – meaning that before corporate counsel asks her first question, the answers have been earmarked for delivery to law enforcement.

That reality changes the dynamic between the individual and the corporation from the very beginning of an internal investigation. Indisputably, some tension in that dynamic was a hallmark of internal investigations even before the Yates Memo. An executive who has long worked collaboratively with in-house and outside counsel, for example, may be surprised when counsel delivers a so-called “*Upjohn* warning”<sup>3</sup> cautioning him that he is not the client, the interview is subject to the corporation’s privilege, and the corporation alone will decide whether to waive privilege and disclose the employee’s statements to law enforcement.<sup>4</sup> But the Yates Memo raises the stakes even higher.

Indeed, changes in the *Upjohn* warnings may be essential to maintaining fairness to employees.<sup>5</sup> What is currently phrased as a mere possibility — the corporation *may* eventually choose to disclose the substance of the interview to law enforcement — is, post-Yates, a certainty once the corporation commits to cooperating. True, the DOJ takes pains to say that it is not requiring companies to waive privilege in order to earn credit for cooperating. But the DOJ certainly insists that the corporation disclose all “facts” relevant to individual wrongdoing. From the employee’s perspective, the distinction is razor thin.<sup>6</sup>

Consider, for example, an executive who tells corporate counsel “I knew what was happening, even though the documents don’t reflect that.” The distinction between the company reporting to law enforcement, on the one hand, “Ms. Executive told us that she knew what was happening, even though the documents don’t reflect that” (which reveals a privileged statement); and reporting to law enforcement, on the other, “Ms. Executive knew what was happening, even though the documents don’t reflect that” (which reveals, in theory, only “facts”),

approaches meaninglessness. An accurate *Upjohn* warning from a cooperating company would warn that the company *will* disclose to law enforcement the information that the employee conveys, if not the employee’s actual statements.

That raises a key question: will the Yates Memo make directors, officers, and employees less likely to participate in the internal investigation at all? From the perspective of counsel for the individual, the answer is yes. The Yates Memo changes at least three things:

1. As explained above, if the corporation is cooperating it must disclose to law enforcement all facts that the individual reveals in an interview. Because the decision to cooperate is likely to predate the interview, the corporation’s lawyers may no longer paint disclosure as a mere possibility.
2. It is now impossible for the corporation to advocate a resolution that spares individuals.<sup>7</sup> In the pre-Yates days it was not unusual for a corporation’s lawyers to assure counsel for the individuals that the corporation would do its best to shield the individuals in negotiations with the DOJ. As noted above, that possibility is now off the table. Not only is a pitch for a corporation-only resolution quite likely to fail, it risks antagonizing the DOJ.
3. Corporations are now much less likely to share information with individuals during the course of an investigation. This is true even setting aside technical legal issues about the impact of the Yates Memo on joint defense arrangements, which permit parties to share information without waiving otherwise-applicable privileges. Indeed, corporate counsel in the field report that prosecutors are asking them — during dialogue about the company’s cooperation — not to share documents or information with individuals during the investigation.<sup>8</sup>

These changes will certainly deepen the rift between individuals and the corporations they serve. When an executive asks his criminal defense lawyer whether he should submit to an interview by corporate

counsel, the lawyer will encourage him to weigh the danger of prosecution (if the corporation later discloses the executive's statements) against the danger of being fired for declining the interview. While "avoiding prosecution" may seem the easy winner,<sup>9</sup> the executive's lawyer would –pre-Yates — explain that staying on the corporation's team carries advantages, too. At the time, those included the possibility of staying under the corporation's protective wing while it negotiated a resolution with the DOJ, as well as ensuring access to the documentation essential to mounting a defense and to information about the progress of the investigation. The Yates Memo has all but eliminated those advantages. When the advantages shrink and the disadvantages grow, decision-making will shift. Post-Yates Memo, individual decision-making will shift away from sharing information with corporate counsel

## II. The Unintended Consequences

Why should the DOJ be concerned if more corporate executives choose to jump ship rather than participate in an internal investigation? Because of the very concern that motivates the DOJ to incentivize corporate cooperation to begin with: investigating corporate wrongdoing presents a "special set of challenges."<sup>10</sup> Specifically, "it is not easy to disentangle who did what within a huge corporate structure ... [b]lurred lines of authority make it hard to identify who is responsible for individual business decisions and it can be difficult to determine whether high-ranking executives, who appear to be removed from day-to-day operations, were part of a particular scheme."<sup>11</sup> Yet a corporation will be no better positioned than the DOJ is to disentangle the threads if the executives "who appear to be removed from day-to-day operations" decline to meet with corporate counsel to confess (or not) to a larger role.

An internal investigation based solely on corporate records is nothing more than a reassignment of labor: associates in corporate counsel's firm, rather than case agents at the investigating agency, will review the records and reconstruct the facts that they reflect. And an internal investigation based solely on records plus interviews of lower-level employees — who may not have separate counsel — will likely result in a skewed and incomplete version of the facts. This presents a catch-

22 for the corporation: the mutual suspicion that the Yates Memo has sown between corporation and individual will ultimately impair the corporation's ability to find the facts for the DOJ. And as the DOJ admits, the DOJ *needs* corporations to find the facts before it can impose individual liability. In that sense the Yates Memo may prove self-defeating.

The Yates Memo may even prove self-defeating at the compliance stage, when an executive is deciding whether to seek guidance from corporate counsel to *avoid* wrongdoing. As noted above, an executive may have spent years working collaboratively with corporate counsel, never dreaming that his interests may diverge from those of the corporation. Now, Deputy AG Yates trumpets the good news (from the DOJ's perspective) that corporate lawyers are walking into the DOJ with "Yates binders" full of, e.g., an executive's relevant emails, to assist prosecutors who are preparing to interview the executive.<sup>12</sup> The possibility of a chilling effect on the attorney-client relationship is palpable.

Indeed, as also noted above, because corporations act only through individuals it is possible that the Yates Memo may shift corporate behavior on the decision whether to cooperate at all. Ethical corporate decision-makers will fulfill their fiduciary duty to the corporation, of course, even when inconsistent with their individual interests — but there is no gainsaying that a decision-maker's perception of the corporation's best interest may be colored by her knowledge of what a commitment to "cooperation" truly requires. A resolution that buys peace and preserves relationships with key personnel is no longer an option. Privately-held corporations in particular may decide that the benefits that cooperation confers no longer outweigh the costs of deepening the divide between corporate and individual interests. Deputy A.G. Yates doubts that this is happening,<sup>13</sup> but she is not in the best position to know. Corporations act through individuals. Whether the Yates Memo will undermine its own purpose by giving short shrift to that principle remains to be seen.

## Notes

1. Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing, *available at*

<https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>.

2. That assumes that a corporate failure *has* occurred. The pressure on corporations to cooperate with the government and admit liability even when they may have a defensible position is a noted problem that is beyond the scope of this piece.

3. The name refers to the Supreme Court's decision in *Upjohn v. United States*, 449 U.S. 383 (1991), which addressed the scope of a corporation's attorney-client privilege.

4. The American Bar Association's White Collar Crime Committee Working Group recommended (pre-Yates Memo) that *Upjohn* warnings inform the employee that (1) the lawyer represents the corporation only, not the employee; (2) the goal of the investigation is to gather facts in order to advise the corporation on how to proceed; (3) the interview is protected by attorney-client privilege, and whether to waive that privilege is up to the corporation alone; and (4) the corporation requests that the employee not disclose to anyone but his attorney the content of the interview, as distinct from the underlying facts. The fourth appears to trace a distinction between privileged communications and non-privileged facts, addressed further below. See *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees* (Oct. 2009), available at <https://www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf>.

5. See generally Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013).

6. Indeed, some cases reject the distinction entirely. *E.g.*, *In re Intel Corp. Microprocessor Anti. Liti.*, 258 F.R.D. 280, 290-91 (D. Del. 2008) (privilege waiver may occur when a party discloses a summary of factual information obtained by an attorney).

7. Even if the company has chosen not to cooperate with the DOJ, the Yates Memo makes a corporate plea, or corporate settlement, that "carves in" individuals (i.e., resolves the case as to them without individual liability) extremely unlikely.

8. See, e.g., William F. Johnson, *Analyzing Early Returns on the Yates Memo*, New York Law Journal (March 3, 2016), available at <https://www.law.com/newyorklawjournal/almID/1202751162691/analyzing-early-returns-on-the-yates-memo/>. The lack of access to email and other documents relating to the subject of the investigation will quickly asphyxiate an individual defense effort. Deputy AG Yates seems perfectly comfortable with the idea of prosecutors advising companies how to conduct their internal investigations. Indeed, she encourages corporate counsel who have "questions" about the proper scope of their investigation to "contact the prosecutor and talk about it." See Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime

Conference (May 10, 2016) ("Yates Remarks, May 2016"), available at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>. This level of DOJ involvement raises substantial legal issues that are beyond the scope of this paper.

9. On the other hand it is not unusual, at that early stage, for "prosecution" to sound so implausible to the client that he weighs the concern for his job far more heavily.

10. See Yates Remarks, May 2016, *supra* n. 8.

11. See *id.*

12. See *id.*

13. See *id.*

## Lisa A. Mathewson

Ms. Mathewson has defended clients in white collar criminal and related civil matters for more than twenty years. She began her career with a large international firm and launched her own firm in 2009. She co-chairs NACDL's Third Circuit Amicus Committee and is Vice Chair of NACDL's White Collar Crime Committee.





## DOJ's New Threshold for “Cooperation”: Challenges Posed by the Yates Memo and USAM Reforms

Matthew S. Miner

*The following is an excerpt published by the U.S. Chamber Institute for Legal Reform. The full report can be found at <http://www.instituteforlegalreform.com/research/dojs-new-threshold-for-cooperation-challenges-posed-by-the-yates-memo-and-usam-revisions>.<sup>1</sup>*

### Internal Investigation and Self-Disclosure in a Post-Memo World

The DOJ policy shift sounded by the Yates Memo and revisions to the U.S. Attorneys' Manual (USAM) changes a number of the practical considerations facing corporate counsel as they evaluate how best to manage internal investigations and weigh the benefits of disclosure and cooperation with the government. No longer can it be assumed that it will be in the best interests of the corporation to cooperate.

### The Costs and Benefits of Self-Disclosure and Cooperation in a World of “All-or-Nothing” Credit

By establishing an “all-or-nothing” approach to corporate cooperation credit, the Yates Memo has effectively created a super factor that trumps other considerations that have historically guided corporate charging decisions since the issuance of then-Deputy Attorney General Holder's 1999 Memorandum. While these factors are still considered important (and time will tell just how broadly the cooperation requirements will be applied), there is potential for aggressive prosecutors to use them to extract comprehensive and resource-intensive investigatory steps from corporations.

