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THE FEDERAL CRIMINAL "CODE" IS A DISGRACE: OBSTRUCTION STATUTES AS CASE STUDY

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Any discussion of federal penal law must begin with an important caveat: There actually *is* no federal criminal "code" worthy of the name. A criminal code is defined as "'a systematic collection, compendium, or revision' of laws."[1] What the federal government has is a haphazard grab-bag of statutes accumulated over 200 years, rather than a comprehensive, thoughtful, and internally consistent system of criminal law. In fact, the federal government has *never* had a true criminal code. The closest Congress has come to enacting a code was its creation of Title 18 of the United States Code in 1948.[2] That "exercise, however, accomplished little more than sweeping a host of internally-disorganized statutes containing fragmentary coverage into a series of chapters laid out in . . . alphabetical order."[3] Readers should be cautioned, then, that my use of the term "federal criminal code" within this Article is simply a shorthand for an "incomprehensible,"[4] random and incoherent,[5] "duplicative, ambiguous, incomplete, and organizationally nonsensical"[6] mass of federal legislation that carries criminal penalties.

Once this caveat is understood, I can state my (by now obvious) thesis: The so-called federal penal "code" is a national disgrace. Let us first understand why the public should care. Professor Herbert Wechsler, the

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[1] Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 210 (1997) (quoting BLACK'S LAW DICTIONARY 256 (6th ed. 1990)).

[2] *See, e.g., id.* at 202.

[3] Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 93 (1998) [hereinafter Gainer, *Federal Criminal Code Reform*].

[4] Ronald L. Gainer, *Report to the Attorney General on Federal Criminal Code Reform*, 1 CRIM. L.F. 99, 100 (1989) [hereinafter Gainer, *Report to the Attorney General*].

[5] Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 315 (1998).

[6] Joost, *supra* note 1, at 195.

prime mover behind the Model Penal Code, articulated the stakes best in a passage worth reprinting in its entirety:

> Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.[7]

In such circumstances, our failure to have in place even a modestly coherent code makes a mockery of the United States' much-vaunted commitments to justice, the rule of law, and human rights. And this is not news.[8] Distinguished academics, codifiers, judges, former prosecutors,

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[7] Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952) [hereinafter Wechsler, *The Challenge of a Model Penal Code*].

[8] *See, e.g.*, Gainer, *Federal Criminal Code Reform*, *supra* note 3, *passim*; Joost, *supra* note 1, at 196-97 ("Current title 18 contains sections that are largely duplicative, statutory gaps that must be filled by case decisions, illogical barriers to federal prosecutions, mandatory penalties, ambiguities, irrelevancies, and a great deal of hard-to-understand statutory language."); Lynch, *supra* note 5, at 299, 315 (arguing that Congress is "the proud possessor of the most important unreconstructed penal law in the United States," with a code that is "incoher[ent] and random[]").

> Federal criminal law unfortunately is a prime example of the accumulation approach to offenses. It has simply accumulated new offenses for two hundred years or so, with little examination or reformulation of existing offenses. The result is serious overlaps in coverage and irrationalities among offense penalties, which create new possibilities for disparity in treatment and for double-punishment for the same harm or evil.

Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 233 (1997); Gainer, *Report to the Attorney General*, *supra* note 4, at 99 ("[The federal penal laws are] an odd collection of two hundred years of *ad hoc* statutes, rather than a unified, interrelated, comprehensive criminal code.").

"All agree that the United States . . . has never before had a comprehensive, logically organized and internally consistent penal code. . . . [T]he present Title 18 of the United States Code [is] . . . merely an assembly of ancient and new provisions arranged alphabetically with little regard to the content of successive chapters." Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1, 15 (1977).

> As our statutes stand at present, they are disorganized and often accidental in their coverage, a medley of enactment and of common law, far more important in their gloss than in their text even in cases where the text is fairly full, a combination of the old and of the new that only history explains. . . . The consequence, it seems to me, gives proper cause for deep concern.

Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 524, 526 (1955) [hereinafter Wechsler, *A Thoughtful Code*].

defense lawyers, politicians (including a number of Presidents and Attorneys General),[9] and others have been expressing outrage over the state of federal criminal law for many decades. To illustrate that reality, I have consciously chosen to exaggerate the usual law review fashion of footnoting and quoting with abandon. By so doing, I hope to underscore that our society's apparent disinterest in remedying this universally-acknowledged default is doubly disgraceful.

To begin with the optimal, an effective and just system of penal laws should be: drafted by elected representatives to be as clear and explicit as possible so that citizens have fair notice of that which will subject them to criminal sanction; public; accessible; comprehensive; internally consistent; reasonably stable; rationally organized to avoid redundancy and ensure appropriate grading of offense seriousness; prospective only in application; and capable of uniform, nonarbitrary, and nondiscriminatory enforcement.[10] No code drafted by human beings and produced by political institutions can meet all of these criteria. What is shameful about the state of federal penal law, however, is that *none* of these characteristics can be claimed by our "code" *and* our elected officials have made no serious effort to correct that glaring fact for decades. I will attempt to substantiate this proposition generally in Part I and particularly in Part II's examination of certain federal obstruction of justice statutes.

Although previous code reform efforts in the 1960's through the 1980's failed, they did yield something that made the deficiencies of the substantive code more tolerable: the U.S. Sentencing Guidelines. As will be explained at greater length in Part III, in pre-Guidelines practice, judges had vast discretion in sentencing criminal offenders; their choice of

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[9] *See, e.g.*, Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 107-08 (quoting President Nixon); *id.* at 110-11 (quoting Attorney General Richard Kleindienst); *id.* at 118-19 (quoting Attorney General Griffin Bell); *id.* at 120 (discussing personal support of President Carter and Attorney General Bell for code reform); *id.* at 122 (quoting President Reagan).

[10] *See, e.g.*, LON FULLER, THE MORALITY OF LAW 38-39 (1964) (stating that attempts to create and maintain a legal order may miscarry in numerous ways, including: the failure to achieve rules at all, so that every issue must be decided on an ad hoc basis, the failure to publicize, the abuse of retroactive legislation, a failure to make rules understandable, the enactment of contrary rules or rules that require conduct beyond the powers of the affected party, introducing too frequent changes in the rules, and a failure of congruence between the rules as announced and their actual administration); Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 56 (stating that to achieve its aims, criminal laws must be adequate in their coverage, reasonably accessible to lawyers and ordinary citizens, and understandable); Robinson, *supra* note 8, at 225 ("[T]he characteristics of an effective criminal code [are] meaningful organization, internal consistency, rationality in formulation, and comprehensiveness in coverage . . . .").

sentence was constrained only by the statutory maximum Congress set for the offense of conviction (e.g., 0-10 years).[11] Because prosecutors often could choose among a variety of overlapping charges, many of which carried different statutory maximums, prosecutors' discretionary charging choices greatly affected the defendant's sentencing exposure. So, for example, a prosecutor could choose a five-year count (e.g., obstruction of justice under 18 U.S.C. § 1505) rather than a twenty-year count (e.g., obstruction of justice under 18 U.S.C. § 1512(c)).

In the Sentencing Reform Act of 1984, Congress delegated to the U.S. Sentencing Commission the task of making more uniform, proportional, and rational federal sentencing through promulgation of *mandatory* guidelines that directly constrained the sentencing discretion of judges.[12] The mandatory Sentencing Guidelines provided sentencing formulas to be applied to the facts of offenders' cases and *required* judges to sentence offenders within the narrow sentencing range (e.g., 15-21 months) dictated by those formulas absent extraordinary circumstances. The statutory maximums still operated to cap defendants' sentencing exposure, but in most cases the maximums were sufficiently generous that they did not impose a significant limitation on Guidelines sentencing ranges.[13]

The Sentencing Commission recognized the many deficiencies of the code—including the power that its redundancy and irrational grading gave prosecutors to manipulate sentencing results and thus create sentencing disparities. The Commission attempted to address these concerns and others by adopting a modified "real offense" sentencing system—that is, a system where the sentence an offender received was based on the "real" circumstances of his case, often regardless of what charge(s) the prosecutor chose to pursue. One aspect of this "real" system was the Sentencing Commission's decision to create its own classification system based on the type of harm or threat posed by the offense committed by the defendant, not on the chaotic array of statutes available or irrational statutory maximums set by Congress. For example, the same sentencing calculus would apply to arrive at a given sentencing range for defendants charged with *either* § 1505 or § 1512(c). Prosecutors' ability to choose between overlapping and randomly graded offenses, then, often had no impact on the final sentence the judge was required to impose.[14]

Some have gone so far as to suggest that prosecutors' vast discretion in selecting among elastic and redundant code provisions, combined with the

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[11] *See, e.g.*, JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME 123-24 (2d ed. 2003).

[12] *See id.* at 122-23.

[13] *See id.* at 124.

[14] *See, e.g., id.* at 130, 134-36.

mandatory Sentencing Guidelines, rendered the substantive code largely irrelevant.[15] Certainly the Guidelines shifted the critical focus and energies of commentators and public officials from substantive law to sentencing for decades. In 2005, however, the Supreme Court held the *mandatory* Sentencing Guidelines unconstitutional in *Booker v. United States.*[16] It reasoned that augmentation of a defendant's sentence by *mandatory* judicial determination of the "real" facts of the case at sentencing violated defendants' jury trial rights.[17] The Court ruled, however, that augmentation of sentences based on judicial findings in a *discretionary* system did not offend the Sixth Amendment.[18] Accordingly, the Court decreed that, henceforth, the U.S. Sentencing Guidelines should be considered in formulating criminal sentences but they would be advisory only.[19]

This means that, once again, judges have enormous sentencing power because their discretion, though informed by the Guidelines, is limited only by the applicable statutory maximum(s). Prosecutors, too, will have great power to influence sentencing results through their choice of charge, which sets the statutory maximum(s) and thus the effective sentencing range. More than anything else, however, *Booker* means that statutory maximums will once more be the critical limiting factor in sentencing; the code's redundancies, internal inconsistencies, and irrational grading will once more be highly visible and undoubtedly much criticized. The *Booker* Court, then, could be said to have restored the substantive code–with all its problems–to its former prominence. To the extent that a galvanizing event was necessary to refocus reform efforts, *Booker* was it.

The first step in creating a code reform movement must be to publicize the problem, promoting a "widespread understanding, not merely on the part of academics carping from the sidelines, but also on the part of practicing lawyers, judges and even political figures, that the criminal law" of the United States is in shameful condition.[20] As detailed throughout this part of the Article, others have published extensively in service of this mission. This Article is an attempt to illustrate the problem, both generally (Part I) and through use of the federal statutes criminalizing non-coercive

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[15] *See* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 252 (1998).

[16] 543 U.S. 220 (2005).

[17] *Id.* at 245.

[18] *Id.* at 233.

[19] *Id.* at 245-46.

[20] Gerard Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 225 (2003) [hereinafter Lynch, *Revising the Model Penal Code*].

obstruction of justice (Part II). Finally, I will address at greater length the important effect that *Booker* should have on reform efforts (Part III).

I. INDICTMENT OF THE FEDERAL CRIMINAL "CODE"

A. THE "CODE" IS A CHAOTIC MASS OF LAWS SO VAST AND SPRAWLING THAT REPEATED EFFORTS TO COMPILE A COMPLETE LISTING OF FEDERAL CRIMES HAVE COME TO NAUGHT

At the most basic level, the above-described attributes of an effective and fair code presuppose that we should be able to *identify* the penal laws of the United States. It is a shocking fact, however, that the federal "code" contains a profusion of laws so complex and sprawling that the laws susceptible to criminal sanction *cannot even be counted.*[21] While a count of 3,000 federal crimes was made in about 1989,[22] an ABA Task Force on the Federalization of Criminal Law chaired by former Attorney General Edwin Meese found this number outmoded by 1998.[23] The Task Force tried to come up with a systematic count and finally was forced to give up the effort, concluding instead that "[s]o large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes."[24] This conclusion was endorsed in 2002 by the Heritage Foundation and, reportedly, the Congressional Research Service (a research arm of Congress).[25] A Federalist Society study estimated in 2003 that there

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[21] Arriving at an accurate count of the number of federal crimes is difficult for two reasons. First, the statutes are numerous and scattered throughout the 50 Titles of the United States Code, federal regulations, and even rules of court. Second, compilers must determine what counts as a crime and differentiate, where different acts are criminalized within a single statutory section, whether that section ought to be counted as one crime or many. *See, e.g.*, JOHN S. BAKER, JR., THE FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 4-10 (2004), *available at* http://www.fed-soc.org/Publications/practicegroupnewsletters/criminallaw/crimereportfinal.pdf [hereinafter FEDERALIST SOCIETY REPORT].

[22] Gainer, *Report to the Attorney General*, *supra* note 4, at 110.

[23] TASK FORCE ON FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, AM. BAR ASS'N, THE FEDERALIZATION OF CRIMINAL LAW 9 n.11, app. C (1998) [hereinafter ABA TASK FORCE REPORT].

[24] *Id.* at 9.

[25] *Id.*; *see also Union Reporting and Disclosure: Legislative Reform Proposals–Consideration of H.R. 4054 and H.R. 4055: Hearing Before the Subcomm. On Employer-Employee Relations of the House Comm. on Educ. And the Workplace*, 107th Cong. (2002) (testimony of Paul Rosenzweig, Senior Legal Research Fellow, Center for Legal and Judicial Studies, the Heritage Foundation) (reporting conversations with CRS and congressional staff, and stating that it is not possible to count all criminally-enforceable federal statutes and regulations because of the diversity of criminal statutes and regulations and their haphazard placement throughout the United States Code).

are more than 4,000 federal crimes,[26] some 1,200 of which are jumbled together in Title 18, with the remainder scattered throughout the remaining 49 titles of the United States Code.[27] This number, however, *excludes* federal regulations that may be criminally enforced. The ABA Task Force projected that, as of 1998, if regulations were included, the number of criminal offense would top 10,000.[28] Other sources, however, estimated in the mid-1990's that there were *300,000* such regulations on the books.[29]

As may be obvious from the above, the code is disorganized and incoherent. And it is not a compulsion for tidiness that underlies the screaming need for *organization* of federal penal statutes. Rather, as Roscoe Pound said, "a satisfactory *administration* of criminal justice must rest ultimately on a satisfactory *criminal law*."[30] Without a *system* of offenses, it is impossible to make a collection of random laws work together[31] to serve the purposes of punishment identified by Congress: just deserts, crime control, and (where incarceration is not an option) rehabilitation.[32] One cannot weed out the archaic sections or winnow the code to that which truly deserves incarceration. Thus, criminal prohibitions on knowing transportation of water hyacinths or use of aircraft to hunt wild burros remain cheek by jowl with federal laws punishing arson and assault.[33] One cannot identify internal inconsistencies, gaps, or redundancies in coverage—and we shall see just how important that can be in examining the obstruction statutes, *infra*. For present purposes it may be sufficient to note that so chaotic was the code that no one noticed that the assassination of a President was not a federal offense until President Kennedy was killed.[34] Perhaps more shocking, Congress neglected to specify *the purposes of criminal punishment* now reflected in 18 U.S.C. § 3553 until 1984.

Absent effective organization, one also cannot assure that offenses are graded in terms of their relative seriousness, as reflected, among other things, in sentencing consequences. Thus, for example, the statutory

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[26] FEDERALIST SOCIETY REPORT, *supra* note 21, at 3.

[27] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 53.

[28] ABA TASK FORCE REPORT, *supra* note 23, at 10.

[29] Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441-42 (1995); *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 216 (1991).

[30] Wechsler, *A Thoughtful Code*, *supra* note 8, at 524 (emphasis added).

[31] *See, e.g.*, Robinson, *supra* note 8, at 233.