With this new standard in place, it may be challenging for a business to evaluate whether to commit to cooperation, especially where the degree of criminal exposure — and the benefit derived from cooperation — are uncertain. After all, companies often evaluate decisions based on risk, and it is difficult

to gauge the relative risks and rewards of cooperation under the Yates Memo when the ultimate outcome is determined by a post-hoc evaluation of the steps the company took to develop the factual record and share it with the government.

Recognizing the difficulty in assessing the precise risks and rewards of cooperation on the front end, there are certain baseline expectations that can be communicated by corporate counsel to the business organization's stakeholders as part of the decision-making process. As a threshold matter, it is important to keep in mind that the Department has tied its decisions on declinations and recommendations for lenity to the requirement of full cooperation. Consequently, the degree of risk of criminal exposure an enterprise faces will necessarily influence how that company views the importance and need of cooperation credit.

Although there are variables regarding what cooperation will entail, there are also standard expectations that can and should be considered and conveyed. For example, to report on all relevant facts, a corporation will be required to investigate facts large and small and make determinations as to relevance. This will inevitably encourage lengthy and costly investigations of the sort that are frequently criticized for “boiling the ocean” in pursuit of facts. Notwithstanding Deputy Attorney General Yates's statement that corporations are merely required to carry out a “thorough investigation tailored to the scope of the wrongdoing” — as determined by Department attorneys — rather than “boiling the ocean,”<sup>29</sup> this type of prolonged investigation will elevate the exposure

individuals face in being interviewed and subjected to proffer and lead to the earlier involvement of individual criminal defense counsel, whose fees may need to be indemnified by the corporation. All of this will come at an increased cost to corporations under investigation in terms of resources, internal distractions, and delays. As a result of such delays, companies may also be expected to consent to tolling agreements with the Department during investigations.

#### Note

1. This publication, or part thereof, may not be reproduced in any form without the written permission of the U.S. Chamber Institute for Legal Reform. Forward requests for permission to reprint to: Reprint Permission Office, U.S. Chamber Institute for Legal Reform, 1615 H Street, N.W., Washington, D.C. 20062-2000 (202.463.5724).

#### **Matthew S. Miner**

is a partner in the Washington, DC, office of Morgan Lewis & Bockius, where he focuses his practice on white collar enforcement and compliance matters, as well as U.S. congressional inquiries. He is a former federal prosecutor and was staff director to the U.S. Senate Judiciary Committee.





## Half-Baked: The Yates Memo Calls for Charging More Offenders, But How Do We Sentence Them?

Barry Boss, Rebecca Brodey, & Emily Gurskis

When the Deputy Attorney General issued what has become her eponymous memorandum, many in the criminal justice community praised the Department's focus on individual prosecutions. In the wake of the financial crisis where executives appeared to get off scot-free, the memorandum let everyone know that federal prosecutors were going to re-focus their efforts on putting more white-collar offenders behind bars. But, this focus on prosecuting more individuals and obtaining greater punishment cannot occur in a vacuum. There is a crisis in the federal criminal justice system presently: sentences in white collar cases are often disproportionate and irrational. If the Yates memorandum becomes a reality and more individuals are criminally prosecuted, this crisis will be exacerbated.

Take for example the sentencing guidelines that are applicable in most white collar cases. These guidelines are widely criticized by both judges and practitioners as being "useless" and having "so run amok that they are patently absurd on their face." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D. N.Y. 2006) (Rakoff, J.). Because the guidelines for white collar cases tether prison sentences to the dollar amount associated with the crime, a single stock tip can yield a sentence of 20 years while an armed robbery is punishable only by 10 years, sexual assault is punishable by 5 years, and child abuse is punishable by 12 years. As recognized by judges, practitioners, legal scholars, and even Judge Patti B. Saris, chair of the Sentencing Commission, the white collar guidelines are "fundamentally broken."<sup>1</sup> Although the Guidelines are advisory in nature, the judge must consider them in determining the sentence, and sentences within the Guideline range are presumed reasonable on appeal by many appellate courts.<sup>2</sup>

While white collar offenders, such as Bernie Madoff, have become the face of villainous greed, most

of the people are first offenders and far less damnable: a home health care provider in Florida is serving a 12-year sentence for submitting claims to Medicare for supplemental oxygen he provided to patients that did not have the requisite certification (although there was no problem with the product);<sup>3</sup> a CEO, after relying on legal advice that no state rebate was due, faced a 20 year sentence under the Guidelines for his company's failure to rebate premiums to a state agency;<sup>4</sup> and a 70-year-old business owner is serving a 7-year sentence after submitting false inventory and account information to a lender, enabling his business to borrow more than it otherwise would have after the company fell on difficult times.<sup>5</sup>

**As recognized by judges, practitioners, legal scholars, and even Judge Patti B. Saris, chair of the Sentencing Commission, the white collar guidelines are "fundamentally broken."**

White collar sentencing guidelines are, of course, not the only guidelines which have come under fire (there are also major movements to reform drug guidelines and other guidelines that target poor communities), but they are the guidelines which will be most implicated by Yates-inspired DOJ policy changes.

The harmful reach of the draconian sentencing guidelines extends well beyond individual offenders. The rate of imprisonment in the United States is now four times the world average, with approximately 2.2 million people in prisons or jails.<sup>6</sup> An ever-increasing number of these individuals are first-time, non-violent offenders. Lengthy sentences for this growing number of non-violent offenders is a costly drain on society

with little or no benefit to protecting the community or rehabilitating offenders. The total per inmate cost averaged \$31,286 annually.<sup>7</sup> Studies show that lengthening prison sentences has no deterrent effect on crime — one of the chief purposes of sentencing.<sup>8</sup> New research also suggests that incarceration and lengthier prison sentences could increase recidivism.<sup>9</sup>

While there has been some sentencing reform in recent years, changes are made at a glacial pace. In 2015, after years of criticism prompted the Sentencing Commission to conduct a multiyear study of the white-collar guidelines, the Sentencing Commission adjusted the loss table for inflation. So, for instance, the sentencing enhancement that was previously triggered by a \$7 million fraud, is now set at \$9.5 million. The commission also amended the “victim enhancement” and “intended loss” so that certain sentencing enhancements are more tailored to the crime. These changes are indeed welcomed but they are modest — and, as sentencing expert Jim Felman points out, they do not “address the fundamental and profound deficiencies” in the current guideline which include an “overemphasis on loss” and a “cumulative piling on of specific offense characteristics.”<sup>10</sup> Thus, they will have little impact on the exaggerated sentences in high loss cases.<sup>11</sup> Even with the recent amendments, any executive of a public company convicted of a criminal offense relating to the company’s business operations likely faces a sentence under the Guidelines of life imprisonment or close to it.<sup>12</sup>

If we are moving forward with more individual prosecutions in white collar cases, then there should be a concomitant focus on how those individuals are sentenced. In 2015, the American Bar Association’s Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes crafted an alternative sentencing structure. The ABA approach would be an excellent starting point for true sentencing reform. Referred to by practitioners and judges as the “shadow guidelines,” the task force proposal considers loss as one of several factors in fashioning a sentence and places greater emphasis on overall offender culpability. Commentators have praised this alternative approach as a way to achieve more just and proportionate sentences, and judges have begun to rely on them in making sentencing decisions.<sup>13</sup>

People will debate whether the Yates memorandum makes good sense from a policy

perspective, but what is indisputable is that if more people are prosecuted, it must be accompanied by a more rational sentencing scheme. Otherwise, the Yates memorandum will result in the opposite of its intended effect: greater injustice.

## Notes

1. Hon. Patti Saris, *Keynote Address, Regulatory Offenses and Criminal Law Conference* (Apr. 14, 2015), available at [http://www.uscc.gov/sites/default/files/pdf/news/speeches-and-articles/speech\\_saris\\_20150414.pdf](http://www.uscc.gov/sites/default/files/pdf/news/speeches-and-articles/speech_saris_20150414.pdf).

2. See *Gall v. United States*, 552 U.S. 38, 50 (2007) (holding that the Guidelines shall be the “starting point and the initial benchmark”); *United States v. Tucker*, 629 Fed. Appx. 572, 572 (4th Cir. 2016) (unpublished) (holding that, upon review, “any sentence that is within or below a properly calculated Guidelines range is presumptively reasonable”).

3. See *United States v. Bane*, 720 F.3d 818 (11th Cir. 2013).

4. See *United States v. Farha*, 8:11-cr-00115 2011 WL 12844360 (M.D. Fla. 2011) (indictment).

5. See *United States v. Massaro*, 1:12-cr-00148 (E.D. Va. 2012) (Brinkema, J.) (sentencing order).

6. Jason Furman and Douglas Holtz-Eakin, *Why Mass Incarceration Doesn't Pay*, N.Y. Times (Apr. 21, 2016), available at <http://www.nytimes.com/2016/04/21/opinion/why-mass-incarceration-doesnt-pay.html>.

7. *Id.*

8. E.g., Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 CARDOZO J. CONFLICT RESOL. 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”); David Weisburd, et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 CRIMINOLOGY 587 (1995) (“There is generally no significant association between perceptions of punishment levels and actual levels . . . implying that increases in punishment levels do not routinely reduce crime through deterrence mechanisms.”).

9. Nat’l Inst. of Justice, *Five Things About Defense*, (May 2016) available at <https://www.ncjrs.gov/pdffiles1/nij/247350.pdf>.

10. James Felman, *Reflections on the United States Sentencing Commission’s 2015 Amendments to the Economic Crimes Guideline*, 27 FED. SENT. R. 288, 290 (2015).

11. *Id.* at 288.

12. James Felman, Am. Bar Ass’n, *Testimony on Economic Crimes to the U.S. Sentencing Comm’n* (Mar. 12, 2015) (“A result of these numerous increases in guideline penalties is that a typical

officer or director of a public company who is convicted of a securities fraud offense now faces an advisory guidelines sentence of life without parole in virtually every case.”)

13. *United States v. Faibish*, Sentencing Hearing, at 23:2-25, No. 1:12-cr-00265. (E.D. N.Y. Mar. 10, 2016) (expressly relying on ABA shadow guidelines in sentencing defendant to 63 months for his role in a check kiting scheme instead of the life sentence requested by the government); Robert J. Anello and Richard F. Albert, *Rise of ABA Task Force’s “Shadow Sentencing Guidelines,”* 255 NYLJ 64 (Apr. 5, 2016).

### **Barry Boss, Rebecca Brodey, & Emily Gurskis**



**Barry Boss** is the co-chair of Cozen O’Connor’s Criminal Defense and Internal Investigations Practice Group and he co-chairs the ABA Criminal Justice Section Sentencing Committee. **Rebecca Brodey** is a senior associate at Cozen O’Connor. **Emily Gurskis** is an associate at Cozen O’Connor. They both handle white collar criminal defense matters.