[32] *See* 18 U.S.C. § 3553 (2000); 28 U.S.C. § 994(k) (2000).

[33] *See, e.g.*, 18 U.S.C. §§ 46, 47, 81, 111.

[34] *See* Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 58.

maximum for fleeing enforcement agents at an INS checkpoint in excess of the speed limit,[35] and possession of a depiction of animal cruelty with the intent to mail that depiction for commercial gain[36]—five years—is the same as the penalty prescribed for female genital mutilation of girls under eighteen.[37] "Discriminations that distinguish minor crime from major criminality, or otherwise have large significance for the offender's treatment and his status in society, reflect a multitude of fine distinctions often turning upon factors that have no discernable relation to the ends the law should serve."[38]

This lack of any *system* to the code's organization is not only rife with the possibility of injustice but is also inarguably ineffective in combating crime. As Ronald Gainer, a veteran of earlier code reform wars, asserts: "the existing morass of statutory provisions and judicial decisions is so complex, and so confusing to law enforcement officers as well as to the public, that it could scarcely have been designed to be less efficient."[39] As will be demonstrated in our examination of the obstruction sections, prosecutors and judges have to fight their way through a maze of legislation to identify the applicable code section(s) and the elements of the offense(s), and often get it wrong. That time would be better spent pursuing and adjudicating more cases. For example, Ronald Gainer has estimated that if investigators, prosecutors, defense counsel, and judges could reduce by 10% the amount of time they spend wrestling with, and litigating about, confusions in the federal code, that 10% of added time would mean that roughly 4,000 more offenders could be prosecuted each year.[40] Finally, "[a] more efficient criminal justice system would soon be perceived by the public to be more effective. This would promote a greater degree of deterrence of criminal conduct, which in turn could somewhat lessen the future caseload, and thereby hold promise of still greater efficiency and still more deterrence."[41]

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[35] 18 U.S.C. § 758.

[36] *Id.* § 48.

[37] *Id.* § 116.

[38] Wechsler, *A Thoughtful Code*, *supra* note 8, at 526.

[39] Gainer, *Report to the Attorney General*, *supra* note 4, at 107; *see also* Joost, *supra* note 1, at 197 (quoting former Attorney General William French Smith as testifying in 1981 that "[w]e have been laboring for decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources") (citation omitted).

[40] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 84-85; *see also* Joost, *supra* note 1, at 215-16.

[41] Gainer, *Report to the Attorney General*, *supra* note 4, at 101.

B. THE "FEDERALIZATION" AND "OVERCRIMINALIZATION" PHENOMENA TRANSLATE INTO FEDERAL OVERREACHING IN AREAS OF TRADITIONAL STATE COMPETENCE AND THE TRIVIALIZATION OF THE CRIMINAL SANCTION

The unfairness and inefficiency flowing from the code's lack of organization is exacerbated by the overly ambitious scope of federal legislation. First-year law students know that the Constitution contemplates a limited role for federal criminal law, but federal officials appear to have only a limited awareness of this constitutional fact. No doubt the breadth of federal penal law would astound the framers. The "federalization" of criminal law—that is, Congress' increasing penchant for making federal crimes of offenses that traditionally were matters left to the states—has been well documented and much lamented. The ABA Task Force on Federalization of Criminal Law issued a report in 1998 that focused on, and criticized, Congress' role in "federalizing" crime.[42] It noted that the impetus for the increased federal presence in law enforcement did not appear to be one grounded on considerations of respective federal and state competence:

> New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. Observers have recognized that a crime being considered for federalization is often "regarded as appropriately federal because it is serious and not because of any structural incapacity to deal with the problem on the part of state and local government." There is widespread recognition that a major reason for the federalization trend—even when federal prosecution of these crimes may not be necessary or effective—is that federal crime legislation is politically popular. . . .[43]

The ABA Report focused on persuading Congress to consider more carefully its apparent proclivity to respond to important criminal issues through knee-jerk (or politically expedient) federalization.[44] Many observers believe, however, that this battle has been lost, and that the real war lies elsewhere. Professor John Jeffries and Judge John Gleeson have

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[42] ABA TASK FORCE REPORT, *supra* note 23.

[43] *Id.* at 14-15 (quoting Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation,* 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 20-21 (1996)); *see also* FEDERALIST SOCIETY REPORT, *supra* note 21, at 5 ("Congress passed many more completely new criminal sections in all the three election years ('98, '00, and '02) than it did in any of the nonelection years."); Paul Rosenzweig, *Epilogue: Overcriminalization: An Agenda for Change*, 54 AM. U. L. REV. 809, 810 (2005).

[44] One group, concerned about overcriminalization in Texas, has gone as so far as to formulate a series of questions entitled "Analyze Before You Criminalize: A Checklist for Legislators," to guard against further overcriminalization. *See* MARC LEVIN, TEX. PUB. POLICY FOUND., NOT JUST FOR CRIMINALS: OVERCRIMINALIZATION IN THE LONE STAR STATE 6 (2005), *available at* http://www.texaspolicy.com/pdf/2005-04-pp-overcrim.pdf.

argued that—like it or not—federalization of the substantive criminal law is "largely an accomplished feat."[45] What this means is that, "[w]ith legislation covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas." [46]

Like "federalization," the federal "overcriminalization" phenomenon has also been widely discussed.[47] As Professor Erik Luna has pointed out, this one phenomenon actually comprises a number of problems: "(1) untenable offenses; (2) superfluous statues; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations."[48] It is almost too easy to find statutory examples: federal criminal statutes sanction using the insignia of the "Swiss Confederation" as a commercial label; knowingly using the character of "Woodsy Owl" without authorization and for profit[49]; transporting alligator grass across a state line; unauthorized use of the slogan "Give a hoot, don't pollute"; wearing a postal worker's uniform in a theatrical production that tends to discredit the postal service[50]; pretending to be a 4-H club member with intent to defraud; and including a member of the armed forces in a voter preference poll.[51] The same sad political considerations that gave us the federalization fashion are also are responsible for this phenomenon: "[a]s a rule, lawmakers have a strong incentive to add new offenses and enhanced penalties, which offer ready-made publicity stunts, but face no countervailing political pressure to scale back the criminal justice system."[52]

"Overcriminalization" of "essentially innocuous conduct has contributed materially to the trivialization of the concept of criminality . . . —a trivialization that erodes the respect for, and hence the deterrent impact of, the criminal law generally."[53] On a more concrete level, the effect of

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[45] John C. Jeffries, Jr. & Hon. John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1125 (1995).

[46] *Id.*

[47] *See, e.g.*, Ellen S. Podger, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

[48] Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005).

[49] *See* Joost, *supra* note 1, at 200 (citing 18 U.S.C. §§ 708, 711a (1994)).

[50] *See id.* at 206 (citing 18 U.S.C. §§ 46, 711a, 1730).

[51] *See* Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 66 (citing 18 U.S.C. §§ 916, 596).

[52] Luna, *supra* note 48, at 718.

[53] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 78.

"overcriminalization" is primarily to empower law enforcement officials: "[T]he more crimes on the books, the more behavior that is restricted (and restricted in more ways), and the more punishment for a particular offense, the more clout police and prosecutors can exercise in the criminal justice system."[54]

The "federalization" and "overcriminalization" trends show no sign of abating. "Whatever the exact number of crimes that comprise today's 'federal criminal law,' it is clear that the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades."[55] The ABA Task Force's research revealed that "[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970."[56] The Federalist Society, in its Report, noted that this "explosive" growth has "continued unabated"; indeed, it concluded that the number of statutory provisions susceptible to criminal enforcement had increased by one-third since 1980.[57]

C. THE "CODE" IS REDUNDANTLY REPETITIVE, THEREBY INCREASING THE POWER OF PROSECUTORS IN CHARGING, PLEA-BARGAINING, AND DETERMINING THE ACTUAL SCOPE OF FEDERAL CRIMINAL LAW

One aspect of the "overcriminalization" phenomenon deserves particular emphasis. Congress is able to legislate in such numbers and at such a pace over what would seem to be a limited criminal subject-matter because it repeats itself–and often. As Attorney General Griffin Bell testified in 1977, the federal criminal law "now, in many ways, can be described as a nonsystem or nonset of laws because there is so much overlap."[58] To give this "overlap" meaning, numbers may help. Professor Joost notes that "in the mid-1970s there were approximately 159 sections in the United States Code pertaining to offenses involving false statements to government officials, 134 pertaining to theft and fraud, 89 pertaining to forgery and counterfeiting, and 84 pertaining to arson and property

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[54] Luna, *supra* note 48, at 722; *see also* William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519-20, 531 (2001).

[55] ABA TASK FORCE REPORT, *supra* note 23, at 10.

[56] *Id.* at 7 (emphasis omitted).

[57] FEDERALIST SOCIETY REPORT, *supra* note 21, at 8.

[58] *Reform of the Federal Criminal Laws, Part XIII: Hearing Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 95th Cong. 8597 (1977) (statement of Attorney General Griffin Bell).

destruction."[59] In sum, the federal "code" had 466 sections to cover these four crime categories. But Congress was not finished: By Ronald Gainer's count in 1998, the "code" had grown to include 642 sections covering these categories: 232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction.[60] To give a sense of how unnecessary this is, one earlier, doomed effort at code reform consolidated these 642 sections into 19 sections, which amply covered the four crime categories at issue.[61]

The reason for the redundancies again can be traced largely to the political desire to react to a given scandal—for example, the destruction of Enron audit records by persons within Arthur Andersen LLP ("Andersen")—by enacting a "new" section that simply repeats existing prohibitions (*and* by jacking up statutory maximum penalties to underscore congressional resolve). Sometimes Congress creates new offenses that are simply more specialized models of old statutes—for example, by passing specific prohibitions on bank, health care, and securities fraud that augment the existing general prohibitions on fraud.[62] Sometimes Congress adds new prohibitions within existing sections that are not specific to the subject-matter of the scandal but can be claimed to be responsive to it. As we shall see in examining certain of the obstruction statutes, these random additions can make the rag-tag offenses on the books even more incoherent.

The redundancy of the Code, to the extent it helps anyone, helps prosecutors. They have the ability to pick and choose among a smorgasbord of statutes that might apply to given criminal conduct. Some of the statutes will offer prosecutors important advantages over others—in terms of such matters as venue, proof, evidentiary admissibility, or sentencing impact. Often a prosecutor may choose a general statute over a statute that is more specifically tailored to a particular context—by choosing mail fraud or the general conspiracy statute, for example, rather than another statute that has more complicated proof requirements. The effect of these choices is to give prosecutors substantially greater bargaining power vis-a-vis the defense.

The code's redundancy also empower prosecutors vis-a-vis Congress. The breadth of the penal laws subject to federal sanction all but ensures that federal enforcement officials, despite substantial increases in funding in the last few decades, will be unable to enforce them all. Prosecutorial choices

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[59] Joost, *supra* note 1, at 197-98.

[60] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 62.

[61] *Id.* at 103-04.

[62] *Compare, e.g.*, 18 U.S.C. § 1344 (2000) (bank fraud), *id.* § 1347 (health care fraud), *and id.* § 1348 (securities fraud), *with id.* §§ 1341, 1343.

regarding enforcement priorities will mean that some sections of the code may be significantly underenforced, while a very select few sections receive a great deal of attention. For example, according to the U.S. Sentencing Commission, in fiscal year 2003, 37.4% of federal criminal offenders were convicted of a small selection of drug offenses (i.e., trafficking (35.7%), use of a communication facility (.6%), and simple possession (1.8%)).[63] Immigration offenses accounted for another 21.9% of offenders and fraud for 10.8%.[64] Thus, these three fairly narrow crime categories accounted for just over 70% of all cases pursued. Effectively, then, prosecutors could be said to be creating their own code within a code—emphasizing drug, immigration, and fraud cases—and nullifying congressional penal choices in thousands of other available statutes through non-enforcement. Although such choices arguably undermine the legislative role in crime definition, courts cannot second-guess such choices unless (as is virtually impossible to prove) they arise out of unconstitutional motives.[65]

D. MUCH OF THE "CODE" CONSISTS OF VAGUE, OVERBROAD, OR INTERNALLY INCONSISTENT LAWS

Congress' penchant for speaking only in very broad and vague terms in criminal legislation may raise more far-reaching and profound issues than does its habit—reflected in the federalization and overcriminalization debates—of speaking often, repetitively, and over a wide range of subject-matters. Drafting criminal statutes concededly is difficult because of an inherent tension between, on the one hand, creating statutes sufficiently open-ended to address new ways of committing the offense and prevent defendants from evading liability by relying on technical "loopholes" in very specific prohibitions, and, on the other, making criminal prohibitions sufficiently specific to provide citizens fair notice of that which is outlawed, avoid delegation of law-making power to judges, and constrain the charging discretion of prosecutors. While accommodating this tension can be challenging, it is not a challenge that federal draftsmen even appear to recognize: Federal statutes consistently and seriously err on the side of over-inclusiveness. In addition to being overbroad, many statutes lack definition—that is, they are vague. In recognition of the grievous lack of specificity in many statutes subject to criminal sanction, courts regularly

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[63] *See, e.g.*, U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig.A, tbl.3 (2003), *available at* http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm.

[64] *Id.* at fig.A.

[65] *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996).

add definitions, or even elements, to existing offenses to "cure" any due process difficulties.

1. Mens Rea

One of the areas in which congressional drafting has been most deficient is in specifying the mental element, or *mens rea*, necessary to support a criminal conviction. Criminal liability is normally founded on the concurrence of two factors, "an evil-meaning mind [and] an evil-doing hand."[66] This is often expressed as a requirement that some degree of *mens rea* (guilty mind) must attend the *actus reus* (guilty act or non-action where there is a duty to act) to warrant the imposition of a criminal stigma. Unfortunately, as Professor George Fletcher observed, "[t]here is no term fraught with greater ambiguity than that venerable Latin phrase that haunts Anglo-American criminal law: *mens rea*."[67]

Part of the ambiguity is founded upon the fact that a seemingly endless variety of terms have been used to describe the guilty mind necessary to prove federal offenses. Federal statutes, for example, provide for more than 100 types of *mens rea*.[68] Even those terms most frequently used in federal legislation—"knowing" and "willful"—have, according to judges, different meanings in different contexts; judges adjust the definitions according to what *they* believe is the correct level of *mens rea* given the conduct at issue and are able to do so because of congressional inaction.[69] Another layer of difficulty is attributable to the fact that Congress may impose one *mens rea* requirement upon certain elements of the offense and a different level of *mens rea*, or no *mens rea* at all, with respect to other elements. Often, the law at issue does not specify a *mens rea* requirement or, far too frequently, is ambiguous as to which elements an express intent requirement modifies.

The lack of statutory specificity regarding the applicable level of the *mens rea*, and the definition of any potentially applicable *mens rea*, is most troubling where Congress enacts a statute that prospectively "criminalizes" regulations Congress has asked a federal agency to produce. This appears to be done almost as a matter of course these days.[70] In pondering the

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[66] Morissette v. United States, 342 U.S. 246, 251 (1952).

[67] GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 398 (1978).

[68] William S. Laufer, *Culpability and Sentencing of Corporations*, 71 NEB. L. REV. 1049, 1065 (1994).

[69] *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 141 (1994) ("'Willful,' this Court has recognized, is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.'" (quoting Spies v. United States, 317 U.S. 492, 497 (1943))).