## NACDL's Common Sense Grand Jury Reform Proposals (Plus Two)

**Ross H. Garber**

The U.S. Constitution provides for the right to be indicted by a grand jury. Undergirding this right is the notion that the grand jury is a bulwark against overly aggressive prosecutors. As it has evolved, however, the grand jury process has instead become, in virtually all cases, simply a tool of the prosecution, presenting hardly a speed bump to prosecutors who wish to investigate, issue broad subpoenas for information, haul individuals in for boundless questioning, and, ultimately, issue indictments. Some might argue that the entire notion of the grand jury process is anachronistic. But a few common sense reforms could restore the federal grand jury to its intended role.

The National Association of Criminal Defense Lawyers (NACDL) has been on the leading edge of advocating for such reforms. Following significant study of the issue, NACDL issued a detailed report and proposed a “Bill of Rights for the Grand Jury.”

One of NACDL's most important proposed reforms addresses the right to counsel for witnesses before a grand jury. Currently, witnesses must testify before the grand jury alone; they may not be accompanied by counsel. There is and can be no rational justification for this. Accordingly, the NACDL Grand Jury Bill of Rights appropriately calls for the right of a witness to be accompanied by counsel. The Bill of Rights makes clear that the role of counsel for a grand jury witness is extremely limited: the witness's attorney could be present in the grand jury room with her client and provide the client advice. The witness's attorney would not, however, be permitted to address the grand jurors, stop the proceedings, object to questions, stop the witness from answering a question or otherwise take an active part in the proceedings. Given the significance of a witness's grand jury testimony, including potentially exposing the witness to criminal charges, it is difficult to imagine a just reason to oppose this proposed reform.

Another significant NACDL proposal is that a prosecutor be required to provide patently exculpatory information to the grand jury. In other words, if a prosecutor knows of information that would exonerate the target of an investigation, it would be improper for the prosecutor to obtain an indictment without first making the grand jurors aware of this information. As with the first proposal above, it is difficult to imagine a principled reason for opposing this reform.

In addition, NACDL's proposed Grand Jury Bill of Rights provides that witnesses shall have adequate advance notice of their appearance before the grand jury, identified in the NACDL proposal as 72 hours. This proposal would ensure that witnesses have adequate time to prepare and receive legal advice. In the event of a true emergency, this period could be reduced.

Another proposed grand jury reform that bears mentioning is the right of a grand jury witness to obtain a transcript of his testimony. While some courts have granted motions by witnesses for such transcripts, others have declined to do so. Thus, at present, a witness must generally rely on his memory for the details of his grand jury testimony, unless that witness is working with the government, in which case prosecutors often permit the witness to read a grand jury transcript or be read relevant portions. As NACDL pointed out in its Grand Jury Bill of Rights: “Allowing witnesses called by the prosecutor at trial to review their own transcripts, while denying this right to any other witnesses recalled to the grand jury or called as a defense witness at trial, fosters a system of mere gamesmanship that denigrates the integrity of federal grand jury proceedings.” Permitting grand jury witnesses to obtain a transcript of their testimony would remedy this unfairness.

Each of NACDL's proposed grand jury reforms reflects a thoughtful, balanced approach. In addition to the NACDL proposals, I would add two

other proposed grand jury reform measures, both of which apply primarily to corporations that receive grand jury subpoenas for documents.

### **I. Narrowly Tailored and Reasonably Timed Subpoenas**

Grand jury subpoenas for documents shall be narrowly tailored to obtain potentially relevant information and shall provide reasonable time for response. With respect to electronically stored information (ESI), the government shall engage in a good faith effort to agree with the recipient of the subpoena on a list of custodians and search terms. Absent extraordinary circumstances, the government shall accept as reasonable searches performed through electronic predictive coding.

The cost and disruption associated with grand jury subpoena compliance can be devastating. All too often subpoenas are drafted with excessive breadth and ambiguity. The agent or prosecutor drafting the subpoena may assume that, at least in the first instance, more is better than less, and that the scope of the subpoena may be narrowed and tailored through negotiations with the recipient. The government often specifies an unrealistically early return date, hoping to get the attention of the recipient, and, again, likely assuming a more realistic date will be arrived at through negotiations.

These overly broad and aggressive subpoenas cause recipients understandable panic. Undue disruption and expense may result as the recipient scrambles to comply with the letter of the subpoena before the return date. Meanwhile, the government may neither expect nor demand compliance with the strict terms of the subpoena. And, in any event, such a broad, aggressive subpoena furthers no significant law enforcement objective. At the outset, therefore, the

government should specify a scope and timeframe that are realistic and justified based on the circumstances.

The government should also work with the recipient on a methodology for searching ESI. Leaving it to the recipient, particularly one that is unsophisticated, in such circumstances is, at best, potentially wasteful and, at worst, counterproductive. Worse is a refusal by the government to negotiate in good faith with a subpoena recipient regarding the search methodology and parameters. In light of recent advances, predictive coding may be the most efficient methodology to identify potentially responsive documents. Accordingly, the government should always consider predictive coding, when agreeable to a subpoena recipient, as a first option. Otherwise, the government should always engage in early, good faith negotiation of the custodians and search terms to be used to identify responsive documents.

### **II. Target Notifications for Corporations and Corporate Agents**

Upon request, and absent compelling reasons to the contrary, the government shall disclose to counsel for a corporation that has received a federal grand jury subpoena whether the corporation or any corporate director, officer or employee is a target of a federal grand jury investigation.

A proper response by a corporation to a grand jury subpoena may depend on whether it is simply in possession of documents relevant to a criminal investigation of an unassociated third-party or, instead, the corporation itself, or one of its officers or agents, is a target of the grand jury investigation. Pursuant to the federal sentencing guidelines and current Department of Justice guidance, including the so-called “Yates Memo”, a corporation is rewarded for taking certain affirmative steps in response to grand jury

investigations, including by providing information about wrongdoing of its personnel. Moreover, a responsible corporation will endeavor to ensure that its subpoena compliance is prompt and complete, and not compromised by actions of corporate employees. Accordingly, absent compelling reason to the contrary, it is important and just that the government timely inform corporate recipients of grand jury subpoenas whether the corporation itself or one or more of its personnel is the subject or target of the investigation.

## Conclusion

It is long past time for Congress to implement significant reform in the federal grand jury process. The NACDL proposals, in addition to those outlined above, would make the grand jury process more just and fair without impairing law enforcement.

### **Ross H. Garber**

An icon depicting a silhouette of a person standing in the center of a complex maze, symbolizing navigating through challenges or legal proceedings.

chairs the Government Investigations practice at Shipman & Goodwin LLP. His clients include public officials and agencies, multi-national companies, executives, professionals, journalists and others facing significant challenges. He has represented three governors in impeachment proceedings: Governor Robert Bentley of Alabama, Governor Mark Sanford of South Carolina, and Governor John Rowland of Connecticut.



## The Five Areas in Which Discovery Reform Is Most Needed

Timothy P. O’Toole

In *Brady v. Maryland*, the Supreme Court interpreted the due process clause to include a requirement that the government look for and disclose to the defense favorable information within the possession of the prosecution team.<sup>1</sup> In the 53 years since *Brady*, the Supreme Court has repeatedly reaffirmed the importance of this constitutional protection, and its importance has also been repeatedly confirmed at all levels of government. As the Department of Justice recognized in the wake of the *Brady* violations that tainted the trial of Senator Ted Stevens, the failure to timely and completely disclose such information can seriously impact the administration of justice:

Any discovery lapse, of course, is a serious matter. . . . [E]ven isolated lapses can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system. Beyond the consequences in the individual case, such a loss in confidence can have significant negative consequences on our effort to achieve justice in every case.<sup>2</sup>

Despite this recognition, discovery failures — and particularly *Brady* violations — have persisted. As noted by one member of the Ninth Circuit in *United States v. Olsen*, “*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.”<sup>3</sup> Indeed, several Circuit Courts, including the Second,<sup>4</sup> Fourth,<sup>5</sup> Sixth,<sup>6</sup> and Ninth,<sup>7</sup> have all commented on the epidemic of *Brady* violations in recent years, ranging from failing to disclose witness biases and credibility concerns to plainly hiding exculpatory evidence. In light of these persistent issues, the question is whether anything can be done to ensure uniform adherence to the *Brady* rule. I propose here five reforms that would amount to a good start.

### I. Eliminate the So-Called “Materiality Requirement” in the Pre-Trial Context

In my opinion, the biggest cause of *Brady* errors arises from confusion created by the context in which the Supreme Court’s *Brady* cases have been decided. The *Brady* case itself, as well as every other case examined by the Supreme Court involving the *Brady* rule, arose in the post-conviction context — that is, the trial was over, the defendant had been convicted, favorable evidence was discovered that was known to the prosecution but not disclosed to the defense, and the question before the Supreme Court was whether the suppression of this evidence warranted a new trial. In this context, the Supreme Court developed a materiality requirement — a rule, similar to a harmless error rule, in which the Court will reverse a conviction only if the suppressed evidence, if known to the jury, would have created a reasonable probability of a different result. Like most harmless error rules, even this standard requires a certain amount of legal creativity, in asking a reviewing court to imagine a different trial and then imagine what the likely outcome of that trial would be. But, at least in the post-trial context, there is some reasoned basis for doing so, as there is a complete trial record and 50 years of Supreme Court guidance about how to apply the materiality test to the trial record.

Serious problems arise, however, when this materiality concept is applied in the pre-trial setting. In that setting, a prosecutor in possession of a piece of favorable evidence has no reasonable basis to determine materiality — there is no trial record, a prosecutor has little or no idea what the defense investigation has produced or what the potential defenses are, and the prosecutor has little basis for estimating the ultimate strength of his or her own trial evidence. Nonetheless, and despite several suggestions from Supreme Court Justices that the materiality concept has no application in the pre-

trial setting,<sup>8</sup> federal prosecutors (and many state prosecutors) attempt to apply this materiality rule in deciding whether to disclose favorable evidence at the pre-trial stage — in effect asking themselves before they have seen their own witnesses at trial and before they are likely to have any meaningful understanding of the defense: Having seen this new piece of favorable defense evidence, am I still reasonably confident I will prevail at trial?

The mere identification of the standard suggests why it is so fraught with peril. Any prosecutor, including one acting in complete good faith, is unlikely to view a particular piece of evidence as creating a reasonable possibility of a different result at trial. Indeed, if the evidence placed significant doubts in the prosecutor's mind about the defendant's guilt or the government's ability to pursue the case, the prosecutor likely would drop the case. Thus, if the new evidence doesn't persuade them to drop the case, *ipso facto*, the evidence is not material, and need not be disclosed. This is the sort of simplistic reasoning that I have seen used to justify withholding evidence in many cases, and it is the sort of reasoning that a pre-trial materiality requirement necessitates because there is no record to go on and a prosecutor is thus left to speculate about the power of a particular piece of evidence in the dark. This sort of speculation is an impossible task, and one that often results in critical evidence not being subjected to the adversarial process and potentially to scrutiny by the factfinder. The impossibility — and some would say irrationality — of this inquiry is also why many courts have eliminated the materiality requirement in the pre-trial context, both as a matter of law,<sup>9</sup> and as a matter of ethics.<sup>10</sup> If courts would uniformly adopt such a rule, or if the Supreme Court would state forthrightly that *Brady* requires the disclosure of favorable evidence pre-trial, but necessitates reversal post-trial only if a non-disclosure was material, it would go a long way toward reducing the number of *Brady* disputes that arise and the number of *Brady* violations that ultimately occur.