[70] *See, e.g.*, Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 72 ("Today, when a congressional committee adopts new requirements concerning . . . virtually any . . . regulated

significance of this drafting default, recall that no one has yet come up with an accurate count of the number of regulations so "criminalized," but estimates range up to *300,000*.[71] Some of these "regulatory" crimes are properly regarded as *malum in se*—wrong in and of themselves independent of law. More often, however, the subject-matters of these regulations concern conduct designed to achieve a regulatory end and are not something that most of the public would know—by reference to societal moral norms—are criminal. Most of these crimes, then, are more properly characterized as *malum prohibitum*—wrong because prohibited. For example, it unlikely that most people would know that criminal sanctions may attach to such activities as walking a dog in a government building, mixing two kinds of turpentine, or violating an instruction in the twenty-two pages of OHSA regulations pertaining to construction of ladders and scaffolding.[72]

Why is this default troubling? I will once again turn to Professor Wechsler to explain:

> Criminal liability imports a condemnation, the gravest we permit ourselves to make. To condemn when fault is absent is barbaric. It is the badge of tyranny, the plainest illustration of injustice. Correct me if I overstate this but I do not think I do. Indeed, we are reluctant—very properly—to condemn action as criminal merely because the actor should have known of its offensive quality. We seek so far as possible to insist that he really must have known. When he knew and acted nonetheless, we feel real confidence that we have our man.[73]

Nonetheless, the federal courts regularly permit *felony* criminal convictions, in *malum prohibitum* cases, to rely on a species of strict liability. In these so-called "public welfare" cases, Congress passed statutes that state that a "knowing violation" of the regulations can be criminally prosecuted. The plain language might indicate that the defendant must know that he is violating the regulation at issue. Federal courts, however, have consistently read this language to mean, in cases where "deleterious devices or products or obnoxious waste materials" and thus the "public welfare" are at issue, people dealing in such materials should be on notice that their activity is subject to regulation. Accordingly, courts have often decided that persons are criminally culpable if they knew the nature of the material with which they were dealing, even if they were not aware of the

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activity, it routinely incorporates . . . a statement that any deviation constitutes a federal crime.").

[71] *See supra* note 30 and accompanying text.

[72] *Id.* at 74 (citing 29 C.F.R. §§ 1926.450-52 (1997); 41 C.F.R. §§ 101-20.311-15 (1997); 7 C.F.R. § 160.85 (1997)).

[73] Wechsler, *The Challenge of a Model Penal Code*, *supra* note 7, at 528.

regulations at issue and, if they were aware, did not know they were violating them.[74]

That is, of course, unless the courts decide that this shockingly (in a felony case) low level of *mens rea* would "criminalize a broad range of otherwise innocent conduct," in which case courts pump up the *mens rea* required.[75] The judgment of what constitutes "innocent" behavior is made by judges. So, for example, the Ninth Circuit held in *United States v. Weitzenhoff* that persons working in wastewater treatment plants may be held criminally liable for discharging pollutants in excess of the permitted amount as long as they knew (as they had to, given the nature of the business in which they were engaged) that they were discharging pollutants (even if that activity itself—discharging pollutants—was lawful within permitted amounts).[76] The rationale in such cases is that these individuals know that they are dealing with a substance dangerous to human health and thus are responsible for ensuring that their conduct conforms to legal requirements. The *Weitzenhoff* court held that the defendants *did not* need to be aware that they are discharging in excess of permitted amounts—that is, they need have no knowledge regarding the *actus reus* of the crime and no culpable state of mind with respect to the alleged wrongdoing. This decision essentially made "designated felons" of anyone working in the wastewater industry, leaving it to prosecutorial discretion to decide who in a given plant will go to jail when unintended discharges in excess of permitted amounts occur.

By contrast, the Supreme Court held in *Staples v. United States* that semiautomatic weapons are not sufficiently dangerous to put their owners on notice of the regulated nature of such gun ownership.[77] Thus, the Court said, for purposes of prosecuting someone for unlicensed possession of a fully-automatic weapon, it is not sufficient that the government prove that the defendant knew of the dangerous character of the gun he had; rather, to avoid entrapping "innocent" owners of machineguns, the government had to prove that the defendant knew that his semiautomatic weapon had been converted to fully-automatic firing.[78] As *Staples* may indicate, it is difficult to sort out just what criteria the courts are using (aside from their own

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[74] *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971); United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Weitzenhoff, 35 F.3d 1275 (9th Cir. 1993) (en banc).

[75] Staples v. United States, 511 U.S. 600, 610 (1994) (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

[76] 35 F.3d at 1284.

[77] 511 U.S. at 611-12.

[78] *Id.* at 619-20.

personal experience and morality) in determining what they consider "innocent" behavior worthy of an elevated *mens rea*.

Should *courts* be able to subject persons violating *malum prohibitum* provisions to felony criminal sanction with only the most negligible showing of *mens rea* (e.g., they knew that they were dealing with a dangerous or deleterious device)? Professor Green identifies arguments many of us would agree with, when he writes that "applying criminal sanctions to morally neutral conduct is both unjust and counterproductive. It unfairly brands defendants as criminals, weakens the moral authority of the sanction, and ultimately renders the penalty ineffective. It also squanders scarce enforcement resources and invites selective, and potentially discriminatory, prosecution."[79] Whatever one might believe is the *correct* answer as a matter of criminal law policy, this is a sufficiently troubling basis for liability that courts have no business making it. The failure of the criminal code to be specific and clear about the critical *mens rea* element in these regulatory cases is, in short, simply appalling.

Judges' willingness to tinker with the *mens rea* applicable to criminal offenses in the "public welfare" line of cases is anything but aberrational. Judges often undertake to supply missing *mens rea* elements, fill in gaps, or correct ambiguities through "interpretation" (some would say common lawmaking). Sometimes they get it right, and sometimes (as I will argue below in the obstruction context) they most assuredly don't. I do not question their good faith in doing so, but I do question the wisdom of such lawmaking. In any case, even were judges able effectively to patch up specific statutory provisions, they cannot do that which is necessary: create a small number of defined and consistent *mens rea* terms to be used with care throughout the United States Code.

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[79] Stuart P. Green, *Why It's a Crime To Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1536 (1997). Consider, too, the following thought from Henry M. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 n.70 (1958):

> In relation to offenses of a traditional type, [the Supreme Court seems to say], we must be much slower to dispense with a basis for genuine blameworthiness in criminal intent than in relation to modern regulatory offenses. But it is precisely in the area of traditional crimes that the nature of the act itself commonly gives some warning that there may be a problem about its propriety and so affords, without more, at least some slight basis of condemnation for doing it. . . . In the area of regulatory crimes, on the other hand, the moral quality of the act is often neutral; and on occasion, the offense may consist not of any act at all, but simply of an intrinsically innocent omission, so there is no basis for moral condemnation whatever.

2. Offense Definition: "Honest Services" Fraud

The over breadth and lack of specificity in the criminal code is not restricted to its *mens rea* provisions and to *malum prohibitum* offenses. Even with respect to *malum in se* offenses, these same characteristics threaten many persons who may deserve some kind of employment, professional, or civil penalty but do not warrant incarceration. Brief reference to any federal criminal law textbook will reveal a wealth of excellent examples.[80]

In Part II of this Article, I will try to illustrate the nature of these problems by examining a number of statutes outlawing non-coercive obstruction of justice. For purposes of this section, however, I would like to focus on an example that is my personal favorite: the oft-used "honest services" theory of mail and wire fraud. I find this particular illustration helpful because it demonstrates the importance of specificity in statutory definitions and of fair notice in a way that should resonate even with those who believe that such things are unnecessary because "ordinary morality" should suffice to keep "good" people safe from criminal prosecution.[81] "Fair notice" ceases to be a merely "academic" concern once one recognizes that *anyone* could be subjected to indictment and the humiliation and stresses of a public trial, and begin serving jail time upon conviction, only to have some court of appeals decide that what s/he did was not, in law, a crime. Also, these cases demonstrate the terrifying power that overbroad or vague statutes give prosecutors. Where federal prosecutors can make an "honest services" case against *anyone* under existing "standards," no matter how generally "good" their character, a vast potential for arbitrary, discriminatory, and unfair prosecutorial choices inevitably follows.

Some background is necessary for the uninitiated. Two of the most popular offenses in the criminal code are mail and wire fraud (18 U.S.C. §§ 1341, 1343). These crimes are among federal prosecutors' favorites because of their seemingly limitless malleability and their simplicity in terms of proof. Technically, the elements of these crimes are: (1) a scheme or artifice to defraud; and (2) a mailing or interstate wiring in furtherance of the scheme.[82] As the Supreme Court has pointed out, under traditional principles, a "scheme or artifice to defraud" commonly referred to "wronging one in his *property rights* by dishonest methods or schemes"—

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[80] In an act of shameless self-promotion, I refer readers to O'SULLIVAN, *supra* note 11, *passim*.

[81] *See, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 481-89 (1996) [hereinafter Kahan, *Is* Chevron *Relevant?*].

[82] *See, e.g.*, Pereira v. United States, 347 U.S. 1, 7 (1954).

that is, to schemes in which the defendant misled another in order to secure *money or property* to which he was not entitled.[83]

Prosecutors sought to push beyond this traditional understanding of fraud because there was (and is) no generally-applicable federal statute available to prosecute state and local political corruption. Accordingly, federal prosecutors pursued state and local politicians under a creative theory of "honest services" fraud. And courts bought it, not just when politicians were inarguably corrupt, but also when their activities were—though disturbing to federal prosecutors—not illegal under state or local law. Thus, for decades prior to 1987, federal courts of appeals were unanimous in holding that criminal "schemes or artifices to defraud" within the meaning of the mail and wire fraud statues encompassed situations in which public officials, or politically-active persons who had no formal government position, deprived the citizenry of its rights to their "honest services." But where is the "fraud" (that is, the lies, deceit, etc.) in public corruption? The gravamen of an honest services case was not the corruption; it was the "fraud" of failing to *tell* the citizenry about the corruption or allegedly improper conduct.[84] (If the public official *did* disclose his alleged wrongdoing, there was no case.) The government did not have to prove that the governmental entity or citizenry "victimized" by this concealment lost money or property—it was sufficient that the defendant deprived his victims of their "right to his honest services" through his concealment of breaches of his duty.

Having met with success in pushing this theory in the public corruption area, prosecutors and courts then expanded the scope of the "honest services" fraud theory to employees of private companies who, prosecutors charged and courts agreed, assumed a duty to advise their employers of material breaches of their terms of employment and who were criminally responsible if they failed to make appropriate disclosures. Thus, prosecutors have "brought to justice," among others, a coach who improperly helped players with their course work to ensure their eligibility to play,[85] a professor who helped his students plagiarize work to secure degrees to which they might not otherwise be entitled,[86] a lawyer who operated under an undisclosed conflict of interest,[87] and a city contractor who did not fulfill his contractual obligation to pay his workers on a city

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[83] McNally v. United States, 483 U.S. 350, 358 (1987) (emphasis added) (quoting Hammerschmidt v. United States, 265 U.S. 182, 188 (1924)).

[84] United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982).

[85] United States v. Gray, 96 F.3d 769, 772 (5th Cir. 1996).

[86] United States v. Frost, 125 F.3d 346, 353 (6th Cir. 1997) (affirming conviction).

[87] United States v. Bronston, 658 F.2d 920, 922 (2d Cir. 1981) (affirming conviction).

project at a certain pay scale.[88] All of these persons were acting improperly or unethically—and should at least be fired or pursued civilly—but are these *criminal* cases? If so, anything is. It is only a slight exaggeration to say that any public official or private employee who has an undisclosed conflict of interest or who otherwise breached their duties to their employers (as defined by those employers) in the vicinity of a mailbox or interstate wire could be charged with a federal felony.

Forty-odd years after individuals started going to prison under this theory of liability, the Supreme Court decided in *McNally v. United States* that a "scheme to defraud" encompassed *only* efforts to deprive another of intangible or tangible *property* rights.[89] All those individuals who had been adjudged criminals, and who had served jail time, for depriving others of an intangible, non-property right to "honest services," were, in fact, not guilty of any crime under the mail and wire fraud statutes. The essence of the Supreme Court's objection to these cases was that they permitted federal prosecutors to pursue state and local public officials for, among other things, political patronage schemes that prosecutors may have found offensive but that were not improper under state law. The Court concluded that

> [r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[90]

Congress' reaction was swift and thoughtless. Rather than speaking "more clearly" regarding what types of state and local political activity ought to be prosecuted on the federal level, Congress created 18 U.S.C. § 1346, which states simply that, for purposes of the fraud statutes, the term "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[91] Ignoring the Supreme Court's request for further definition of "honest services," a term never before seen in the United States Code, Congress essentially re-delegated to prosecutors and the judiciary responsibility for determining the contours of

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[88] United States v. Handakas, 286 F.3d 92, 96 (2d Cir. 2002) (overturning "honest services" fraud conviction on vagueness grounds).

[89] McNally v. United States, 483 U.S. 350, 360 (1987) ("[W]e read § 1341 as limited in scope to property rights."); *see also* Carpenter v. United States, 484 U.S. 19, 25 (1987) ("*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.").

[90] *McNally*, 483 U.S. at 360.

[91] 18 U.S.C. § 1346 (2000).

the honest services prohibition.[92] The legislative history indicates that Congress gave critical definitional questions (what *are* honest services?) no thought at all. Section 1346 was inserted into an otherwise unrelated omnibus drug bill for the first time on the day that the omnibus bill was passed, was never examined in committee, and had no contemporaneous legislative history.

The *post hoc* legislative history indicates that in this section Congress intended to overturn the Supreme Court's decision in *McNally*.[93] What Congress failed to consider, however, was that there *was* no extant, unified concept of "honest services": The circuits were split on the meaning of various aspects of that theory's application. What, then, were the courts to do? As the Second Circuit explained,

> [s]ome circuits have implemented § 1346 by resurrecting pre-*McNally* law. Thus, the Sixth Circuit has held that "§ 1346 has restored the mail fraud statute to its pre-*McNally* scope." And the Fifth Circuit, after noting that "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," observed that "Congress . . . has set us back on a course of defining 'honest services'"; and that Court has "turn[ed] to that task." However, one of these approaches simply reinstates the entire, dissonant body of prior circuit precedent, while the other invites the creation out of whole cloth of new judicial interpretations of "honest services"—interpretations that will undoubtedly vary from circuit to circuit. The result is "a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit."[94]

"Extraordinary," indeed.

Federal courts are now split every which way from Sunday on construction of this statute.[95] Why? Because read literally, this section would make a crime of the nondisclosure of virtually every breach of any public or private employment relationship–turning § 1346 into a "draconian personnel regulation" that transforms private and governmental "workplace violations into felonies."[96] As the Second Circuit has noted,

> a customer who importunes an employee to allow her to use the company's telephone access code to make an important long-distance telephone call, in the face of a written

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[92] *See, e.g.*, United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly, J., dissenting).

[93] *See id.* at 742-45 (Jolly, J., dissenting) (discussing legislative record).

[94] United States v. Handakas, 286 F.3d 92, 103 (2d Cir. 2002) (citations omitted) (alterations in original).

[95] *See, e.g.*, O'SULLIVAN, *supra* note 11, at 543-83; *see also* United States v. Rybicki, 354 F.3d 124, 162-65 (2d Cir. 2003) [hereinafter *Rybicki En Banc*] (en banc) (Jacobs, J., dissenting).

[96] United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997); *see also* United States v. Frost, 125 F.3d 346, 368 (6th Cir. 1997) ("[Section 1346's] literal terms suggest that dishonesty by an employee, standing alone, is a crime.").