## II. **Impose concrete timing requirements for the disclosure of Brady evidence**

Another important way in which the criminal discovery system is failing involves timing. *Brady* says nothing about the timing of disclosures. To fill this gap, most lower courts use a flexible standard that requires disclosure in time to make effective use of the evidence at trial. On its face, this standard seems reasonable, since the

point of requiring disclosure is to allow use of the evidence, and the point of any timing requirement is to require disclosure in time to allow the evidence to be used effectively. But in practice, such a malleable deadline creates the opportunity for gamesmanship. When must a certain piece of evidence be disclosed in time for use at trial? The answer to that question often depends on who's asking, with prosecutors timing their disclosures to how much time they believe the defense needs to make effective use of the evidence. Not surprisingly, the defense often disputes these timing estimates, complains about eve-of-trial disclosures, and courts are left to speculate about how much time is required for a defendant to incorporate new evidence into a defense theory as trial is approaching.

Recognizing that this sort of ambiguity is a recipe for unfairness and unnecessary disputes, some courts have taken a different route, imposing concrete deadlines for disclosure of favorable evidence. The most common deadline used by court rule is to require disclosure within 14 days of arraignment.<sup>11</sup> Courts have also taken it upon themselves to impose such deadlines by standing order.<sup>12</sup> If courts would uniformly adopt these concrete rules, it would go a long way in reducing or eliminating disputes about timing — disputes the current rules virtually compel, since the prosecution and defense will rarely agree about how far in advance of trial disclosures must occur to allow for effective use of the evidence.

## III. **Establish a procedure by which the government can document and justify for the court any decision to withhold favorable evidence for compelling reasons**

Another important discovery reform involves the establishment of a procedure for use by the government if it seeks judicial permission to withhold otherwise disclosable evidence. The *Brady* rule is important, but in some cases there are legitimate reasons to excuse the government from its disclosure obligations. For example, if the government can demonstrate that a disclosure would threaten witness safety or national security, then a procedure should exist that would allow courts to limit or excuse the government from its discovery obligations. Such a procedure is important in its own right, and its existence would blunt or eliminate many of the government's stated concerns about discovery reform.

To be more specific, whenever the topic of discovery reform is mentioned, the government often

invokes concerns about witness safety or national security as reasons to disallow discovery entirely. But because there are many criminal cases in which no such concerns exist, the government's interests can be fully satisfied by addressing these issues on a case-by-case basis, in which the government is permitted to modify its obligations upon a showing that a disclosure would compromise witness safety, national security, a sensitive law enforcement technique or any other substantial government interest. But at the same time, such a rule would allow for full discovery in cases where those concerns do not exist, and would require that the government actually make some showing, generally subject to adversarial scrutiny, so that merely mouthing the terms "witness safety" or "national security" do not automatically prevent the disclosure of important evidence. Likewise, such a rule would allow courts to narrowly tailor any reduced disclosures in such a way — through redactions or protective orders — to ensure that discovery is provided to the fullest extent possible, consistent with any countervailing concerns.

#### **IV. Mandate disclosure of evidence in a usable format**

Another discovery issue that has been arising with more and more frequency in the electronic age involves disclosure of the evidence in a usable format. Many criminal investigations now involve the accumulation of rooms full of electronic information. When the government — which has often spent years accumulating and reviewing the evidence — discloses this evidence, it is important that it does so in a way that provides the evidence in usable form. This means that (1) the information is searchable if the original form is searchable; (2) the exculpatory material is readily identifiable (i.e., not buried in a "document dump" of largely irrelevant material); and (3) disclosure of information is made in a way that will allow the defense to reasonably investigate it (e.g., names and contact information for witnesses who possess favorable, material information).<sup>13</sup>

#### **V. Empower courts to remedy *Brady* violations**

A final reform to consider is the empowerment of courts to remedy *Brady* violations when they occur. To be sure, courts currently have such power, but the scope of

their ability to dismiss cases or to take other serious action in response to a *Brady* violation often varies from court-to-court. On this issue, it is important to ensure that courts understand that they have a wide variety of tools available to remedy *Brady* violations. These may include (1) dismissal with or without prejudice, (2) an order precluding the introduction of a particular item of evidence, (3) an order that the government make a witness available to the defense, or (4) an instruction to the jury about the import of the government's suppression of evidence. It is also important to identify possible factors courts should consider in imposing a remedy for a *Brady* violation. These should include (1) the extent to which the suppression of evidence interfered with the defense investigation or preparation of the case, (2) the disappearance of witnesses that would have been available if timely disclosure had occurred, and (3) a showing that any tardy disclosure was made to secure a strategic advantage in the case. For a rule of constitutional disclosure to actually work in practice, it is important for courts, the government and the defense to understand what likely will happen when disclosure does not occur as mandated.

In sum, the sound administration of justice and fairness depends on such criminal discovery reforms like these occurring sooner rather than later.

#### **Notes**

1. 373 U.S. 83 (1963).

2. David W. Ogden, Deputy Attorney General, *Memorandum for Department Prosecutors dated January 4, 2010 re: Issuance of Guidance and Summary of Actions Taken in Response to Report of the Department of Justice Criminal Discovery and Case Management Working Group*, available at <http://www.justice.gov/dag/dag-memo.html>. The memo summarizes the findings and recommendations of a working group convened after Senator Stevens' conviction in the United States District Court for the District of Columbia was vacated due to *Brady* violations. The Deputy Attorney General issued two *other related memos on the same day*: (1) *Guidance for Prosecutors Regarding Criminal Discovery* available at <http://www.justice.gov/dag/discovery-guidance.html>, and now codified at Section 165 of the United States Attorney's Criminal Resource Manual, and (2) *Requirement for Office Discovery Policies in Criminal Matters*, available at <http://www.justice.gov/dag/dag-to-usas-component-heads.html>

3. 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) (collecting cases); see also *United States v. Morales*, 746 F.3d 310, 311 (7th Cir. 2014) ("One would think that by now failures to comply with [*Brady*] would be

rare. But *Brady* issues continue to arise. Often, non-disclosure comes at no price for prosecutors, because courts find that the withheld evidence would not have created a ‘reasonable probability of a different result.’”)

4. *See, e.g., United States v. Mahaffy*, 693 F.3d 113, 133 (2d Cir. 2012) (“The government’s failures to comply with *Brady* were entirely preventable. On multiple occasions, the prosecution team either actively decided not to disclose the SEC deposition transcripts or consciously avoided its responsibilities to comply with *Brady*.”).

5. *See, e.g., United States v. Parker*, 790 F.3d 550, 554 (4th Cir. 2015) (vacating the defendant’s conviction because federal prosecutors failed to disclose that key witness was under investigation by the SEC for fraud); *United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013) (finding *Brady* violation (but no prejudice) where federal prosecutors did not disclose proffer agreements with two government witnesses).

6. *See, e.g., United States v. Tavera*, 719 F.3d 705, 714 (6th Cir. 2013) (vacating conviction based on *Brady* violations where federal prosecutors failed to disclose plainly exculpatory and material statements by government witness).

7. *See, e.g., United States v. Mazzarella*, 784 F.3d 532 (9th Cir. 2015) (finding *Brady* violations (but no prejudice) where federal prosecutors failed to disclose bias information for several government witnesses, including an informal promise of immunity and communications about potential employment with the FBI); *United States v. Sedaghaty*, 728 F.3d 885, 892 (9th Cir. 2013) (concluding “that the government violated its obligations pursuant to *Brady v. Maryland* . . . by withholding significant impeachment evidence relevant to a central government witness” and remanding for a new trial).

8. Bidish Sarma, *Do Supreme Court Justices Understand How Prosecutors Decide Whether to Disclose Exculpatory Evidence?* (March 17, 2016) available at <https://www.acslaw.org/acsblog/will-the-supreme-court-reinvigorate-the-brady-doctrine-in-turner-and-overton/>.

9. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (“The only question before (and even during) trial is whether the evidence at issue may be ‘favorable to the accused’; if so, it must be disclosed [under *Brady* and its progeny].”)

10. *In re Kline*, 113 A.3d 202, 213 (D.C. 2015) (interpreting D.C. Rule of Professional Conduct 3.8(e) as requiring disclosure without regard to materiality and without regard to any sort of “triviality” analysis),

11. *See, e.g., N.D. N.Y. L. Crim. R. 14.1(a)*.

12. *See, e.g., United States v. Rodriguez*, No 08-cr- 1311, 2009 WL 2569116, at \*12 (S.D. N.Y. 2009) (Patterson, J.) (court ordered government to turn over “*Brady* material . . . as it is discovered by the Government” and “*Giglio* material . . . twenty-

one days before the commencement of trial”); *United States v. Smith*, No 02-cr-1LN, 2008 WL 906526, at \*2 (S.D. Miss. 2008) (Lee, J.) (noting the magistrate’s issuance of a “standard” order requiring the government “to produce as soon as possible all . . . *Brady* exculpatory materials”).

13. *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) (requiring disclosures that are “sufficiently specific and complete” to permit effective use); *Eastridge v. United States*, 372 F. Supp.2d 26, 60 (D. D. C. 2005) (production of favorable grand jury transcripts to the defense was a “constitutional necessity”).

## Timothy P. O’Toole

a lawyer at Miller & Chevalier in Washington D.C., represents clients in a variety of white collar criminal and regulatory matters, with a primary focus on defending and investigating alleged violations of the economic sanctions and export controls laws.



A person is walking through a complex, multi-level maze. The maze is composed of light-colored, curved walls and paths, creating a confusing and intricate environment. The person is seen from behind, walking away from the viewer towards the center of the maze. The overall scene is rendered in a light, monochromatic blue and white color palette.

## Over-Criminalization and Mens Rea Reform

**Christopher Bates**

I'm going to focus my comments on *mens rea* reform, which I don't think will surprise anyone who's been following the criminal justice debate and Senator Hatch's role in it. I'd like to start with a few postulates on which I hope everyone can agree.

First, our criminal laws should be knowable. We should not hide them from public view as the Roman Emperor Caligula reportedly did by placing new laws on a column so high that people could not read them. Neither should we make our criminal laws so inscrutable, and so arcane, that only an expert with years of training can understand them.

Second, we should not use our criminal laws to trap people. We should construct our laws so that a person who wants to obey the law *can*. The alternative, whereby criminal law becomes a tool to penalize "out-groups," or to embolden arbitrary exercises of government power, is, to put it mildly, unacceptable.