> company policy expressly prohibiting non-employees from using the access code, could conceivably fall within the scope of the statute if read literally. So too could an employee's use of his company's letterhead to lend authority to a letter of complaint mailed to the employee's landlord in disregard of the company's code of conduct prohibiting the use of the company's letterhead for non-company business.[97]

To take a more current example, all those people who use their work email or internet connection for personal matters (assuming the connection runs in any respect interstate) are potentially subject to up to *twenty years'* imprisonment under § 1346. And in two circuits (Fourth and Seventh) but not in another (Second), the fact that the purported employer-"victim" does not feel victimized by this deviation from the employee manual and is satisfied with its employee's performance would not excuse the employee from criminal liability at the behest of a federal prosecutor eager to make a case. As the Fourth Circuit has stated, "[s]uch issues are not decided by the whim of the perceived victim. The perception of the victim or target of the scheme is ultimately irrelevant"[98]

Likewise, most government officials could be prosecuted under this section for failing to disclose *something* that their constituents might like to know. For example, many constituents would deem "material" government officials' true reasons for supporting certain legislation (e.g., horse-trading, promoting their chances for reelection, etc.) or, in the case of the executive, for myriad decisions including everything from budget allocations to going to war.[99]

Federal courts have thus struggled to give this penal provision a limiting construction, grafting onto the statute elements not apparent on its face rather than throwing the vague statute back in Congress' lap, as would be appropriate. Unfortunately, the courts disagree on the best means to contain the reach of the statute.[100] If judges cannot make sense of the statute, neither can laymen. As Judge Jacobs, dissenting in an en banc decision upholding § 1346 against a vagueness challenge, noted after surveying the ever-shifting contours of the "honest services" decisions in

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[97] United States v. Rybicki, 287 F.3d 257, 264 (2d Cir. 2002) [hereinafter *Rybicki Panel*], *aff'd*, 354 F.3d 124.

[98] United States v. Bereano, Nos. 95-5312, 95-5395, 1998 LEXIS 21131, *12 (4th Cir. Aug. 28, 1998) (unpublished opinion); *see also* United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975) (holding that employee may be convicted of defrauding employer of "honest and faithful services" even if victim took no retributive action and was satisfied with defendant's performance). The court further stated that "the defendant's intent must be judged by his actions, not the reaction of the mail fraud victims." *Id. But see* United States v. D'Amato, 39 F.3d 1249, 1257 (2d Cir. 1994).

[99] *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 139-43 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part).

[100] *See, e.g., Rybicki En Banc*, 354 F.3d at 145-47.

the Second Circuit: "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?"[101]

E. THE PENAL LAWS OF THE UNITED STATES MAY BE NOMINALLY PUBLIC, BUT THEY ARE NOT "ACCESSIBLE," DO NOT PROVIDE "FAIR NOTICE," AND INVITE ARBITRARY OR DISCRIMINATORY ENFORCEMENT

This lack of clarity has a number of consequences. First and most obviously, we have both a "fair notice" and an "accessibility" problem. For example, the words of § 1346 say very little, and the prosecutorial theories expanding the reach of the statute are certainly not clear on the statute's face. Thus, to secure anything close to "fair notice," citizens would have to wade through a confusing welter of courts of appeals decisions. Section 1346 is perhaps the most obvious example of this phenomenon, but it is assuredly not alone among commonly-used federal criminal statutes. Without reference to the—often conflicting—federal case law and, sometimes, volumes of federal regulations, one cannot know the law.

Problems of practical accessibility are compounded by the sheer bulk of federal criminal statutes and the random way in which they are organized, all of which "make[s] it difficult to ferret out the applicable law even in the age of electronic databases. It is particularly hard to find important offenses because they are often surrounded by trivial ones."[102] Once one (or more likely, several) potentially applicable code sections are identified, it is not infrequently the case that the statutory language is difficult to parse. While many statutes are well-drafted, many others are very "plainly deficient either in their conception or in their amenability to application."[103] Consider, for example, that "[m]any of the sentences in current title 18 run over 200 words," and one statute, 18 U.S.C. § 793, contains a lead sentence that is approximately 700 words long.[104] Further, given that different draftsmen over 200 years were responsible for the present code, it is not surprising that there is a great deal of inconsistency in language and structure among statutes pertaining to the same subject-matter. These overlaps in coverage among different sections, then, mean that the code is not only redundant but also internally inconsistent. In short, these statutes may be "public" in the sense of being available in print or on-line, but the "code" is not by any stretch "accessible" to the average citizen.

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[101] *Id.* at 160 (Jacobs, J., dissenting).

[102] Joost, *supra* note 1, at 214.

[103] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 58.

[104] Joost, *supra* note 1, at 198.

A lack of precision in statutory drafting fails due process vagueness standards not only when the statutory provision at issue cannot be said to provide "fair notice." An even more important consideration is whether "the legislature [has] establish[ed] minimal guidelines to govern law enforcement."[105] The test is whether the statute "permit[s] 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[106] I believe that if investigators dig deep enough, *anyone* can be convicted under § 1346. The Supreme Court has cautioned that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should bet set at large."[107] Yet that is precisely what § 1346 and many other code sections do. I join Judge Jacobs in his confidence that "prosecutors . . . and the Attorney General under whom they serve can be trusted to avoid any systematic abuse of such a statute; but we should construe [§ 1346] so that it serves to bind those who nevertheless may need constraint."[108] The potential for arbitrary and discriminatory enforcement is simply too great under many of the statutes in the federal "code" to do anything else.

F. THE ABOVE CHARACTERISTICS HAVE FUNDAMENTALLY CHANGED THE TRADITIONAL UNDERSTANDING OF THE APPROPRIATE ROLES OF JUDGES AND PROSECUTORS

The above discussion has highlighted the fact that Congress' default has empowered judges and prosecutors to an extraordinary degree. By leaving to prosecutors and judges the determination of the contours of these vague and overbroad statutes, Congress has effectively delegated its responsibility to determine the content of substantive federal criminal law. Let us turn, then, to the institutional consequences of this delegation.

1. Judges

The Supreme Court has decreed that federal crimes "are solely creatures of statute."[109] Arguably a central myth of federal criminal jurisprudence is that there are no "federal common law crimes."[110] To be sure, in a technical sense, federal judges are not creating a federal common

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[105] Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[106] *Id.* (quoting *Smith*, 415 U.S. at 575).

[107] *Id.* at 358 n.7.

[108] *Rybicki En Banc*, 354 F.3d at 162 (Jacobs, J., dissenting).

[109] Liparota v. United States, 471 U.S. 419, 424 (1985).

[110] *See* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

law of crime because they always ultimately found their decisions regarding the content of a criminal rule on a statute or regulation.[111] As Professor Jeffries has noted, "[t]oday, no court would invoke the unadorned rubrics of the common law, and the exigencies of law enforcement do not require resort to such authority. Penal legislation exists in such abundance that wholesale judicial creativity is simply unnecessary."[112] And it is worth recalling that "[e]very code will inevitably contain ambiguous language that will be interpreted by judges. A legislature's obligation is to reserve that delegation of judicial authority to the instances in which it is not reasonably avoided."[113] The fact that federal courts clearly engage in interstitial "lawmaking" in the course of interpreting positive law does not raise serious constitutional concerns. Even those most committed to traditional constitutional separation of powers principles acknowledge that "no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it."[114]

However, the line between common lawmaking and statutory interpretation is one of degree. Given the complete lack of definition in some important federal statutes, courts are in fact engaging in lawmaking in determining that such statutes in fact apply to varied fact situations when the statutes themselves do not in any intelligible terms speak to those situations. Section 1346 is one example of this phenomenon. Another excellent example are the rules that govern organizational criminal liability. There is *no generally applicable statute* in the federal criminal code that defines when corporations can be held liable for crimes. *Courts* have created the black-letter law of organizational liability: a corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment or authority if the agents intend, at least in part, to benefit the corporation.[115] In 1909, the Supreme Court rejected a due

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[111] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1246, 1247 (1996).

> Federal common law is generally used to refer to "federal judge-made law"—that is, rules of decision adopted and applied by federal courts that have the force and effect of positive federal law but "whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command."

Id. (citations omitted).

[112] *See, e.g.*, John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 202 (1985) (criticizing rule of strict construction because it does not serve stated goals).

[113] Robinson, *supra* note 8, at 231; *see also id.* at 252.

[114] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[115] *See* O'SULLIVAN, *supra* note 11, at 202.

process challenge to application of this *respondeat superior* formula when it was *included in a criminal statute*,[116] but courts since that time have simply assumed that this standard applies regardless of whether the criminal statute involved explicitly provides for such liability. Courts have also embroidered on the basic standard, for example, by rejecting a corporate "due diligence" defense—which would relieve organizations of criminal liability where their agents' actions were contrary to organizational policy or express organizational orders—based on what they infer *would be* congressional intent were Congress to speak.[117] Courts have in fact massaged the corporate liability standard to allow for corporate criminal liability where, under traditional *respondeat superior* liability principles, it would not be appropriate.[118] Indeed, given the way that courts have applied these principles, it is difficult to find a case in which a corporation *cannot* be tagged for the activities of its agents[119]—and all on the say-so of judges, rather than Congress.

These examples are not outliers: Once again, this phenomenon is one that is well-recognized among those who study and practice federal criminal law. For example, Professor Daniel Richman, who was a federal prosecutor for many years, knowledgeably asserts that

> anyone with more than a passing familiarity with federal criminal law is struck by the extraordinary extent to which Congress has eschewed legislative specificity in this highly sensitive area. The result, intended or otherwise, has been to transfer a considerable degree of lawmaking authority to the other branches of government.[120]

Even Professor Dan Kahan, who is less troubled by Congress' default in this area than I, has acknowledged that "[t]he proposition that federal crimes are 'solely creatures of statute' is a truth so partial that it is nearly a

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[116] N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481 (1909).

[117] *See* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972).

[118] Under traditional *respondeat superior* principles, if there is no identifiable individual whose conduct and state of mind can be attributed to the corporation, the corporation would not be liable. This conceptual difficulty has been obviated by courts in a number of ways. *See* O'SULLIVAN, *supra* note 11, at 221-22. One significant departure was created by the First Circuit and adopted by most other circuits. Thus, in *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856-57 (1st Cir. 1987), the First Circuit held that a corporation could be found liable *either* under traditional *respondeat superior* rules *or* under a theory of liability that allowed the jury to (1) "collect" the diffuse knowledge of a number of agents and attribute it to the corporation; and (2) find that a corporation acted "willfully" where the government proved "flagrant organizational indifference."

[119] *See, e.g.*, United States v. Sun-Diamond Growers of Cal., 138 F.3d 961 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999).

[120] Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 761 (1999).

lie. To be sure, Congress must speak before a person can be convicted of a federal crime, but it needn't say much of anything when it does."[121]

The bar on judicial making in the criminal realm is not a theoretical nicety. It is founded in a number of very basic principles—separation of powers being one. "Enlightenment theoreticians decreed that liberty is most secure when power is fractured and separated."[122] It would be a dangerous concentration of power for life tenured judges to both propound the law and to preside over its interpretation and administration. More fundamentally, "[a]s the branch most directly accountable to the people, only the legislature could validate the surrender of individual freedom necessary to formulation of the social contract."[123]

The bar on judicial crime-creation is also founded on "*the* first principle"[124] of criminal law—the principle of legality—which outlaws the retroactive definition of criminal offenses.

> It is condemned because it is retroactive and also because it is judicial—that is, accomplished by an institution not recognized as politically competent to define crime. Thus, a fuller statement of the legality ideal would be that it stands for the desirability in principle of advance legislative specification of criminal misconduct.[125]

The legality principle has been identified as the most basic of human rights in a myriad of international treaties and declarations.[126]

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[121] Kahan, *Is* Chevron *Relevant?*, *supra* note 81, at 471 (footnote omitted); *see also* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 BUFF. CRIM. L. REV. 5 (1997).

[122] Jeffries, *supra* note 112, at 202 (criticizing rule of strict construction because it does not serve stated goals); *see also* Dan M. Kahan, *Lenity and Federal Law Crimes*, 1994 SUP. CT. REV. 345. *But see* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

[123] Jeffries, *supra* note 112, at 202; *see also* Whalen v. United States, 445 U.S. 684, 689 (1980) (affirming that "within our federal constitutional framework . . . the power to define criminal offenses[,] and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress").

[124] HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79–80 (1968).

[125] Jeffries, *supra* note 112, at 190.

[126] In particular, most major human rights treaties contain explicit protection against being held guilty of a penal offence "on account of any act or omission which did not constitute a penal offence at the time when it was committed" or being punished more severely than is proscribed by law at the time of the offense. Universal Declaration of Human Rights, U.N. G.A. Res. 217A, art. 11(2); *see also* International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 15(1) (Dec. 16, 1966); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, arts. XXV, XXVI (1948); American Convention on Human Rights, O.A.S. Treaty Ser. No. 36, art. 9 (1969); African [Banjul] Charter on Human and Peoples' Rights, O.A.U. Doc. CAB/LEG/67/3 Rev. 5, art. 7(2) (1981); European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 7(1) (1950). The same right is guaranteed to defendants

This requisite is, in part, operationalized in U.S. law in the due process vagueness doctrine,[127] which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[128] "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[129] The vagueness doctrine's "connection to legality is obvious: a law whose meaning can only be guessed at remits the actual task of defining criminal misconduct to retroactive judicial decisionmaking."[130]

As the above discussion demonstrates, however, judges have (in this author's view), all too infrequently attended to the allocation of lawmaking responsibility demanded by our democratic system, by separation of powers, by the principle of legality, and by human rights and due process guarantees. Again, it is important to emphasize that I am not questioning their good faith. Many judges may decide that, to do justice in individual cases, they have no choice but to do *something* to clarify the law at issue, given elected officials' demonstrated unwillingness to attend properly to the dismal state of the federal criminal code generally. My view, however, is that by attempting to carry Congress' water through piecemeal fixes, they have in fact made a morass out of a mess. Moreover, if judges were to more consistent in requiring Congress to fix what ails many statutes, perhaps Congress would be more willing to address the morass through comprehensive code reform.

2. Prosecutors

The same principles that demand that Congress take the laboring oar in identifying the conduct that will be subject to penal sanction—beforehand and with reasonable specificity and clarity—also, of course, bars prosecutorial law-making. And, as noted above, Congress' penchant for federalization, overcriminalization, and speaking in overbroad and vague terms has had the direct effect of empowering prosecutors with vast discretion. Federal prosecutors exercise a very broad—and for the most

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brought to answer for international crimes before international criminal tribunals. *See* Rome Statute of the International Criminal Court, arts. 22 (*Nullem crimen sine lege*), 23 (*Nulla poena sine lege*), 24 (Non-retroactivity *ratione personae*).

[127] Jeffries, *supra* note 112, at 196.

[128] Kolender v. Lawson, 461 U.S. 352, 357 (1983).

[129] Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

[130] Jeffries, *supra* note 112, at 196.

part unreviewable—discretion in selecting cases and charges. They can also fundamentally change the content of a vaguely worded criminal statute by pursuing novel theories of prosecution—for example, by creating the "honest services" theory to address public corruption. Prosecutors "make law," then, by exercising their discretion to make enforcement decisions that functionally determine the real shape of the federal code and to formulate theories of prosecution that expand the accepted understandings of the reach of certain criminal statutes. In these respects, prosecutors are allied with judges in determining the true content of federal penal laws.

Some prosecutorial discretion is inevitable, and it *can be* a positive.[131] Most codes will provide prosecutors with some flexibility in enforcement; as noted above, statutes that are *too* specific may irrationally foreclose the prosecution of persons who knowingly imposed criminal harm on others. And most common law justice systems include some provision for selectivity in prosecution. Otherwise, the social and economic costs of full enforcement of the code would be oppressive. Finally, as Judge Gerard Lynch put it,

> [s]o long as our criminal codes contain too many prohibitions, the contents of which are left to be defined by their implementation, or which cover conduct that is clearly not intended to be punished in every instance, or which provide for the punishment of those who act without wrongful intent, prosecutors must exercise judgment about which of the many cases that are technically covered by the criminal laws are really worthy of criminal punishment.[132]

Again, I believe that most prosecutors act in the good faith belief that they are "doing justice." And I also believe that they sometimes *do* "do justice" by stretching the code. For example, there most certainly *are* cases that were prosecuted under an "honest services" theory in which the defendants deserved criminal sanction, although one would wish it were dispensed under a statute that actually addressed their particular crime.