Third, there is — or should be — a distinction between civil law and criminal law. Not all government regulation of behavior need come with criminal penalties. Indeed, if criminal law is to retain its force as a marker for the types of conduct society simply will not tolerate, then there *must* be a distinction between civil and criminal law. Otherwise, the effort collapses into a single, undifferentiated plane of punishable conduct. The mere fact that a law or regulation has been violated is all that matters. *Why* the law or regulation is on the books, or *why* the conduct was made illegal in the first place, is irrelevant. Call it legal positivism on steroids.

So, the three postulates are: criminal laws should be knowable, we should not use criminal laws to trap people, and there should be a distinction between civil and criminal law.

Unfortunately, each of these postulates is under sustained assault.

Take knowability. We don't even know how many criminal laws there are. When the Congressional Research Service was asked recently to count the number

of laws and regulations with criminal penalties, it said it couldn't. There are simply too many.

And then there's the actual content of our criminal laws, many of which deal with the most arcane, technical issues imaginable. Everyone knows assault and murder are wrong. But how many know the ins and outs of the Clean Water Act or the Marine Mammal Protection Act? In addition, there are thousands upon thousands of pages of implementing regulations, many of which carry criminal penalties. The modern federal criminal code is beyond the capacity of any one person to understand.

**[C]riminal laws should be knowable, we should not use criminal laws to trap people, and there should be a distinction between civil and criminal law.**

Nor can we say that our criminal laws reach only the evildoer, the one who knowingly or intentionally does something wrong. Stories abound of everyday Americans who have been swept up in the criminal justice system for seemingly innocuous conduct. There's the fur trader who sold an otter to the wrong person, the snowmobile driver who wandered onto federal land in the middle of a blizzard, and the mother who helped her daughter rescue an injured woodpecker.

So much conduct has been criminalized in recent decades that it's hard to know what's *not* illegal. Indeed, under certain circumstances, probably just about any act you can think of is a federal crime. Famed defense attorney Harvey Silverglate wrote a book a few years ago in which he claimed that the average American unknowingly commits three felonies a day. When everyone's a criminal, there's a serious problem at hand — not with the people, but with the laws that govern them.

And then there's the ever-eroding distinction between civil and criminal law. At common law there

were only a handful of crimes, most of which were felonies punishable by death and nearly all of which were inherently wrong. Examples include murder, pillage, and assault.

Today, however, there are all sorts of criminal laws that proscribe conduct that is not inherently wrong. Take the three examples I mentioned earlier: trading fur, driving a snowmobile on federal land, and rescuing a woodpecker. These are crimes only because Congress or some agency decided to attach criminal penalties to the behavior. The conduct at issue just as easily could — and in fact *should* — be discouraged through civil fines. Save the criminal penalties for truly odious conduct where it's important, not just to discourage behavior, but to send a message of moral disapproval.

This brings us to *mens rea* reform. As many readers likely know, the idea behind *mens rea* reform is to set a default criminal intent standard for all criminal statutes and regulations that fail to specify the level of intent required for conviction. It's a simple, straightforward fix that will address all three of the problems I have just described.

First, the problem of knowability. Setting a default *mens rea* standard will not in and of itself reduce the number of federal crimes or make them more intelligible. But it will narrow the circumstances under which a person may be convicted for doing something the person didn't know was a crime. Let me explain.

The default *mens rea* bills that have been introduced in the House and Senate effectively say that, unless Congress or an agency has provided otherwise, a person cannot be criminally convicted for doing something that the person, or a reasonable person in their shoes, would not know is wrong. One point to emphasize here is that these bills allow Congress to set a lower *mens rea* standard. They do not suddenly make ignorance of the law an excuse for every crime. What these bills *do* say is that if Congress wants a person to be criminally liable for breaking a law the person didn't know about, then Congress needs to make that clear by including a lower *mens rea* standard in the statute, just as it has done in many situations. Revolutionary this is not.

Now to entrapment. Again, the benefits of a default intent standard are clear. Set a robust default standard, require Congress to be clear when it wishes to depart from that standard, and you narrow the circumstances where criminal penalties attach for seemingly benign conduct.

Lastly, there's the civil-criminal distinction. A default *mens rea* standard will not in and of itself return criminal laws to the civil sphere, but it will confine the reach of criminal liability. Require evil intent, or knowledge of wrongful conduct, before criminal penalties attach, and the universe of potential criminal liability decreases. That's not to say the conduct goes unpunished. Civil penalties still apply. But the cases in which prosecutors can add criminal penalties on top of civil penalties — where they can threaten prison time on top of fines and debarment — become more circumscribed. And the situations where criminal penalties still attach are precisely those situations where they *should* attach — where the defendant's acts were inherently wrongful, or where the defendant knew he or she was violating the law.

That's why a robust default *mens rea* standard would be such an effective response to the problem of over-criminalization. It attacks multiple aspects of the problem from multiple angles. And it's simple — elegant, even. It avoids the need for a statute-by-statute or regulation-by-regulation review, which is sure to get bogged down by opposition from groups with vested interests in each individual statute or regulation, and which is beyond the capability of Congress in any event. Where a default would cause problems, Congress can go in and fix the particular statute at issue. But put the onus on the vested interests to explain why we should be convicting people who lack criminal intent.

### Christopher Bates

serves as Counsel to Senator Orrin G. Hatch on the Senate Judiciary Committee. Prior to working in the Senate, Chris was a litigation associate at Sidley Austin LLP in Washington, DC and clerked for Judge Thomas B. Griffith on the U.S. Court of Appeals for the D.C. Circuit.



A person is walking through a maze, symbolizing a complex path or a search for a solution. The maze is composed of light-colored walls and paths, and the person is seen from behind, walking away from the viewer.

## Criminal Justice Reform Through a Focus on Federalism: The need to stay engaged at the state level and to pull back the bounds of federal power

Joe Luppino-Esposito

### Introduction

Perhaps it is cliché to say that Washington DC exists in a “bubble,” but on criminal justice reform issues, it bears repeating. Though states, including particularly conservative states, have made major changes to their sentencing and corrections systems and to criminal intent standards over the last several years, criminal justice reform seems to be a novel concept to the good people of our nation’s capital. Please forgive the advocates who roll their eyes at the headlines about “strange bedfellows” who want to improve criminal justice reform. Those stories do not faze those who have been working in such coalitions over the years.

“States are the laboratories of democracy” has also been a cliché for some time, but for good reason.<sup>1</sup> States are able to test policy and other states, or the federal government, can take lessons from that success or failure.

Perhaps this author’s bias is showing here, but it seems that when a policy idea that begins in the states finds its way to Washington, there is some apprehension about using it, because the states are so incredibly different from the *important* work of the federal government. To be fair, many issues that Congress tackles have no analogue. For example, there will never be (hopefully) a state that has engaged in a foreign military action. Criminal law, in which Congress ought to be limited in its purview, is not such a policy arena.

Nonetheless, federalism still matters. Of course, the discussion of “federalism in law enforcement” is a broad one that includes discussions on civil asset forfeiture, terrorism, and a whole host of issues that will not be discussed here. Rather, this essay will focus on two main themes. First, that the states as laboratories can serve as good examples for

improvements to sentencing, corrections, and criminal intent. Second, that over-federalization of criminal law remains a problem and that the continued expansion of federal power is unjustified.

### Why Consider State Models

Spoiler alert: *Examining the Myths of Federal Sentencing Reform*, the paper accompanying this symposium essay, explains that by analyzing the success of state reforms for sentencing low-level, non-violent drug offenders, the federal system can take a similar approach and wind up with similar results.<sup>2</sup> It seems rather logical: if you can follow someone else’s model of success, you should do so.

**As a matter of First Principles, Congress rarely asks if it ought to be involved in legislating behavior. And once that question is summarily skipped, Congress rarely pauses to consider if a criminal penalty is appropriate, either.**

The examples of state success are powerful tools for advocates. For the sake of full disclosure, this is something that *Right on Crime* does regularly.<sup>3</sup> Using the Texas Model, which has led to a precipitous drop in crime and incarceration rates,<sup>4</sup> we work in states to share that knowledge, and to improve their criminal justice systems as well. States often suffer from their own form of “Special Snowflake Syndrome”<sup>5</sup> but there are still some reforms that translate well across borders. And it is especially important for states to learn from other states, more so than the federal government to learn from states or to dictate to states.<sup>6</sup>

Ignoring for a moment the blatant political

maneuvering and messaging that occurs during the criminal justice reform debate, there are two lines of attack that the reform opponents can use. First, that the drop in crime over the past several decades can be attributed to harsh sentencing policies at the federal level. This is the weaker of the two arguments, because it fails to recognize that far more criminal prosecutions occur in the states and assumes some causal relationship between federal drug trafficking penalties and crime across the board and at different levels of sovereignty. Second, opponents of reform may argue that state reforms cannot be translated into the federal system.<sup>7</sup> This is not the place to litigate the accuracy of that thesis, but it speaks to the importance of using those examples and getting them right.<sup>8</sup>

States have also led in improving criminal intent reform. Michigan and Ohio are the most recent states to add a default standard of *mens rea* into their criminal laws.<sup>9</sup> Though the federal government still has an unknown number of criminal penalties on the books,<sup>10</sup> we know that it is likely more than the also hefty 3,100 on the books in Michigan.<sup>11</sup> And this was an effort supported by both conservative groups and the state chapter of the ACLU, leading to a unanimous vote.<sup>12</sup>

Simple legislation to protect one of the most basic tenets of criminal law does not have a home in Washington, DC, it appears. Progressives, who used to favor this legislation, and will likely favor it again when a conservative returns to the Oval Office, have used the issue to slow sentencing and corrections reform.<sup>13</sup> Rather than looking to the states that have made these reforms with no known negative consequences, progressives are convinced that all businesses are run by 19<sup>th</sup> century robber baron caricatures who want to poison the air and water as a means of improving profit margins and that undefined *mens rea* standards are the only way to achieve justice, their armies of attorneys notwithstanding.<sup>14</sup>

It is the state work that will encourage progress in other states and at the federal level. Though the national media focus has turned to the federal government's potential reforms in this legislative session, that is an incomplete story. This is all to say that advocates on both sides of the debate should not assume that success or failure of reform will be determined by the actions of the federal government. Most criminal justice still happens at the state and local level, despite the overreaches by the federal government described below.