The problem is that there is *too much* discretion available to prosecutors. Prosecutorial discretion flows from a number of circumstances in addition to those noted above.[133] First and foremost is the fact that the

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[131] *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2138-2142 (1998).

[132] *Id.* at 2136-37.

[133] It is notoriously difficult to do empirical work relating to declination statistics because the data is not kept in a detailed, organized way and is generally not revealed to persons outside of the Department of Justice. An unusual empirical study of the exercise of prosecutorial discretion by federal prosecutors in the Northern District of Illinois, however, revealed that formal charges were filed in less than one-fifth of the matters received by the U.S. Attorney in that district. Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 257, 278

number of crimes worthy of investigation outstrips the resources available to pursue them. Prosecutors' flexibility in responding to these constraints is augmented by the availability of alternative civil and regulatory sanctions; thus prosecutors can decline a case with some confidence that the misconduct involved will be addressed through alternative civil and regulatory sanctions. Much of what is subject to federal prosecution is also subject to prosecution under state law.[134] Accordingly, prosecutors can use their judgment regarding what does and does not deserve federal criminal action.

I view this as the "natural" discretion imbedded in the job given the overabundance of crime and the availability of alternative remedies. That "natural" discretion, however, is exaggerated in a potentially dangerous way by the state of the code. The "code" allows prosecutors to bring cases that would not be warranted under a clean and rational system, and it permits them choices that simply leverage their bargaining power vis-a-vis the defense but (as we shall see below) serve no legitimate penal purpose. I have no problem with plea bargaining—it often serves the interests of the government *and* the defense. If, however, prosecutors are given undue power to pressure defendants into pleading because of code irrationalities, the result may be disparate treatment of similarly situated defendants based on the idiosyncratic choices of prosecutors.

(1980). When the question whether there was perceived to be a sufficient basis to obtain a conviction was factored into the equation, the ratio increased only to slightly higher than one of four. *Id.* at 278-79. Forty-five percent of the declinations were based to some degree on evidentiary or legal barriers to prosecution. *Id.* at 264, 278. "About two-thirds of the remaining declinations involved the use of an alternative to federal prosecution (most often state or local prosecution), and the rest—18% of all declinations—were based entirely on policy considerations, especially the perceived triviality of the offense." *Id.* at 278; *see also* John Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L.J. 174 (1966) (describing considerations in exercise of prosecutorial discretion).

[134] Some argue that this overlap creates its own equitable problems.

> Although the substance of federal criminal law has come to duplicate much of state criminal law, the procedures that apply and the sentences that convicted defendants receive and serve in the federal criminal justice system are often far different than those encountered in state courts. Notwithstanding some significant exceptions, defendants typically fare considerably worse when prosecuted in federal court.

Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668 (1997); *see also* ABA TASK FORCE REPORT, *supra* note 23, at 27–35. Thus, even in situations where the defendant's conduct is "wrong" in a moral sense, substantial equitable concerns are raised when a defendant had no way of knowing until the appeal of his conviction was decided whether his conduct violated *federal* laws that exponentially increased his sentencing exposure when compared to his confederates prosecuted in state courts. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005).

A more fundamental concern is that prosecutors, in plea bargaining, can offer defendants such a stark choice between a lenient plea offer (say a five-year count) and a threat of harsh charges if the plea is rejected (the potential for a twenty-year sentence after trial) that risk-averse but innocent defendants will be coerced into a guilty plea. In some white-collar cases, where the issue is less about what happened or who "did it" (the drug deal, assault, etc.) and more about what the defendant's state of mind was at the time or whether the conduct at issue should be sanctioned under an expansive theory of the law, the issue is more subtle. Where a defendant's culpability—even on the facts—is arguable, prosecutors can avoid the adjudication of novel theories or of difficult questions of intent by pressuring a plea. The cases may not involve a complete "innocent," but they may be ones where formal adjudication would reveal that what the defendant did (or what he thought while doing it) should not be criminally sanctioned or should be sanctioned much less stringently than charged.

In sum, the overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice. While it would be impossible–and counterproductive—to attempt to stamp out all prosecutorial discretion, there is clearly a point beyond which the code's empowerment of prosecutors is harmful, whether measured in the language of "efficiency" or of "justice." And the overwhelming majority of those familiar with the federal code—including many former prosecutors like me—believe that we have passed that tipping point by a substantial margin.

The fact that prosecutors have such (in my view, outsized) discretion has in part contributed to a reality of prosecutorial functioning that is fundamentally at odds with the traditional conception of prosecutors as advocates in a system of justice where convictions are obtained through adversarial testing.[135] It is more accurate to characterize prosecutors as "administrators" or "quasi-judicial" actors than as advocates. This re-conceptualization of the prosecutorial role is warranted because of the simple truth that the outcome in most cases is determined not by a court or a jury but by the prosecutor. Prosecutors have broad power to pick and choose among cases and, because of the state of the code, to secure indictments and force dispositions; the fact that somewhere around *95% of all federal criminal cases are resolved by guilty plea*[136] demonstrates that

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[135] *See, e.g., id. passim.*

[136] *See, e.g.*, U.S. SENTENCING COMM'N, 2003 DATAFILE, USSCFY03 fig.C (2003) (showing that guilty plea rates varied between 94.6% and 97.1% between 1999 and 2003), *available at* http://www.ussc.gov./ANNRPT/2003/Fig-c.pdf.

criminal law is increasingly an administrative system in which the prosecutor reigns supreme (with occasional "appeals" to the jury).

The costs of *undue* prosecutorial power are many. I have discussed above the concerns that undue prosecutorial discretion may well result in arbitrary and discriminatory enforcement decisions. In addition, as a matter of separation of powers, prosecutors' broad discretion allows them to usurp Congress's role in determining what should and should not be sanctioned criminally. One may further assert that prosecutors, using their discretion to act as administrative adjudicators in declining some cases and plea bargaining away others, are usurping the role of courts and juries. Some contend that prosecutors are not competent—given their adversarial orientation, selection, and training—to dispense the type of neutral justice contemplated by such a role, and that politics and other improper considerations may well taint their exercises of discretion. Certainly, because prosecutorial discretion is largely exercised outside the public eye, it is difficult to document, let alone to regulate or check. The existence of this broad power also "relieve[s] pressure on the public and the legislature to make important and painful decisions."[137] Instead of requiring that hard policy and political choices regarding the allocation of scarce criminal justice resources be debated openly and made publicly, this discretionary power allows prosecutors to make hidden resource decisions.

Most fundamentally, the quantity of unreviewed or unreviewable discretion vested in federal prosecutors obviously raises fundamental questions regarding fair process and equal treatment. As Professor James Vorenberg argued,

> prosecutors are not held to anything remotely like what due process would require if they were engaged in an acknowledged rather than a hidden system of adjudication. No uniform, pre-announced rules inform the defendant and control the decisionmaker; a single official can invoke society's harshest sanctions on the basis of ad hoc personal judgments. Prosecutors can and do accord different treatment—prison for some and probation or diversion to others—on grounds that are not written down anywhere and may not have been either rational, consistent, or discoverable in advance.[138]

The risk of unequal treatment created by standardless discretion is troubling not only as a threat to due process but in its own right as well. Giving prosecutors the power to invoke or deny punishment at their discretion raises the prospect that society's most fundamental sanctions will be imposed arbitrarily and capriciously

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[137] James Vorenberg, *Decent Restraints in Prosecutorial Power*, 94 HARV. L. REV. 1521, 1559 (1981).

[138] *Id.* at 1554.

and that the least favored members of the community—racial and ethnic minorities, social outcasts, the poor—will be treated most harshly.[139]

In short, although it is probably beneficial and certainly inevitable that federal prosecutors exercise *some* discretion in deciding when and how to bring cases, there are substantial costs to investing prosecutors with *too* much discretion. Among the suggestions made for restraining prosecutorial discretion or making prosecutors more accountable for its exercise are: instituting formal guidelines to control prosecutors' choices; legislative oversight; increased judicial activism in reviewing prosecutorial decisions; increasing the public visibility of prosecutorial choices; making governing ethical standards more stringent and specific; and educating prosecutors on their duties and the ramifications of their choices.[140] All of these suggestions have merit. All except perhaps the last, however, are in my view unlikely to come to fruition. In sources too numerous to recount, commentators have documented the ever-increasing discretion vested in federal prosecutors and almost universally bemoaned this increase in prosecutorial power as a pernicious development—but none of these reforms has been seriously considered. The final suggested "fix" is code reform. Although it may, if properly done, be the most effective in appropriately cabining prosecutorial discretion, it is, in the view of many, also the least likely to happen. As is discussed further in Part III, *infra*, my view is that the potential for code reform is higher than it has been for decades as a result of the Supreme Court's *Booker* decision.

G. THE FINAL COST OF CODE IRRATIONALITY IS LOSS OF PUBLIC RESPECT FOR, AND VOLUNTARY COMPLIANCE WITH, CRIMINAL NORMS

I have traced in the above discussion some of the costs of code irrationality: inefficiency and ineffectiveness in enforcement of the criminal law, "fair notice" and accessibility issues, the potential for arbitrary and discriminatory enforcement, the undue delegation of law-making authority to judges and prosecutors, and the consequences that delegation has for the code and for the traditional roles of judges and prosecutors in the

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[139] *Id.* at 1554–55; *see also generally* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969).

[140] *See, e.g.*, Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 763–777 (1996); Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1530–35 (2000); Vorenberg, *supra* note 137, at 1562–73; *see also* Kathleen F. Brickey, *Federal Criminal Code Reform: Hidden Costs, Illusory Benefits*, 2 BUFF. CRIM. L. REV. 161 (1998); Stuntz, *supra* note 54, at 505.

administration of criminal law. All of these are fairly specific, and even potentially measurable. A perhaps greater but harder to quantify cost is the affect that a chaotic code has on societal confidence in the criminal justice system.

A traditional criminal code has a dual audience. First, it speaks to lawyers, judges, jurors and other participants in the criminal system in defining the rules they must employ to decide whether a defendant should be criminally liable, and for what.[141] As noted above, the inefficiency of the code obviously means that those involved in criminal cases—judges, prosecutors, defense lawyers, defendants, and others—will needlessly expend time and energy to deal with poorly drafted, organized, or conceptualized criminal provisions. But the inefficient and ineffective enforcement of criminal law has reverberations far beyond opportunity costs expressed in terms of resources. A code's second audience is the general public, and its purpose in this regard is to "announce[] the law's commands to those whose conduct it seeks to influence."[142]

Obviously, if the law is in a real sense inaccessible, people cannot make the rational calculation necessary for effective deterrence. A code correctly perceived to be irrational, moreover, will undermine faith in the criminal justice system as a whole, thus encouraging the view that "beating the system" is neither immoral nor antisocial. The most unique feature of the penal law is its ability to impose upon wrongdoers the moral stigma of a criminal conviction. Criminal law is critical in assisting in the "building, shaping, and maintaining of [moral] norms and moral principles."[143] If criminal law

> earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases where the propriety of certain conduct is unsettled or ambiguous in the mind of the actor.[144]

This expressive function is particularly important in a complex, multi-cultural and multi-ethnic society such as ours. Obviously, law's expressive function, and criminal law's moral stigma, are only effective where the public is in fact persuaded of the moral culpability of offenders. "In this respect, the criminal law exhibits unavoidable circularity: criminality turns on morality, yet morality may itself turn on criminality. Hence, one of the features that makes criminal law unique—the moral stigma associated with

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[141] *See, e.g.*, Robinson, *supra* note 8, at 268.

[142] *Id.*

[143] *Id.* at 264.

[144] *Id.*

a criminal conviction—is not self-executing. It can be lost over time with overreaching."[145]

"[T]he main goal of penal reform is to promote respect for the law by making law respectable."[146] Public compliance with the law—whether through fear (deterrence) or example (reinforcement of moral norms)—is critical because resource constraints mean that enforcement efforts cannot alone reduce crime rates. To induce the necessary public voluntary compliance with the law's requirements,

> the criminal laws and the criminal process must be, and must be publicly perceived to be, sensible, certain, impartial, and efficient. A nation can achieve neither the reality nor the perception of these qualities if the laws themselves are confusing and complex, if important legal consequences turn on accidents in legislative drafting, and if just disposition of offenders often rests as much on chance as on design.[147]

II. APPLICATION TO OBSTRUCTION

I was inspired to attempt to use some of the non-coercive obstruction of justice offenses found in the United States Code to illustrate many of the problems identified above by two circumstances. First, I can, without burdening readers with too broad a statutory survey, demonstrate some of the greatest problems with the "code" generally. Second, it appears to me that white-collar prosecutors are increasingly electing to rely on obstruction charges in high-profile cases such as the criminal prosecutions of Frank Quattrone (former star banker for Credit Suisse First Boston), Andrew Fastow (former CFO of Enron), Martha Stewart, Sam Waksal (founder of ImClone Systems), Arthur Andersen LLP, and "Scooter" Libby (the former Chief of Staff for Vice President Cheney). Perhaps the increased visibility of these offenses will translate into an increased interest in the deficiencies of this portion of the "code." In the best case, then, my attempt to make clear those deficiencies may serve my larger purpose in promoting comprehensive code reform.

There is one point that should be underscored at the inception of this analysis. I believe obstruction of justice is a serious crime and should be treated as such, independent of the merits of the matter under investigation. For example, Martha Stewart was charged with conspiracy, false statements, obstruction of justice under 18 U.S.C. § 1505, and securities fraud in connection with her sale of shares of ImClone Systems Inc. stock, allegedly after a "tip" from ImClone's founder. Although convicted for

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[145] Lazarus, *supra* note 29, at 2443.

[146] Schwartz, *supra* note 8, at 4.

[147] Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 55-56.

obstruction, lying to federal investigators, and conspiracy in connection with the false explanations she had offered for her stock sale, she was never indicted for the alleged insider trading that spawned the investigation. Some criticize the prosecutors' decision to bring the case, arguing that "it is far from clear whether Stewart's trades were unlawful, let alone illegal, and it is hard to identify any harm her acts directly caused anyone."[148]

These arguments fundamentally misconceive the harm in obstruction, which is not dependant on the merits of the matter "obstructed."

> Considering especially the size of modern government, the prominent role it plays, and its far-reaching effects, it is vital to impose criminal sanctions to safeguard the integrity of government operations so as to assure the effective transaction of the public's business and ultimately to maintain the highest degree of public confidence in government."[149]

Where the effective conduct of the criminal justice system is at issue, obstruction is particularly pernicious. Not only may it impair investigators' ability to discern whether the underlying activity *is* a crime and (if it is) to successfully prosecute it, but also, if unaddressed, criminally obstructive activity will encourage a public belief that the system is gamed on a regular basis with no consequences. It is difficult to promote respect for law, and law administration, when attempts to impede the effective administration of justice are essentially permitted if they are *successful* in preventing prosecutions. I bring this up to underscore my belief that so potentially serious is the harm presented by obstruction of justice, the "code's" defaults in this area are particularly acute.

The obstruction provisions I will be talking about demonstrate quite graphically how incompletely defined, redundant, and internally inconsistent the obstruction portion of the "code" is. They provide clear examples of the irrationalities in organization and grading that plague the code as a whole. Examining the post-2002 state of the criminal code should also illustrate Congress' penchant for reactive, and not terribly thoughtful, criminal legislation. This is an area where statutes have recently been enacted in response to specific events—such as, most recently, the destruction of Enron audit records by Andersen personnel and the resultant prosecution and conviction of Andersen. As a result, the non-coercive obstruction provisions are fairly incoherent, often overlapping, and

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[148] Jeanne L. Schroeder, *Envy and Outsider Trading: The Case of Martha Stewart*, 26 CARDOZO L. REV. 2023, 2023 (2004); *see also* Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 DICK. L. REV. 1107 (2005).

[149] S. REP. NO. 97-307, at 289 (1981) (as reported by S. Comm. on the Judiciary accompanying S. 1630, the Criminal Code Reform Act of 1981).

overbroad—leaving much to the discretion of prosecutors. Judges' good faith attempts to "rationalize" the law of obstruction through judicial "fixes" have resulted in yet more confusion.

To the extent that I find a recent obstruction prosecution helpful in illustrating the code's deficiencies, it is Andersen, rather than Martha Stewart. The Andersen case demonstrates that non-coercive obstruction offenses are so broadly defined that they can encompass almost anything—even entirely legal acts—that prosecutors or juries might find troubling. Andersen, an accounting and consulting company that served as the auditor for Enron Corp., was charged with obstruction of justice under § 1512(b) based on its wholesale destruction of Enron-related workpapers just prior to the inception of an SEC investigation into Enron's finances. The jury, however, apparently did not convict Andersen based on the conduct charged in the indictment. Rather, it named an in-house legal counsel, Nancy Temple, as the person who rendered Andersen liable by virtue of legal advice she communicated in one email suggesting revisions to a *draft* memo for the Andersen files.[150] The Andersen partner who was drafting the memo accepted her suggested changes, and the jury concluded that Temple had "corruptly persuaded"[151] the partner to "alter" the draft so as to render it unavailable for use in subsequent legal proceedings. In short, the jury was able to read the language of § 1512(b) to criminally sanction what noted legal ethics expert Professor Stephen Gillers characterized as precisely "the kind of advice lawyers give clients all the time."[152]

A. THE OBSTRUCTION STATUTES ARE SPREAD THROUGHOUT THE "CODE" AND WHAT PROVISIONS HAVE FOUND THEIR WAY INTO CHAPTER 73 ARE UNORGANIZED AND CONCEPTUALLY INCOHERENT

Chapter 73 of Title 18 is supposed to contain the criminal code provisions related to "Obstruction of Justice." As is typical, however, obstruction prohibitions can be found scattered throughout Title 18[153] and beyond. For example, bribing a juror can be prosecuted under § 201, which resides in the Bribery, Graft, and Conflicts of Interests Chapter of Title 18,

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[150] *See* O'SULLIVAN, *supra* note 11, at 449-67.

[151] *See* Sterling P. A. Darling, Jr., *Mitigating the Impressionability of the Incorporeal Mind: Reassessing Unanimity Following the Obstruction of Justice Case of* United States v. Arthur Andersen, LLP, 40 AM. CRIM. L. REV. 1625, 1630-31 (2003).

[152] Stephen Gillers, *The Flaw in the Andersen Verdict*, N.Y. TIMES, June 18, 2002, at A25.

[153] *See, e.g.*, 18 U.S.C. § 551 (2000); *id.* § 665(c); *id.* § 1033(d) (crimes by or affecting persons engaged in the business of insurance whose activities affect interstate commerce).

or it can be pursued as obstruction of justice under § 1503, which is found within the Obstruction of Justice Chapter of the same title, or both. Many statutes which deal with obstructive activity in specific contexts, such as corrupt endeavors to obstruct the due administration of the IRS laws, can be found scattered through the remaining forty-nine Titles of the United States Code.[154] The potential activities covered by these (and other) sections of the Code are wide-ranging but, given the lack of systematic organization, they can be difficult to locate. Once they *are* located, however, prosecutors faced with obstructive activity in specific contexts can choose the particular provision or a more general one, or (assuming no double jeopardy problems) both, depending upon which provision is easier to prove or carries sentencing advantages.

Much of the legwork necessary to rationalize the obstruction offenses has already been done. For example, in the proposed but never enacted Criminal Code Reform Act of 1981, S. 1630, members of Congress conceptualized the different ways that obstruction can occur, and identified those offenses within each category that warranted federal attention.[155] Congress proposed creating an overall Chapter entitled "Offenses Involving Government Processes" and splitting obstruction offenses into three subchapters:

> "General Obstruction of Government Functions" (which included obstructing a government function by fraud; obstructing a government function by physical interference; and impersonating an official);
>
> "Obstructions of Law Enforcement" (including hindering law enforcement; bail jumping; escape; providing or possessing contraband in a prison; and flight to avoid prosecution or appearance as a witness); and
>
> "Obstruction of Justice" (which included witness bribery; corrupting a witness or an informant; tampering with a witness, victim, or an informant; retaliating against a witness or an informant; tampering with physical evidence; improperly influencing a juror; monitoring jury deliberations; and demonstrating to influence a judicial proceeding).[156]

Within the Obstruction Chapter were additional subchapters containing related categories of offenses: "Contempt Offenses" (including criminal contempt; failing to appear as a witness; refusing to testify or to produce information; obstructing a proceeding by disorderly conduct; and

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[154] *See* 26 U.S.C. § 7206(5) (2000); 28 U.S.C. § 7212(a) (2000); *see also, e.g.*, 45 U.S.C. § 60 (2000); 49 U.S.C. § 1472(g) (2000).

[155] S. REP. NO. 97-307, at 289 (1981) (as reported by the Sen. Comm. on the Judiciary accompanying S. 1630, the Criminal Code Reform Act of 1981).

[156] *See id.* at 289-367.

disobeying a judicial order)[157]; "Perjury False Statements, and Related Offenses" (including perjury; false swearing; making a false statement; tampering with a government record; and failing to keep a government record)[158]; and "Official Corruption and Intimidation."[159]

This work is nowhere reflected in the current United States Code. As noted, obstruction provisions remain scattered through the Code, with eighteen substantive criminal prohibition jumbled together in Chapter 73 of Title 18 (along with two provisions relating to civil actions and one definitional section). The offenses in Chapter 73 relate to all three of the "obstruction" subcategories noted above but they are not grouped according to kind—that is, the kind of obstruction with which they conceptually belong. Nor does each section target a specific type of obstructive activity (e.g., tampering with physical evidence as opposed to tampering with witnesses). To give a sense of just what an organizational and conceptual mess this "code" is, *one section*, 18 U.S.C. § 1503, has been applied to conduct that falls in *at least five* of the discrete subchapters identified in S. 1630: general obstruction of a governmental function by fraud (e.g., lawyers' efforts to obtain monies from criminal defendants by false promises to "fix" the proceedings or pay off criminal justice officials); obstruction of justice (e.g., knowing concealment, falsification, or destruction of evidence to be submitted to a grand jury or court and efforts to alter the testimony of witnesses for corrupt purposes); contempt (e.g., refusing to testify before a grand jury after immunity has been conferred); false statements and perjury (e.g., false statements made to federal agents and false testimony before a grand jury or trial court); and public corruption (e.g., bribing a juror).

Consistent with this lack of discipline, the sections in Chapter 73 are subject to serious overlaps in coverage, as we shall see in our specific discussion of the statutes. This means that the irrationality of the grading of current offenses—reflected in the statutory maximums attached to different provisions—can give prosecutors substantial power as they pick and choose among potentially applicable code provisions. Finally, it is somewhat difficult to know whether the coverage of obstruction offenses now in the United States Code is as comprehensive as S. 1630 because the existing offenses are vague and elastic, as well as scattered and disorganized. While it is not clear whether the existing code is underinclusive, we do know that it is overinclusive. For example, Chapter 73 contains: discrete provisions not thought necessary by congressional code reformers in the 1980's (e.g.,

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[157] *Id.* at 367-89.

[158] *Id.* at 389-420.

[159] *Id.* at 420-63.

assault on a process server (§ 1501) and resistance to an extradition agent (§ 1502)); at least one prohibition that probably unnecessarily invades state prerogatives (e.g., obstruction of state or local law enforcement (§ 1511)); and a number of specific provisions that could probably be either folded into more general prohibitions or deleted entirely (e.g., obstruction of federal audit (§ 1516); obstructing examination of financial institution (§ 1517); obstruction of criminal investigations of health care offenses (§ 1518); destruction of corporate audit records (§ 1520)). Thus, one could argue that seven out of the eighteen substantive criminal statutes in Chapter 73 should not be in there.

I will not try to make my way through all the offenses in Chapter 73. My analysis focuses on the two provisions traditionally used in white-collar cases: the "omnibus" clause of § 1503 and the more recently enacted non-coercive witness tampering prohibitions in § 1512(b). Brief coverage is given to a less frequently invoked statute, § 1505, which has been used where obstructive activity takes place in the context of federal agency and congressional investigations and proceedings. Finally, Congress's additions to the code in the Sarbanes-Oxley Act of 2002,[160] 18 U.S.C. §§ 1512(c), 1519, and 1520, are discussed and compared with the protections already embodied in sections 1503, 1505, and 1512(b).

"[T]he purpose of § 1503 is to protect not only the procedures of the criminal system but also the very goal of that system—to achieve justice."[161] This statute "was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.'"[162] The main body of § 1503[163] specifically targets conduct that

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[160] Pub. L. No. 107–204, 116 Stat. 745 (2002).

[161] United States v. Griffin, 589 F.2d 200, 204 (5th Cir.1979).

[162] *Id.* at 206–07 (quoting Anderson v. United States, 215 F.2d 84, 88 (6th Cir. 1954)).

[163] 18 U.S.C. § 1503 (2000). Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of

interferes with the duties of a juror or court officer. The "omnibus" clause is the portion of the statute with which we are principally concerned and it states that "[w]hoever . . . *corruptly* or by threats or force, or by any threatening letter or communication, *influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice*, shall be punished."[164] The omnibus clause "is essentially a catch-all provision which generally prohibits conduct that interferes with the due administration of justice."[165]

Section 1505 is very similar to § 1503 in structure and (at least currently) effect.[166] While § 1503 deals with obstruction in the context of judicial proceedings, § 1505 applies to corrupt endeavors to obstruct or impede investigations conducted by Congress or administrative agencies.

Congress has tinkered with Chapter 73 increasingly over time, but its most significant amendments to the obstruction provisions occurred in 1982 and 2002. In 1982, Congress removed the express references to intimidating or influencing witnesses in § 1503 and § 1505, and created a new, consolidated prohibition on witness tampering: 18 U.S.C. § 1512.[167]

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that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

[164] *Id.*

[165] United States v. Thomas, 916 F.2d 647, 650 n.3 (11th Cir. 1990).

[166] Section 1505 reads, in relevant part:

Whoever corruptly, or by threats or force, or by threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of Congress—Shall be fined under this title, imprisoned not more than five years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1505.

[167] Consistent with the focus of this article, the following are excerpted portions of § 1512 (Tampering with a witness, victim, or an informant) which deal with non-coercive witness tampering:

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

Until Congress amended § 1512 in 2002 (more about that below), § 1512 was specifically concerned with protecting witnesses and the integrity of physical evidence.

When first enacted, § 1512 contained provisions prohibiting tampering with witnesses by intimidation, physical force, threats, misleading conduct,

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(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly–

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

. . .

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant. . .

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or harassment.[168] With the exception of misleading conduct, all the activities proscribed by the 1982 incarnation of § 1512 involved some element of coercion. This provision, then, did not cover all the non-coercive types of witness tampering that courts had, prior to 1982, recognized as falling with the "omnibus" obstruction prohibition in § 1503. Accordingly, even after passage of § 1512, prosecutors successfully continued to invoke § 1503 to address non-coercive witness tampering such as "efforts to urge a witness to give false testimony or withhold or destroy evidence."[169] In 1988, Congress responded to this perceived gap by amending § 1512 to include the "corruptly persuades" language.[170]

Sections 1503 and 1505 are different from § 1512 in structure as well as intended affect. Sections 1503 and 1505 are focused on "corrupt endeavors" to interfere with pending judicial, congressional or agency proceedings. Under § 1512, only one of the proscribed activities—persuasion—requires proof of a "corrupt" motive. Instead of § 1503's broad prohibition on any type of "corrupt" activity that obstructs the "due administration of justice," then, § 1512 focuses more narrowly on specific types of conduct through which physical evidence can be compromised or witnesses tampered with. In short, § 1512 was said to change the focus from corrupt *motives* to presumptively corrupt *methods*. The problem is, as the Supreme Court emphasized in *Arthur Andersen, LLP v. United States*[171] (*Andersen*), not all of the methods outlawed *are* inherently corrupt.

In the Sarbanes-Oxley Act of 2002, Congress again made substantial changes to the obstruction of justice chapter in reaction to the scandal surrounding Andersen's destruction of Enron-related audit records.[172] It added a new omnibus provision, § 1512(c)(2), which mimics in major part § 1503's omnibus clause but is applicable in contexts outside of the judicial proceedings that § 1503 protects, such as in proceedings before federal agencies and in congressional inquiries. Violations of § 1512(c)(2) carry a maximum sentence of double that usually available under § 1503. In the same Act, Congress also tacked two additional provisions, 18 U.S.C. §§ 1519 and 1520 onto the end of Chapter 73.

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[168] *See* Victim and Witness Protection Act, Pub. L. No. 97–291, 96 Stat. 1248 (1982).

[169] *See, e.g.*, United States v. Ladum, 141 F.3d 1328, 1338 (9th Cir.1998); United States v. Lester, 749 F.2d 1288, 1294 (9th Cir. 1984).

[170] *See* United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997).

[171] 125 S. Ct. 2129 (2005).

[172] 18 U.S.C. §§ 1519-20.

B. FEDERAL NON-COERCIVE OBSTRUCTION OFFENSES LACK APPROPRIATE DEFINITION AND ARE OFTEN OVERBROAD, THUS ENCOURAGING JUDICIAL LAW-MAKING

Two of the problems identified above were the code's vagueness and over breadth. I will illustrate these qualities by reference to two commonly-used provisions. First, § 1503's omnibus provision has been on the books in substantially the same form for over a hundred years, yet the elements of the crime are still emerging. As will be demonstrated in the following materials, in response to the statute's lack of definition, courts have nearly doubled the elements of the crime visible on the face of the statute. Unfortunately, federal courts still do not agree on the content or appropriate application of these elements. This lack of definition in statutory terms not only invites further judicial law-making, but also permits convictions for actions that should not constitute crimes, and further empowers prosecutors.

The second section examined within, § 1512(b), also demonstrates the over breadth of the statutory terms. As noted above, the *Andersen* jury apparently convicted the company because it thought that a lawyer's provision of comments on a draft memorandum destined for Andersen's own files, in response to a legitimate request for legal advice, constituted corrupt witness tampering. Perhaps more shocking than the possibility that criminal convictions may rest on such grounds is the fact that the government defended this theory of conviction against post-conviction attacks.

1. Section 1503's Omnibus Provision

Let us begin with the question of elements—that is, the basic building blocks of any criminal case, each of which constitutionally must be proved beyond a reasonable doubt to a jury.[173] Section 1503's "omnibus" clause is most often invoked in white-collar obstruction cases that do not involve the type of witness tampering usually pursued under 18 U.S.C. § 1512.[174] Where no killing or other special circumstances exist, the statutory maximum punishment is ten years' imprisonment.[175] On its face, the statute would seem to be satisfied by proof that a defendant (1) "corruptly"; (2) "endeavored"; (3) to influence, obstruct or impede; (4) the due administration of justice.[176] Not so.