## The Over-Federalization Factor

As a matter of First Principles, Congress rarely asks if it *ought* to be involved in legislating behavior. And once that question is summarily skipped, Congress rarely pauses to consider if a criminal penalty is appropriate, either.<sup>15</sup>

There is a tendency for many to assume that because the federal government is stepping into a policy area it means that *now* the issue will be taken seriously and that government will get it right. It is especially disturbing to hear conservatives make this argument. The legend of Rudolph Giuliani's "federal day" prosecutions of drug dealers may not stand up to scrutiny, but the premise that the feds simply do criminal justice better persists.<sup>16</sup>

It is unclear why this happens except for the attention that federal cases often get. Plea rates for states and federal courts are comparable — and extremely high — and are not necessarily an indicator of better justice.<sup>17</sup> What is different is the "severity gap" between the federal and state sentencing systems. This is problematic with the increased overlap of crimes that can be found in both the state and federal systems. The federal government, with no regard for budgets and high regard for the symbolism behind its taking action on crime, processes far more cases than one would suspect.<sup>18</sup> The growth of the ranks of federal prosecutors, from 1,500 in 1980 to roughly 7,500 today, has us asking the "chicken and egg" question about why so many more cases are prosecuted by the federal government today.<sup>19</sup>

One of the more interesting debates on the federalization of criminal law comes from the Federalist Society's 1997 National Lawyers Convention.<sup>20</sup> Though nearly two decades old, the discussion is very relevant today. Judge D. Brooks Smith argued that the federal government should be careful to not prosecute a case unless a truly federal interest was involved, not merely a tangential one.<sup>21</sup> On the other side, Richard K. Willard countered that the public expects government to step up and do more to prevent crime, and that the case of states' rights has already been lost.<sup>22</sup> But the comments of former attorney general Edwin Meese III hold up the best over time.<sup>23</sup> Meese outlined how the federal government went from nearly no involvement to supporting local law enforcement to taking a leading role as a means of showing the public that Congress cares. Meese argues that arson, carjacking, and even the

assassination of President John F. Kennedy could have been adjudicated in state courts. There is nothing stopping those states from imposing the harshest penalties for crimes that have been enforced since time immemorial.<sup>24</sup>

No longer is there an understanding that the state and federal government will cooperate, as necessary, and that the federal government will only involve itself in criminal enforcement where it is truly needed. Instead, we now have a system where those calling for more federal criminal enforcement ignore that states exist at all.

With that said, leaving everything to the states can be problematic as well. Federalism that is too decentralized can lead to double the penalties and regulations in a world where it is unlikely that the federal government will back down. If states do decide to step up to the plate and go after every offense that falls within their purview, there could be a rise of regulatory enforcement that would make things worse for professionals who already seem to require a team of lawyers just to open up shop.<sup>25</sup>

## Conclusion

Criminal justice reform advocates must keep the principles of federalism in mind, especially when working at the federal level. The tit-for-tat politicking in Washington can easily get in the way of good policymaking for even the most seemingly agreeable reforms. With an understanding of federalism, advocates are equipped with a legal and ideological argument that will prove successful.

## Notes

1. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
2. Greg Glod and Joe Luppino-Esposito, *Examining the*

*Myths of Federal Sentencing Reform*, Texas Public Policy Foundation Policy Perspective, March 2016, <http://www.texaspolicy.com/library/doclib/2016-03-PP03-MythsFedPrisonReform-CEJ-GregGlodJoeLuppinoEsposito.pdf>.

3. Right On Crime is “the one-stop source for conservative ideas on criminal justice. It is a project of the Texas Public Policy Foundation in cooperation with the American Conservative Union Foundation and the Prison Fellowship.” For more information, see Right on Crime, *About Us*, available at <http://rightoncrime.com/about/>.

4. See Greg Glod, *Texas Adult Corrections: A Model for the Rest of the Nation*, Texas Public Policy Foundation Policy Perspective, October 2015, <http://www.texaspolicy.com/library/doclib/PP-Texas-Adult-Corrections-A-Model-for-the-Rest-of-the-Nation.pdf>.

5. Though not a perfect analogy to states, “Special Snowflake Syndrome” is defined in part as “the belief that she is rare in her qualities, despite, in reality, being an only slightly less common cliché.” See *Definition of Special Snowflake Syndrome*, Urban Dictionary, available at <https://www.urbandictionary.com/define.php?term=Special%20Snowflake%20Syndrome>.

6. Reihan Salam, ‘Laboratories of Democracy’ and What Works Where, *National Review*, (Mar. 17, 2013) <http://www.nationalreview.com/agenda/343218/laboratories-democracy-and-what-works-where-reihan-salam>

7. David W. Murray and Brian Blake, *Why Texas’ Criminal Justice Reforms Don’t Translate to the Federal Level*, Hudson Institute, Mar. 6, 2016, <http://www.hudson.org/research/12476-why-texas-criminal-justice-reforms-don-t-translate-to-the-federal-level>.

8. Among the many errors made in the piece cited above include: the misrepresentation of the “drug trafficking” charge at the federal level, applying an assumption that all those charged as such are “high-level” offenders, which is not accurate; assumptions regarding the pleas of certain prisoners; and just to keep this brief, the insinuation that the impact of the Texas reforms is “disputable,” which is not accurate, as research across the nation shows that states that have adopted similar reforms and lower incarceration rates have seen

greater reductions in crimes in the states that have not done so.

9. Josh Siegel, *How Michigan and Ohio Made It Harder to Accidentally Break the Law*, Daily Signal, Jan. 27, 2016, <http://dailysignal.com/2016/01/27/how-michigan-and-ohio-made-it-harder-to-accidentally-break-the-law/>.

10. John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation, Legal Memorandum #26, June 16, 2008, <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

11. *Id.*

12. Michael J. Reitz, *Michigan Legislature Unanimously Passes Criminal Intent Reform*, Mackinac Center for Public Policy, Dec. 17, 2015, <https://www.mackinac.org/22003>.

13. To read some of the apocalyptic predictions, see Greg Dotson and Alison Cassady, *Three Ways Congressional Mens Rea Proposals Could Allow White Collar Criminals to Escape Prosecution*, Center for American Progress, Mar. 11, 2016, <https://www.americanprogress.org/issues/criminal-justice/report/2016/03/11/133113/three-ways-congressional-mens-rea-proposals-could-allow-white-collar-criminals-to-escape-prosecution>.

14. Never mind that the two most recent headline-grabbing environmental disasters, the Gold King Mine wastewater spill in Colorado and the Flint, Michigan water crisis were caused by government ineptitude and not private action. It is very unlikely that the loosely prescribed *mens rea* standards will be used to prosecute the guilty parties in these cases.

15. Brian W. Walsh and Tiffany Joslyn, *Time to Arrest the Federal Criminalization Spree*, Wall St. J., Jan. 28, 2015, <http://www.wsj.com/articles/brian-w-walsh-and-tiffany-joslyn-time-to-arrest-the-federal-criminalization-spree-1422489255>.

16. See Josh Barbanel, *Koch Recommends Stiffer Penalties and More Prisons*, N.Y. Times, Feb. 15, 1985, <http://www.nytimes.com/1985/02/15/nyregion/koch-recommends-stiffer-penalties-and-more-prisons.html>; William Glaberson, *Giuliani's Powerful Image Under Campaign Scrutiny*, N.Y. Times, July 11, 1989, <http://www.nytimes.com/1989/07/11/nyregion/giuliani-s-powerful-image-under-campaign-scrutiny.html>.

17. Lindsey Devers, *Plea and Charge Bargaining Research Summary*, Bureau of Justice Assistance, Jan. 24, 2011, <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

18. Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, A.B.A. Crim. Just. Newsl., Summer 2006, [https://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_cjmag\\_21\\_2\\_](https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_21_2_federalorstate.authcheckdam.pdf)

[federalorstate.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_21_2_federalorstate.authcheckdam.pdf).

19. William L. Anderson, *Federal Crimes and the Destruction of Law*, Cato Inst. Regulation (Winter 2009-2010) available at <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/11/v32n4-2.pdf>.

20. William H. Jordan, *Debate: The Federalization of Criminal Law*, Federalist Soc. Crim. L. & Proc. Prac. Group Newsl., 2.1, (Spring 1998) available at <http://www.fed-soc.org/publications/detail/debate-the-federalization-of-criminal-law>.

21. D. Brook Smith, *Debate: The Federalization of Criminal Law*, Federalist Soc. Crim. L. & Proc. Prac. Group Newsl., 2.1, (Spring 1998) available at <https://fedsoc.org/commentary/publications/the-federalization-of-criminal-law>.

22. Richard Willard, *Crime is an Important Federal Issue*, Federalist Soc. Crim. L. & Proc. Prac. Group Newsl., 2.1, (Spring 1998) available at <http://www.fed-soc.org/publications/detail/crime-is-an-important-federal-issue>

23. Edwin Meese III, *Federalism in Law Enforcement*, Federalist Soc. Crim. L. & Proc. Prac. Group Newsl., 2.1, (Spring 1998) available at <http://www.fed-soc.org/publications/detail/federalism-in-law-enforcement>

24. *Id.*

25. Michael S. Greve, *But What Kind of Federalism?*, The Insider, Heritage Foundation, (Winter 2013) available at <http://www.insideronline.org/2013/01/but-what-kind-of-federalism/>.

## Joe Luppino-Esposito

is a Policy Analyst for Right on Crime and the Center for Effective Justice at the Texas Public Policy Foundation. Joe serves as the Foundation's liaison in the nation's capital, working with Congress and allied organizations to develop criminal justice reforms.





## Confronting the “See What Sticks and Who Flips”<sup>1</sup> Perils of Federal Conspiracy Law

Shana-Tara O’Toole

For almost as long as the concept of the crime of conspiracy has existed, there have been judges who were concerned about how such laws might be unfairly wielded in the hands of prosecutors. In 1925, Justice Learned Hand called conspiracy the “darling of the modern prosecutor’s nursery.”<sup>2</sup> In 1949, Justice Jackson explained that the crime of conspiracy “is so vague that it almost defies definition... .”<sup>3</sup> And, in 1990, Judge Frank H. Easterbrook of the Seventh Circuit noted that “prosecutors seem to have conspiracy on their word processors as Count I; rare is the case omitting such a charge.”<sup>4</sup> Defense lawyers have also been criticizing federal conspiracy laws for decades, recognizing that these laws often ensnare people with very little knowledge or direct involvement in criminal wrongdoing.<sup>5</sup> Despite these criticisms, a majority of federal judges, however, have historically been tolerant of increasingly broad uses of conspiracy.

The dissents in the recent *Ocasio*<sup>6</sup> decision give hope that such tolerance might be starting to wane. While the majority opinion reads as a depressing dissertation on all the things that a prosecutor need *not* prove before someone is convicted of conspiracy, three members of the Supreme Court criticized the application of the Court’s conspiracy doctrine — at least in a specific Hobbs Act context — and dissented. Chief Justice Roberts and Justice Sotomayor lamented that “conspiracy has long been criticized as vague and elastic, fitting whatever a prosecutor needs in a given case.”<sup>7</sup> Citing to a much older decision, they expressed disapproval of the Court’s broken promise to “view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.”<sup>8</sup> Perhaps most enlightening was their statement that the majority’s decision “rais[es] the specter” that federal prosecutors will “charg[e] everybody with conspiracy and see[] what sticks and who flips.”<sup>9</sup> Such candor from the Court regarding what prosecutors can do with unlimited discretion is refreshing.

So what can be done to rein in the problem?

Certain states have adopted reforms that curtail overly broad conspiracy laws. It is time for efforts to revise federal conspiracy laws to find some momentum. Here are three much-needed reforms to get us back on track.