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[173] *See, e.g.*, United States v. Booker, 543 U.S. 220 (2005); United States v. Gaudin, 515 U.S. 506 (1995).

[174] For the full text, see *supra* note 163 and accompanying text.

[175] 18 U.S.C. § 1503(b) (2000).

[176] *See* United States v. Cueto, 151 F.3d 620, 633 (7th Cir. 1998); United States v. Brenson, 104 F.3d 1267, 1275 (11th Cir. 1997).

In 1893, the Supreme Court, in *Pettibone v. United States*, added two more elements: (5) the defendant must know that a judicial proceeding is pending; and (6) must specifically intend to obstruct justice.[177] Although the Supreme Court, in *United States v. Aguilar*,[178] seemed to confirm these two additional requirements,[179] some lower courts have questioned whether the pending proceeding requirement is consistent with the statute's text.[180]

Potentially more important is the status of the "specific intent to obstruct" element. The "specific intent" terminology was applied by the Supreme Court to this statute in 1893. Since that time, this term has become outmoded: It (and its cognate, "general intent") do not appear in the code and have been rejected by the Supreme Court as outdated and confusing.[181] Yet, because of the *Pettibone* case, courts of appeals are still trying to apply this element in § 1503 cases, with (in my view) decidedly mixed results. To understand what was originally meant by "specific intent," one must understand that the term "*mens rea*" has two general uses. First, *mens rea* is used to describe a general wicked state of mind or intention, suggesting that the defendant committed a particular action with a morally blameworthy state of mind. This has been described as the "culpability" meaning of *mens rea*.[182] Second, *mens rea* means the particular mental state required to be proved by the statutory offense. This

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[177] 148 U.S. 197, 204-07 (1893) (reasoning that "a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court"); *see also* United States v. Aguilar, 515 U.S. 593, 599 (1995) (stating that the *Pettibone* Court "reasoned that a person lacking knowledge of a pending proceeding necessarily lacked the evil intent to obstruct").

[178] 515 U.S. 593, 599 (1995).

[179] Most courts believe that "*Aguilar* reaffirmed the proposition that a defendant may be convicted under section 1503 only when he knew or had notice of a pending proceeding." United States v. Frankhauser, 80 F.3d 641, 650 (1st Cir. 1996).

[180] *See, e.g.*, United States v. Novak, 217 F.3d 566 (8th Cir. 2000) (questioning existence of the "pending proceeding" element, which is not reflected in plain language of statute, but assuming its existence for purposes of the case).

[181] *See* Liparota v. United States, 471 U.S. 419, 433 n.16 (1985) (stating that jury instructions concerning specific intent have "been criticized as too general and potentially misleading" and courts should "eschew use of difficult legal concepts like 'specific intent'"); United States v. Bailey, 444 U.S. 394, 403–06 (1980) (distinguishing between specific and general intent "has been the source of a good deal of confusion"). "Each of the jury instruction committees of the circuit courts of appeals have followed suit and discouraged the use of jury instructions on specific intent." KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.03 (5th ed. 2000).

[182] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 102 (Matthew Bender & Co. 1995).

has been labeled the "elemental" meaning of *mens rea*[183] and is the use of the term that has been explored in these materials.

Today's statutes generally include some type of express *mens rea* element, but this is a modern development. The historical meaning of "specific" versus "general" intent reflects the fact that statutes formerly did not specify the mental state necessary to be proved. Thus, "general intent" meant that the crime required a *mens rea* in the culpability sense of a blameworthy state of mind. "Specific intent" was a designation reserved for those offenses that required proof of a particular, additional state of mind.

Because modern statutes, or courts interpreting them, at least attempt to specify a particular level of "elemental" *mens rea*, the continuing meaning of the distinction between "general" and "specific" intent is questionable; indeed, there appears to be no commonly accepted definition of these terms.

> Generally speaking, however, a "specific intent" offense is one in which the definition of the crime: (1) includes an intent to do some future act, or achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the actus reus of the offense; or (2) provides that the actor must be aware of a statutory attendant circumstance. An offense that does not contain either of these features is termed "general intent."[184]

In this context, then, it would appear that a specific intent to obstruct would mean that government must prove that the defendant's *purpose* was to obstruct justice—that was his special motive for acting. An apparent majority of federal courts hold, however, that a defendant can be said to have acted with a specific intent to obstruct when he specifically intended to engage in the conduct alleged to be obstructive and he should have reasonably foreseen that the natural and probable consequences of his actions would be the obstruction of justice.[185] This means that most federal

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[183] *Id.* at 103.

[184] *Id.* at 119.

[185] Although many courts acknowledge that obstruction is a specific intent crime, they are confused about just *what* the defendant must specifically intend. *See* United States v. LaRouche Campaign, 695 F. Supp. 1265, 1270–74 (D. Mass. 1988). That is, courts disagree about whether the Government must prove that the defendant did the obstructive act with a specific intent *to obstruct justice* or only that the defendant specifically intended *to engage in the conduct alleged to be obstructive* and *should have reasonably foreseen that the natural and probable consequences of his actions* would be the obstruction of justice. Although there is support in the case law for both propositions, the latter seems to be in ascendancy. *See* United States v. Cueto, 151 F.3d 620, 630-31 (7th Cir. 1998) (stating that to prove that the defendant acted corruptly, that is, "with the purpose of obstructing justice," the government "only has to establish that the defendant should have reasonably seen that the natural and probable consequences of his acts was the obstruction of justice"); United States

courts read the "specific intent to obstruct" element to be satisfied by proof that the defendant acted intentionally in, for example, destroying documents but *negligently* with respect to the possibility that the destruction of those documents would obstruct justice.

Substituting a negligence ("reasonably foreseeable") standard for a specific intent to obstruct requirement does not make sense. Considered together with the fact that criminal liability founded on negligence is generally only reserved for the most severe harms (such as negligent manslaughter),[186] and that traditional notions of "specific intent" reflect the highest, not the lowest, form of culpable mental states, the majority rule seems particularly misguided. And this is not a quibble. Such a reading permits the criminal sanction to be applied to all kinds of nonculpable conduct: "It is easy to imagine conduct which could foreseeably result in obstruction of justice but which lacks any sort of criminal culpability. For example, employees often ignore office memoranda; people carelessly—sometimes even recklessly—fail to preserve evidence. Section 1503 was not meant to criminalize such conduct."[187] Judges, in relying on a misconstruction of the meaning of "specific intent," have significantly increased the power of prosecutors to pick and choose among potential defendants—only some of whom could be deemed to have been truly culpable. Why would courts wish to water down the intent to obstruct requirement, and empower prosecutors, in this way?

As it turns out, this instruction is useful to the government where the government chooses to pursue wrongful conduct as obstruction but the heart of the harm involved is something other than obstruction—usually simple fraud. Rather than forcing prosecutors to proceed on a fraud theory to prosecute this clearly wrongful activity, however, judges have acceded to prosecutors' reliance on inapposite statutes. In so doing, they have responded to bad facts by making bad law, giving prosecutors a *mens rea* instruction that can be used to prosecute the culpable *and* the not culpable.

For example, in *United States v. Neiswender*, shortly after the beginning of the criminal trial of former Maryland Governor Marvin Mandel, defendant Neiswender contacted Mandel's defense attorney and

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v. Brenson, 104 F.3d 1267, 1277–78 (11th Cir. 1997); Joseph V. DeMarco, Note, *A Funny Thing Happened on the Way to the Courthouse: Mens Rea, Document Destruction, and the Federal Obstruction of Justice Statute*, 67 N.Y.U. L. REV. 570, 576–84 (1992). *But see* United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981) ("We hold that the word 'corruptly' as used in the statute means that the act must be done with the purpose of obstructing justice.").

[186] *See, e.g.*, Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1439 (1968).

[187] DeMarco, *supra* note 185, at 589.

told the attorney that he had a contact with a corrupt juror and could "guarantee" an acquittal of Mandel if "proper financial arrangements were made."[188] Defense counsel promptly informed the court and prosecutor but no corrupt juror was ever identified. Neiswender, indicted for obstruction under § 1503, argued that his primary intent was to defraud, not to obstruct. He contended that his actual motivation "was directly at odds with any design to obstruct justice since a guilty verdict would have revealed Neiswender's fraud. It was in his best interests for [Mandel's defense counsel to continue] to press hard in his efforts to obtain an acquittal."[189]

The Fourth Circuit, however, upheld the conviction, ruling that "a defendant who intentionally undertakes an act or attempts to effectuate an arrangement, the reasonably foreseeable consequence of which is to obstruct justice, violates § 1503 even if his hope is that the judicial machinery will not be seriously impaired."[190] The court reasoned that had Neiswender convinced defense counsel that Neiswender had a juror under his control and induced defense counsel to participate in the scheme, the natural consequence would have been to reduce defense counsel's efforts in defending his client.[191] Presumably most people would agree that this conduct is harmful–particularly the disturbing number of *Neiswender*-type cases that involve fraud by attorneys on criminal defendants involving false offers by counsel to pay off criminal justice officials to secure favorable treatment for the defendants.[192] But they are not first and foremost the type of *purposeful* obstructive activity that is supposed to be pursued under § 1503. To allow the government to salvage these cases against (I concede) people who are committing a crime (just not obstruction) by watering down the "specific intent" instruction, courts are inviting overbroad and irresponsible applications of the statute.

To return to our attempt to sketch out the elements of a prosecution under § 1503's omnibus clause, we have one more ill-defined element to discuss. The Supreme Court, in *United States v. Aguilar*, added another element to the crime of obstruction under § 1503's omnibus provision, thereby further muddying already murky waters: (7) The government must prove that there was a "nexus" between the wrongful conduct and the due

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[188] 590 F.2d 1269, 1270 (4th Cir. 1979).

[189] *Id.* at 1273.

[190] *Id.* at 1274.

[191] *Id.* at 1272.

[192] *See, e.g.*, United States v. Machi, 811 F.2d 991 (7th Cir. 1987); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984); United States v. Buffalano, 727 F.2d 50 (2d Cir. 1984).

administration of justice.[193] In *Aguilar*, a judge was convicted under § 1503 for lying to two FBI agents who interviewed him in connection with a grand jury investigation concerning alleged wrongdoing in the conduct of the judge's office.[194] The Supreme Court reversed Aguilar's conviction, holding that the government had failed to demonstrate a sufficient "nexus" between the judge's lies and the conduct of judicial proceedings (here, the grand jury).[195]

The *Aguilar* Court was apparently concerned that the government's theory would convert every lie to an investigator into obstruction, when § 1503 was intended to be reserved for obstruction of pending *judicial* proceedings. Thus, the Court emphasized, "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority."[196] The *Aguilar* Court then imposed on the Government the requirement that it prove a "nexus"—that is, the defendant's "act must have a relationship in time, causation or logic with the judicial proceedings. . . . In other words, the endeavor must have the 'natural and probable effect' of interfering with the due administration of justice."[197]

Does this "nexus" requirement sound familiar? It should. As Justice Scalia pointed out in his *Aguilar* dissent, this is the precise language previously employed in the lower courts to reduce the government's *mens rea* burden from a specific intent to obstruct to an intentional act taken with negligent disregard for its affect on the due administration of justice.[198] Justice Scalia argued in *Aguilar* that the Court's "nexus" element—which requires that the defendant's activity have the "natural and probable effect" of interfering with the due administration of justice—is correctly viewed as a means of proving intent, not an independent evidentiary requirement as the majority apparently held.[199] Should lower courts rethink their "specific intent to obstruct" instructions? Where does the "nexus" requirement fit into the statutory scheme? The *Aguilar* Court provided no answers, or at least no answers that it has consistently applied.

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[193] 515 U.S. 593, 599 (1995).
[194] *Id.* at 596-97.
[195] *Id.* at 606.
[196] *Id.* at 599.
[197] *Id.*
[198] *Id.* at 612 n.2.
[199] *Id.* at 611-12.

The *Aguilar* Court seemed to derive the "nexus" requirement from lower court opinions that were themselves all over the lot with respect to where that requirement fit in the statutory scheme.[200] Those decisions cited with approval by the *Aguilar* Court in support of the "nexus" requirement treated it as modifying the "due administration of justice" element.[201] Justice Scalia's opinion is correct in noting, however, that the "natural and probable effect" language that the majority adopted for its "nexus" requirement was and is often used not as an independent showing necessary to prove the impairment of the "due administration of justice," but rather as a means of lightening the government's burden of showing an intent to obstruct.[202] The *Aguilar* majority certainly implied in its response to Justice Scalia's dissent its belief that the specific intent to obstruct may be present even where the requisite "nexus" is absent, thus evidencing its belief that the two proof requirements are separate.[203] All this would argue, then, that the Court was tucking this new "nexus" requirement into the "due administration of justice" element. Instead of endorsing a negligence *mens rea*, the "nexus" element was intended to serve as a sort of objective causation requirement or perhaps as a way of requiring some showing of materiality (an element not yet read into the statute). If this *is* a new element, it would mean that almost *half* the elements of a prosecution under § 1503's omnibus clause are judge-made.

This reading of the *Aguilar* "nexus" requirement as an additional element unique to § 1503's omnibus clause prosecutions was borne out by post-*Aguilar* court of appeals decisions holding that prosecutors proceeding under § 1512 *did not* need to satisfy the *Aguilar* "nexus" requirement to

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[200] *See, e.g.*, United States v. Thomas, 916 F.2d 647, 651 n.5 (11th Cir. 1990) (explaining that various panels of the Eleventh Circuit have grafted the "nexus" requirement onto different elements of § 1503).

[201] *See* United States v. Wood, 6 F.3d 692, 695–96 (10th Cir. 1993); United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990); United States v. Walasek, 527 F.2d 676, 679 & n.12 (3d Cir. 1975).

[202] *See* United States v. Brenson, 104 F.3d 1267, 1277–78 (11th Cir. 1997).

[203] *See* 515 U.S. at 602. The majority argued that an act done with a specific intent to obstruct could still not be actionable if it would not have the natural and probable effect of obstructing justice:

> Justice Scalia . . . apparently believes that *any* act, done with the intent to "obstruct . . . the due administration of justice," is sufficient to impose criminal liability. Under the dissent's theory, a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability [because no nexus has been shown].

Id.

prevail.[204] Given that § 1512 does not mandate that a defendant know of a pending proceeding, and indeed does not require that a pending proceeding even exist, it was difficult to see how a "nexus" requirement would work in the § 1512 context. Yet, in the subsequent case of *Arthur Andersen, LLP v. United States*, the Supreme Court required proof of a "nexus" in a case prosecuted under § 1512(b), which has no "due administration of justice" element.[205] In *Andersen*, the Court's discussion—although far from clear on this point—strongly implies that the "nexus" requirement is inherent in any attempt to show a "knowingly corrupt" intent to obstruct justice.[206]

Does it matter what element the "nexus" requirement modifies? Of course. First, in terms of notice of that which is proscribed, the "nexus" requirement is not visible in the text of the statute. It would be helpful to know which element it was read into so that one can forecast whether it should also be read it into other obstruction statutes that require proof the same element (e.g., "corrupt" motive or "due administration of justice"). Certainly, this mess is a drag on the fair and efficient administration of justice. For example, following *Aguilar* and *Andersen*, prosecutors will be scratching their heads about what proof will be required of them. Courts will be trying to determine how to charge juries on the elements of the offense. Assumedly, all parties in the system will be trying to figure out how a "nexus" requirement works in the context of a statute that does not require knowledge of the pendency of an official proceeding. It is almost

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[204] *See, e.g.*, United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997); United States v. Veal, 153 F.3d 1233, 1250–51 (11th Cir. 1998).

[205] 125 S. Ct. 2129 (2005).