### *But First, A Primer...*

There are multiple federal statutes that criminalize conspiracies, but when someone is referring to *the* federal conspiracy statute, they mean 18 U.S.C. § 371. Section 371 reads, in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined ... or imprisoned ... or both....

Decades of case law have made clear that none of conspiracy’s legal elements must be proven by direct evidence and can all be inferred from circumstantial evidence.<sup>10</sup> Unfortunately, such evidence often includes the use of statements of an alleged co-conspirator, which are admissible for their truth *despite* the fact that they are hearsay.<sup>11</sup> Agreements to conspire need not be explicit; they, too, can be inferred.<sup>12</sup> Long-standing legal precedent requires at least one “overt act” by a conspirator for a conspiracy to occur,<sup>13</sup> but, surprisingly, the overt act need not be illegal. It can actually be legal conduct,<sup>14</sup> or worse, it can even involve constitutionally protected conduct.<sup>15</sup> It can be trivial or minor conduct and can even be an act that “has no tendency to accomplish” the conspiracy.<sup>16</sup> A defendant is vicariously liable for all criminal acts performed by co-conspirators

in furtherance of the conspiracy.<sup>17</sup> In fact, a person even becomes liable for actions anyone in the conspiracy took *before* joining the conspiracy.<sup>18</sup> A person is liable for all these criminal acts even if they did not know the acts took place.<sup>19</sup>

### **I. All Federal Conspiracy Laws Should Require That Someone Actually *Did* Something**

While the main federal conspiracy statute, 18 U.S.C. § 371, requires an “overt act” within the conspiracy to occur before a prosecution should proceed, other federal conspiracy statutes, unfortunately, do not. To prevent unfairness and in support of more uniform law-making, all conspiracy laws should include this element.

For example, a drug conspiracy under 21 U.S.C. § 846 criminalizes many different kinds of drug conspiracies under the Controlled Substances Act, including the conspiracy to distribute, the conspiracy to manufacture, and the conspiracy to possess.<sup>20</sup> *No* conspiracy charge under 21 U.S.C. § 846 requires an overt act.<sup>21</sup> In a different part of the federal code, 18 U.S.C. § 2339B criminalizes conspiring to “provide material support or resources to a foreign terrorist organization.”<sup>22</sup> No overt act is needed to prove this conspiracy either.<sup>23</sup> The Racketeer-Influenced and Corrupt Organizations Act (RICO), at 18 U.S.C. § 1962, was originally adopted to make possible the prosecution of mobsters engaged in a widespread criminal enterprise, but now increasingly is used in a much broader manner involving all types of conduct. It also allows prosecution for conspiracy to perform any of the hundreds of actions that fall under the definition of “racketeering” enumerated in § 1961. RICO also fails to require prosecutors to prove an overt act.<sup>24</sup>

In the white collar context, 18 U.S.C. § 1956 covers a wide array of conduct that constitutes the crime of money laundering. The Supreme Court has held that no overt act is required to prosecute a conspiracy to violate § 1956,<sup>25</sup> thus opening the door for the conviction of a person who has agreed with another to do something that constitutes money laundering, but who fails to actually do it.

The legislative adoption of several substantive federal conspiracy laws – from the drug context to the white collar context – without an “overt act” requirement was ill-conceived and should be corrected. All federal conspiracy laws should require that someone actually *did something* before they can be convicted of conspiracy.

To be meaningful, the overt act should consist of a “real and substantial step toward accomplishment of the conspiratorial objective.”<sup>26</sup> In addition, the overt act should be accompanied by a specific intent to commit the conspiratorial objective. “This element is all too often discounted or even ignored.”<sup>27</sup> The overt act requirement should actually require conduct, not mere speech.<sup>28</sup> Lastly, constitutionally protected speech or conduct should definitely not be permitted to satisfy the overt act requirement.<sup>29</sup> Surely, if a criminal conspiracy did occur, the government can identify *one* overt act that comprises actual conduct and that is not constitutionally protected.

### **II. Federal Conspiracy Laws Should Not Convict Someone for Something Someone Else Did, That They Might Not Even Have Known About**

In 1946, the Supreme Court created a vast new theory of criminal conspiracy liability.<sup>30</sup> In *Pinkerton v. United States*, the defendant was charged with conspiracy to defraud the Internal Revenue Service, even though he was in jail at the time for another crime, and even though it was his brother who actually perpetrated the fraud. A member of a conspiracy may be responsible for “substantive offense[s] . . . committed by one of the conspirators in furtherance of the conspiracy,” the Court ruled, even if “there [i]s *no evidence that [he] counseled, advised or had knowledge of those particular acts or offenses.*”<sup>31</sup> In essence, the Court ruled that Daniel Pinkerton was guilty of conspiracy because he and his brother had initially agreed to commit the fraud, thus making Daniel criminally responsible for the acts of his brother even if he did not participate in those acts, or even know they occurred. The only limitations on this theory of liability are that the crime must be “reasonably foreseeable” and “in furtherance of the conspiracy” – elements that are routinely satisfied despite attenuated circumstances.

For over two hundred years, federal courts have rejected common law theories of criminal liability, and when the Court created a new liability for substantive crimes of a co-conspirator, the so-called “*Pinkerton* Rule” created one of the only exceptions to this time-honored bar against judicial law-making.<sup>32</sup> As scholars and defense lawyers have explained, “[t]his is an exceptional assault on the principle of separation of powers, and one that a future Supreme Court could revisit.”<sup>33</sup> The unfairly broad extension of criminal liability under *Pinkerton* should be eliminated entirely from the federal

law – either by the Supreme Court or by Congress – as it provides a very powerful tool for potential prosecutorial overreaching. For those reticent to support the abolition of *Pinkerton* liability, they should be comforted by the fact that accomplice liability – the ability to find one person criminally liable for the acts of another – would still exist pursuant to 18 U.S.C. § 2.<sup>34</sup>

### III. Federal Conspiracy Laws Should Not Allow Prosecutors to Charge, Juries to Convict, or Judges to Sentence Someone For Two Conspiracies, When Only One, In Fact, Exists

While prosecuting a conspiracy charge, as well as prosecuting a completed substantive crime, may be justifiable because a defendant who both conspires and commits a substantive crime in fact commits two separate crimes, the prosecution of two conspiracies from what amounts to the same set of conspiratorial facts, objectives, members, and intent is unfair.

In *Albernaz v. United States*, the Supreme Court reviewed the conviction of defendants on two conspiracy counts. One count was a conspiracy to import marijuana and the second count was a conspiracy to distribute marijuana.<sup>35</sup> Although the Court recognized that the defendants only actually entered into *one* singular conspiracy, which encompassed both counts,<sup>36</sup> the Court upheld defendants' convictions. They also upheld the consecutive sentences each defendant received, despite the fact that the length of their combined sentences exceeded the maximum that could have been imposed for either conspiracy conviction individually.<sup>37</sup> Two consecutive jail sentences arising from one singular criminal act is excessive. Congress should mandate the merger of multiple conspiracy counts where only one agreement-in-fact exists.<sup>38</sup>

### In Sum

Reforms like the three discussed here would not prevent all overreaching or unfairness in the conspiracy law context, but they would make a huge impact on who is charged and for what conduct. Conspiracy laws should not be used to unfairly punish someone with jail time for selling drugs that someone else sold or for writing an email that someone else wrote. Lawmakers need to realize that the “prosecutor’s darling” does not help lead

us to an accurate or fair outcome, but instead is a powerful dragnet that federal prosecutors use to play the “see what sticks and who flips” game.

### Notes

1. *Ocasio v. United States*, 136 S. Ct. 1423, 1445 (2016) (Sotomayor, J., dissenting).
2. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).
3. *Krulewitch v. United States*, 336 U.S. 440, 446-47 (1949) (Jackson, J., concurring).
4. *United States v. Reynolds*, 919 F.2d 435, 439 (7th Cir. 1990).
5. Erin Fuchs, *The Disturbing Reason 97% Of Federal Drug Defendants Plead Guilty*, Business Insider, Dec. 6, 2013, <https://www.businessinsider.com.au/human-rights-watch-report-on-plea-agreements-2013-12>.
6. *Ocasio*, 136 S. Ct. at 1438.
7. *Id.* at 1445.
8. *Id.* at 1446 (citing *Grunewald v. United States*, 353 U.S. 391, 404 (1957)).
9. *Id.* at 1445.
10. *E.g., United States v. Schmick*, 904 F.2d 936 (5th Cir. 1990).
11. Fed. R. Evid. 801(d)(2)(E). In addition to the other reforms mentioned here, judges should hold hearings to determine conspiracy membership before trial so that they can then determine the admissibility of an alleged co-conspirator’s statements under Fed. R. Evid. 801(d)(2)(E). Typically, membership in a conspiracy is determined during trial, *after* the alleged co-conspirator’s statement have already been conditionally admitted.
12. *E.g., United States v. Murphy*, 957 F.2d 550 (8th Cir. 1992); *United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991).
13. *Ocasio*, 136 S. Ct. at 1432 n.5.
14. *United States v. Tzolov*, 642 F.3d 314, 320 (2d Cir. 2011).
15. See Elizabeth Shumejda, *The Use of Rap Music Lyrics as Criminal Evidence*, 25 NYSBA Entertainment, Arts and Sports Law Journal 3 (2014). In *United States v. Moore*, a video of the defendant rapping about the drug trade was used as evidence to convict him of a drug conspiracy, despite the fact that no drugs were actually seized. 639 F.3d 443, 445, 446-48 (8th Cir. 2011).
16. *Hall v. United States*, 109 F.2d 976 (10th Cir. 1940).
17. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).
18. *United States v. Stewart*, 104 F.3d 1377, 1382 (D.C. Cir. 1997).
19. *Id.*

20. 21 U.S.C. § 841(a)(1) (2015).

21. *E.g.*, *United States v. Shabani*, 513 U.S. 10, 16 (1994).

22. 18 U.S.C. § 2339B(a)(1) (2015).

23. *United States v. Abdi*, 498 F.Supp.2d 1048, 1064 (S.D. Ohio 2007).

24. *Salinas v. United States*, 522 U.S. 52, 63 (1997).

25. *Whitfield v. United States*, 543 U.S. 209 (2005).

26. *Resolution of the Board of Directors of the National Association of Criminal Defense Lawyers Concerning Adoption of a Conspiracy Law Policy*, Apr. 19, 2015, <https://www.nacdl.org/resolutions/2015sm02/>.

27. Ellen C. Brotman, John Cline, Matt Kaiser, Lisa Mathewson, Caleigh Milton, & Steven R. Morrison, *Criminal Conspiracy: Position Paper and Proposals for Reform* April 19, 2015: [www.nacdl.org/ConspiracyPositionPaper/](http://www.nacdl.org/ConspiracyPositionPaper/), at 33.

28. *Compare United States v. Donner*, 497 F.2d 184, 192 (7th Cir. 1974) (“While that which occurred at the November 20th press conference constituted words rather than action, constitutionally protected speech may nevertheless be an overt act in a conspiracy charge.”) *with* Kaitlin Ek, *Conspiracy and the Fantasy Defense: The Strange Case of the Cannibal Cop*, 64 DUKE L.J. 901 (2015) (suggesting that a strengthened overt-act requirement mitigates against the use of pure speech as the actus reus in criminal conspiracy cases).

29. *See* Steven R. Morrison, *Conspiracy Law’s Threat to Free Speech*, 15 U. PA. J. CONST. L. 865 (2013).

30. *Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946).

31. *Id.* at 646-47; 651 (emphasis added).

32. Bruce A. Antkowiak, *The Pinkerton Problem*, 115 PENN ST. L. REV. 607, 618 (2011); Michael Manning, *A Common Law Crime Analysis of Pinkerton v. United States: Sixty Years of Impermissible Judicially-Created Criminal Liability*, 67 MONT. L. REV. (2006), available at <http://scholarship.law.umt.edu/mlr/vol67/iss1/4>.

33. *See* Position Paper, note 27, *supra*, at 21.

34. 18 U.S.C. § 2 provides that:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

35. 450 U.S. 333, 335 (1981).

36. *Id.* at 336.

37. *Id.* at 335, 342-43.

38. For example, if Defendant 1 and Defendant 2 are charged with (1) conspiracy to import marijuana, (2) conspiracy

to distribute marijuana, (3) possession of marijuana with intent to distribute, and (4) distribution of marijuana, and the Defendants only had one agreement to obtain and sell marijuana, then counts (1) and (2) should merge, and both Defendants would only be charged with (and sentenced to) one count of conspiracy. In addition, both Defendants could also be charged with (and sentenced to) the two substantive counts — possession and distribution.

## Shana-Tara O’Toole

Shana-Tara O’Toole serves as the Director of White Collar Crime Policy for the National Association of Criminal Defense Lawyers. Prior to joining NACDL, Shana practiced as a white collar defense lawyer representing individual and corporate clients in state and federal civil and criminal investigations.



## Remarks Delivered at U.S. Chamber of Commerce Institute for Legal Reform and National Association of Criminal Defense Lawyers Symposium on “The Enforcement Maze: Over-Criminalizing American Enterprise.”

**Senator Orrin G. Hatch**

Thank you for inviting me to be here today. This is a very important event, and I applaud the organizers for putting it together.

Criminal justice reform is a hot topic right now. President Obama says it’s a priority, Democrats and Republicans in both houses of Congress are pushing for it, and there’s been a great deal of ink spilt in the press on the issue.

But much of the discussion has been too narrow — far too narrow. If you read news reports and statements by some supporters, you might think that criminal justice reform is all about sentencing reform. Certainly it seems like sentencing reform has gotten the lion’s share of the coverage in recent months.

But criminal justice reform is about much more than sentencing. Those of you who have been involved in the anti-overcriminalization effort know that. From the earliest days of the effort, when groups on the right and the left first came together to find areas of common ground, there was broad recognition that Congress was criminalizing too much conduct, was federalizing too many crimes, and was paying inadequate attention to criminal intent requirements. Sentencing was *part* of the discussion, yes, but it was not *all* of the discussion.

Unfortunately, it seems like that dynamic has flipped, at least in certain quarters. Supporters of sentencing reform are now actively seeking to keep other anti-overcriminalization efforts out of the picture. They say that criminal justice reform is, and always has been, about sentencing reform. That, of course, is false. If the effort really were just about sentencing reform, that’s what we would call it —



Photo by Koichi Take | 1:57 Pictures

sentencing reform. That we use a different, broader term — *criminal justice reform* — indicates there is much more to the picture.

And that’s why this event is so important. It’s a reminder, and an emblem, that criminal justice reform involves much more than sentencing.

You see, there are two sides to criminal justice reform. The first involves the question of

what constitutes a criminal act. Under what circumstances should Congress declare certain conduct illegal? When should criminal penalties attach? When does an individual become deserving of punishment? These are all front-end questions that address whether a person should be branded a criminal in the first place.

The other side of criminal justice reform involves the question of what we should *do* with a person who commits a criminal act. Is prison appropriate? How long should the sentence be? What should prison look like? What should we do with a person once they're released from prison? These are back-end questions that address the punishment a person who commits a criminal act should receive.

**It's a tragedy, in my view, that so many of us have accepted the notion that a crime can be a crime even without criminal intent.**

These two sides of the coin — whether a person has done something deserving of criminal punishment, and how much punishment the person should receive — are inseparably connected. You cannot say a person is a criminal but attach no punishment. That would make the very idea of criminal law a nullity. Neither can you say a person is deserving of some sentence until you've determined whether they did something wrong. Otherwise you turn criminal law into an arbitrary exercise of government power.

Sentencing reform gets at the back-end question of what punishment a person should receive, but it doesn't even touch the equally important front-end question of whether an individual deserves punishment in the first place. A criminal justice bill that focuses entirely on sentencing and other back-end questions thus leaves a lot on the table.

And that's why — as I've said in other forums — I believe the current Senate criminal justice bill is inadequate. I don't fault the bill sponsors for their efforts, but they have overlooked crucial problems with our criminal justice system that demand attention and correction.

Indeed, this entire symposium has been devoted to a *major* problem that the Senate bill virtually ignores — the problem of overcriminalization. As today's speakers have detailed, in recent years Congress has criminalized too much conduct, has turned matters best handled at the state level into federal crimes, and has let languish the bedrock principle that a criminal act requires criminal intent. Yet the Senate bill contains precious little to address any of these problems.

I'm committed to criminal justice reform. I believe it's the right thing to do. But I also believe it must be done the right way. To focus myopically on back-end reforms without paying any heed to front-end problems is to see but half the forest. It's to miss the central issue that brought conservatives and liberals together in this effort in the first place — overcriminalization.

Now, I've proposed what I believe is a commonsense response to the problem of overcriminalization. It's a straightforward fix that addresses both the growth in the number of federal crimes and the deterioration of criminal intent protections. It's called default *mens rea*.

Most of you are probably familiar with the idea, but for those who aren't, the idea is to set a default criminal intent standard for all criminal statutes and regulations that fail to specify the level of intent required for conviction. The default would be just that — a default. It would not apply to statutes that *do* specify the intent required for conviction, nor would it apply to statutes that Congress later amends to add an intent standard. It would apply only to statutes that have no intent standard whatsoever.

Default *mens rea* attacks the problem of overcriminalization in a number of ways. First, it gets at the fact that Congress has criminalized a lot of things that shouldn't be crimes by requiring at least some degree of mental culpability for all offenses unless Congress has expressly said otherwise. Although default *mens rea* won't by itself reduce the number of federal crimes, it will limit the circumstances under which Congress or an agency can turn some random act — such as surfing in a designated swimming area — into a federal crime that carries fines and jail time regardless of one's intent.

It also gets at the fact that most people have no idea that these unnecessary crimes even exist. Transporting water hyacinths, walking a dog on a leash longer than six feet, using the 4-H Club logo without authorization — all of these things are federal crimes. By requiring at least some level of intent — unless Congress has specified otherwise — default *mens rea* narrows the range of circumstances under which individuals may be convicted for doing things they had no idea were against the law.

Lastly, default *mens rea* addresses head-on the deterioration of criminal intent requirements across much of our criminal code. It's a tragedy, in my view, that so many of us have accepted the notion that a crime can be a crime even without criminal intent. What separates civil law from criminal law is the idea that criminal actors are morally blameworthy. They haven't just violated some legal provision; they've done so in a morally culpable way.

But the idea of moral culpability is inextricably tied to a person's mental state. A person who does something accidentally, or against their wishes, is far less culpable than a person who acts intentionally or with knowledge of the likely consequences. Strict liability crimes obliterate this distinction. They criminalize non-culpable conduct. In my view, that is a serious problem.

Default *mens rea* attacks this problem by requiring Congress to be clear when it wants to create a strict liability crime. It requires Congress affirmatively to choose strict liability rather than allowing it to sidestep the question through statutory silence. And it puts Congress on notice that *mens rea* is important and that lawmakers should think long and hard before dispensing with this crucial bedrock protection.

Default *mens rea* should be a central component of *any* criminal justice reform bill. It's an effective, straightforward way to address the problem of overcriminalization. I've said before on numerous occasions, and I repeat again today, that I believe that *any* package of criminal justice reform legislation that passes the Senate *must* include meaningful *mens rea* reform.

Chairman Goodlatte has said the same thing about House legislation. I'm grateful to Chairman Goodlatte for his resolve on this issue, and intend to continue working with him to make sure that

reducing overcriminalization is a focus of criminal justice reform. Policymakers and the public must understand that criminal justice reform is not just about sentencing. Today's symposium is an important step in that direction.

Thank you.

## Senator Orrin G. Hatch

serves as the Chairman of Senate Finance Committee; and, in his seventh term, he is the most senior Republican in the Senate. He is also a member (and former Chairman) of the Senate Judiciary Committee and serves on the Board of Directors for the National Holocaust Memorial Museum.



For more information contact:

**National Association of Criminal Defense Lawyers®**

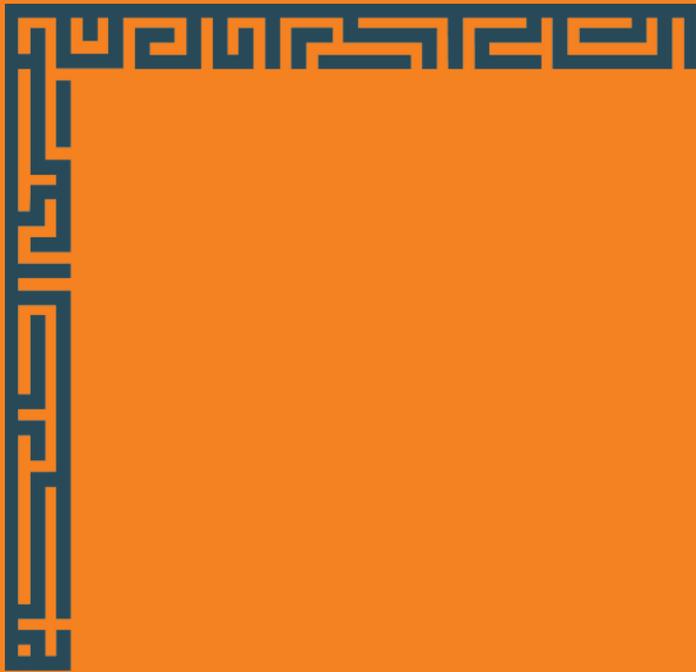
1660 L Street NW, 12th Floor, Washington, DC 20036

Phone 202-872-8600

**[www.nacdl.org](http://www.nacdl.org)**

This publication is available online at

**[www.nacdl.org/EnforcementMaze](http://www.nacdl.org/EnforcementMaze)**



NATIONAL ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS®



U.S. CHAMBER  
Institute for Legal Reform