[206] The *Andersen* Court explained,

> The instructions . . . were infirm [because] . . . [t]hey led the jury to believe that it did not have to find *any* nexus between the "persua[sion]" to destroy documents and any particular proceeding. In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, one thing to say that a proceeding "need not be pending or about to be instituted at the time of the offense," and quite another to say a proceeding need not even be foreseen. A "knowingly . . . corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.
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> We faced a similar situation in *Aguilar*. Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of "'corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation'" under § 1503. All the Government had shown was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury." We held that § 1503 required something more—specifically, a "nexus" between the obstructive act and the proceeding. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct."

Id. at 2136-37.

inevitable that the lower courts will disagree on the meaning of these elements, thus ensuring that a defendant who might be acquitted in one Circuit will be found guilty in another.

In short, absent guidance from Congress or the Supreme Court, prosecutors, defense counsel, judges, and juries will waste valuable time and resources trying to figure out what basic notions of justice require to be crystal clear: the elements of § 1503 and other obstruction statutes. And defendants may well be subjected to the agony of criminal investigation, indictment, trial, conviction—and even spend some time in jail—before being told that (sorry!) the theory of prosecution was mistaken after all. The saddest part of this story is that § 1503 is only one example of the disarray that exists in the definition of statutory elements.

2. *Section 1512(b) and the* Andersen *Verdict*

A very abbreviated synopsis of the facts of the *Andersen* case ought to be sufficient to set the stage for the legal questions we wish to explore. Andersen was indicted under § 1512(b)(2) for "knowingly . . . corruptly" persuading another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."[207] The government alleged that Andersen violated this provision by virtue of the fact that Andersen personnel assigned to the Enron audit team engaged in "a wholesale destruction of documents," shredding and deleting Enron-related work papers over a two-week period in Andersen's Houston, Portland, Chicago and London offices.[208] The district court charged the jury, in part, as follows:

> [T]o determine whether Andersen corruptly persuaded "another person," an employee or partner of Andersen is considered "another person." To "persuade" is to engage in any non-coercive attempt to induce another person to engage in certain conduct. The word "corruptly" means having an improper purpose. An improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding. In order to establish this corrupt persuasion element, the government must prove that the agent of Andersen who engaged in the persuasion, not the other person persuaded, possessed the improper purpose. The improper purpose need not be the sole motivation for the defendant's conduct so long as the defendant acted, at least in part, with that improper purpose.
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> Thus, if you find beyond a reasonable doubt that an agent, such as a partner, of Andersen acting within the scope of his or her employment, induced or attempted to induce another employee or partner of the firm or some other person to withhold,

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[207] 18 U.S.C. § 1512 (2000).

[208] *See* Indictment ¶¶ 9-12, United States v. Arthur Andersen, LLP, Cr. No. H-02-121, (S.D. Tex. Mar. 14, 2002), *as reprinted in* O'SULLIVAN, *supra* note 11, at 442-45.

> alter, destroy, mutilate, or conceal an object, and that the agent did so with the intent, at least in part, to subvert, undermine, or impede the fact-finding ability of an official proceeding, then you may find that Andersen committed [an element of the charged offense.][209]

What is extraordinary about the case is the apparent fact that, although the jury convicted Andersen, it did not do so on the theory advanced in the indictment—that is, the Andersen partners' wholesale destruction of Enron-related audit documents over a two-week period in a variety of Andersen offices.

Rather, the jury identified the "corrupt persuader" on its special verdict form as an in-house lawyer for Andersen, Nancy Temple, who was not involved in the extensive destruction of documents that was the focus of the indictment. Six of the jurors subsequently explained in post-trial interviews that the jury convicted Andersen based on one email Temple sent to David Duncan, Andersen's partner in charge of the Enron account, in which she advised him to make two alterations in a *draft* memo he was preparing for the Andersen files.[210] Further background may assist in understanding the jury's theory.

On October 16, 2001, Enron issued a press release announcing a $618 million net loss for the third quarter of 2001 and announced to analysts that it would reduce shareholder equity by approximately $1.2 billion. As a result of these disclosures, the price of Enron's stock plummeted. The Enron press release characterized certain charges against income for the third quarter as "non-recurring." Duncan's October 15 draft memorandum to the files regarding Enron's proposed press release documented that Andersen had, a few days before the press release was issued, conveyed its concern to Enron that the characterization of these charges as "non-recurring" could be misunderstood by investors. It is important to note that the draft did *not* anywhere indicate that Andersen had concluded that the press release was, in fact, misleading.[211] Duncan circulated the draft memo for comment. On October 16, Temple wrote back to Duncan, suggesting that he delete reference to his consultation with her and the legal group and explaining that the reference may constitute a waiver of the attorney-client privilege and make Temple a witness. She also "suggested deleting some

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[209] Court's Instructions to the Jury, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 447.

[210] Indictment ¶¶ 5-6, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 443.

[211] Government Exhibit No. 1018B, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 465.

language that might suggest we have concluded the release is misleading."[212]

Judging from the way in which the indictment was drafted, this evidence was *not* submitted to the jury to prove that Temple was the "corrupt persuader." Although the indictment referred to Andersen's documentation of its problem with the October 16 earnings release, it did so under the heading "anticipation of litigation."[213] Evidently, this evidence was introduced in an effort to demonstrate that the Andersen could foresee the initiation of an "official proceeding" against it.

We shall perhaps never know why the jury rejected the obstruction theory traced in the indictment. It is reasonably clear from the post-trial interviews, however, that the jury concluded that Temple's email "corruptly persuaded" Duncan to "alter" a document—that is his draft memo—by accepting her two suggested revisions, and that they acted "with intent to impair" the draft memo's "integrity or availability for use in an official proceeding." The defense's post-verdict motion took emphatic issue with the jury's apparent conclusion that Temple persuaded Duncan to "alter" the memo within the meaning of the statute, arguing that changing a hard-copy original document by (for example) whiting out a date and inserting a false date would be an "alteration" but "*suggesting edits* to a draft memorandum explicitly circulated for that purpose–an action that will lead to creation of a *new draft*"—plainly does not.[214] The defense argued, in vain, that

> if collaboration on the redraft of a document may so easily be deemed a crime, virtually every law firm in the United States engages in criminal conduct every day, every suggested rephrasing of a memo to the file (or of an FBI form 302 [interview memorandum]) relating to a matter that might give rise to litigation could be said to undermine the factfinding function of an official proceeding. That cannot be what Congress had in mind when enacting Section 1512(b).[215]

The government defended its verdict in terms that seemed to contemplate that a lawyer may not—without fear of criminal liability—give her client advice on word choice used in a draft document to the files where that word choice is designed to protect the client in any future litigation that might eventuate.[216] The defense's motion was ultimately denied based on

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[212] *Id.*, *as reprinted in* O'SULLIVAN, *supra* note 11, at 463.

[213] Indictment, *supra* note 210, § II, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 443.

[214] Andersen's Motion for Judgment of Acquittal or a New Trial, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 453.

[215] *Id.*

[216] Government's Memorandum of Law in Oppostion to Andersen's Motion for a Judgment of Acquittal or a New Trial, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 456.

Federal Rule of Evidence 606(b), which, the District Court held, prohibited inquiry into the validity of the verdict because insufficient evidence was provided "of extraneous influence or the type of extraordinary prejudice that would allow the Court to open to scrutiny the deliberation process."[217] Eventually, as will be discussed below, the Supreme Court reversed Andersen's conviction because of error in the jury instructions and did not pass on the validity of the jury's apparent basis for conviction.

C. THE STATUTORY ELEMENT(S) MOST CRITICAL IN TESTING CRIMINAL CULPABILITY—THE *MENS REA* ELEMENT(S)—ARE UNDEFINED, APPLIED IN AN INTERNALLY INCONSISTENT MANNER, AND POTENTIALLY SANCTION THOSE WHO HAVE PERFORMED NO GUILTY ACT AND/OR HAVE NO CONSCIOUSNESS OF WRONGDOING

Reference to the many faces of the word "corruptly" should serve to illustrate the general deficiencies of the code in relation to clear and uniform definitions of applicable *mens rea* elements. "Corrupt" intent is central to three important obstruction statutes—§ 1503's omnibus provision, § 1505, and § 1512(b)'s prohibition on "knowingly . . . corrupt[]" persuasion to obstruct. As is demonstrated in subsection *a*, below, contrary to the usual rules applied in criminal law, judges have held that an "improper" motive is all that may separate legal—even laudable—behavior from conduct that will earn the actor jail time under § 1503. And, as is demonstrated in subsections *a* and *b*, below, although one would think that a "corrupt" intent is a "corrupt" intent, that is not the case; courts have read the word to have different meanings even within the Chapter devoted to the single subject-matter of obstruction. What all of the definitions have in common is their utter lack of meaningful direction; each invites judges and juries to apply their own views of what constitutes an "evil" or "improper" motive to the case at bar. Sometimes, as occurred in the *Poindexter* case decided under § 1505, that discretion is abused either out of error or for political purposes.

Finally, the lack of a clear, consistent definition of the applicable *mens rea* under § 1512 permitted prosecutors to secure a conviction of Andersen under jury instructions that invited the jury to convict without any proof of consciousness of wrongdoing. In essence, prosecutors used their discretion to try and thus destroy a company on a legal theory that, everyone learned, was not a crime only on ultimate appeal.

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[217] Order, *Arthur Andersen, LLP*, Cr. No. H-02-121, *as reprinted in* O'SULLIVAN, *supra* note 11, at 461.

1. "Corruptly" Under 18 U.S.C. § 1503

The "corrupt" *mens rea* required under § 1503 and other obstruction statutes is nothing more than proof of an "evil" or "improper" *motive* and thus is a throw-back that requires policing. As noted above, ancient notions of *mens rea* turned on "evil" motives; the modern conception, however, is that "motives" as elements should be abandoned in favor of proof of specific states of mind—such as "knowledge" or "purpose."[218] As Jerome Hall put it in 1960, "hardly any part of penal law is more definitely settled than that motive is irrelevant" to criminal liability.[219] Scholars recently have taken aim at Hall's statement and the tradition it reflects, both as a descriptive and as a normative matter.[220] And certainly the scholars are correct that Hall's much-quoted statement is overinclusive. Thus, motive has long been relevant as *evidence* to prove matters such as intent, has traditionally been part of prosecutors' *charging* choices, and often has often been used in judges' *sentencing* determinations. Legislators have recently resurrected "motive" crimes as well, making motive an element of an offense in, for example, hate crimes statutes.

Still, there remains a universal consensus that while "motive" may sometimes excuse or justify conduct that is otherwise criminal, or it may make more blameworthy that which is already criminally culpable behavior, it may *not* make a crime of an innocent act. "As a general rule, no act otherwise lawful becomes criminal because done with a bad motive . . . ."[221]

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[218] *See* Martin R. Gardner, *The* Mens Rea *Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 640.

> The first and historically original concept [of *mens rea*] embodied an explicitly normative requirement that the offender not only intentionally commit a criminal act, but also do so out of evil motivation. The second and currently more predominant tradition adopts an essentially nonnormative approach that finds sufficient ground for liability in the presence of particular states of mind without evaluating or even appealing to the motives underlying the offender's actions.

Id.

[219] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 88 (2d ed. 1960); *see also* ALAN W. NORRIE, CRIME, REASON, AND HISTORY: A CRITICAL INTRODUCTION TO CRIMINAL LAW 37 (1993) ("It is as firmly established in legal doctrine as any rule could be that motive is irrelevant to responsibility."); Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 3 (1989) ("This thesis is endorsed, sometimes with minor qualifications, by almost all leading criminal theorists.").

[220] *Compare, e.g.*, Husak, *supra* note 219, *passim, and* Jeffrie G. Murphy, *Bias Crimes: What do Haters Deserve?*, 11 CRIM. JUST. ETHICS 20 (1992), *with* Gardner, *supra* note 218, *passim, and* Whitley R. P. Kaufman, *Motive, Intention, and Morality in the Criminal Law*, 28 CRIM. JUST. REV. 317 (2003).

[221] Walter Harrison Hitchler, *Motive as an Essential Element of Crime*, 35 DICK. L. REV. 105, 109 (1931).

A "bad" act must attend a corrupt motive for a variety of good reasons. "One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone" and that basic premise applies in the obstruction context just as elsewhere.[222] First Amendment concerns play a part, as does the difficulty of "proving" thoughts unmoored from action and distinguishing "a fixed intent from mere daydream and fantasy."[223] Professor LaFave emphasizes "the notion that the criminal law should not be so broadly defined to reach those who entertain criminal schemes but never let their thoughts govern their conduct."[224]

In the context of statutes that do not require proof of a specific type of obviously criminal "act" (such as killing, raping, or the like), this prohibition has another rationale. "[I]n morality there is by no means agreement on just what sort of good motives justify what sort of wrongdoing" and what sort of "improper" motives might render an innocent act criminal.[225] While we trust our elected representatives to consider, outside of specific cases, whether particular motives should be a crime, modern legislatures have generally done so with reasonable specificity. That is, we know what *types* of motives are "improper"—such as harming another because of their race, sex, or ethnicity. When confronted with the question of what constitutes a "corrupt" motive in the obstruction context, however, juries and judges are given no such guidance. And where all that stands between an otherwise legal act and incarceration is a "corrupt" motive, this lack of guidance constitutes an invitation to arbitrary, uneven, and potentially very unjust results depending on the "ethical" predispositions of the persons called upon to decide a given case. This is especially true when what is at issue is defense counsel's actions in defending his client. Many jurors will not understand, or if they do, sympathize with, the defense imperative of zealous advocacy even for a guilty-as-sin client.

All this renders judicial interpretations and applications of the "corrupt" motive requirement in § 1503 confounding. Judges regularly hold that a "corrupt" motive for purposes of § 1503 *can* make innocent conduct criminally culpable. As the Seventh Circuit explained in *United States v. Cueto*,

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[222] WAYNE R. LAFAVE, CRIMINAL LAW 303 (4th ed. 2003).

[223] *Id.* at 304.

[224] *Id.*

[225] Kaufman, *supra* note 220, at 334 (arguing that the orthodox doctrine regarding the general irrelevance of motive to criminal liability "is a quite sensible way to pursue goals of preserving social order, providing clear definitions of criminality, yet allowing prosecutorial or judicial discretion [in sentencing] to prevent serious injustices").

> "[c]orrect application of Section 1503 . . . requires, in a very real sense, that the factfinder discern—by direct evidence or from inference—the motive which led any individual to perform particular actions . . . . 'Intent may make any otherwise innocent act criminal, if it is a step in the plot.'" Therefore, it is not the means employed by the defendant that are specifically prohibited by the statute; instead, it is the defendant's corrupt endeavor which motivated the action. *Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids.*[226]

In *Cueto*, the Seventh Circuit affirmed the conviction of an attorney under § 1503 for his corrupt attempts to influence the due administration of justice through, *inter alia*, filing otherwise unexceptional appellate briefs and a petition for certiorari with the Supreme Court on behalf of a client.[227] It was, in short, Cueto's corrupt *motive*—which the Seventh Circuit identified as Cueto's intent to protect his own financial interest in his client's illegal gambling operations—that converted legitimate advocacy on behalf of his client into criminal conduct. To demonstrate just how far this reasoning goes, courts have held that if a lawyer advises a client to assert a valid privilege—say, his or her right against self-incrimination—that lawyer may be convicted of obstruction where a jury concludes that his *motive* was "corrupt."[228]

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[226] United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998) (citations omitted) (emphasis added).

[227] *See id.* at 628-29.

[228] *See* United States v. Cintolo, 818 F.2d 980, 992 (1st Cir. 1987) ("[M]eans, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive, (ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct."); United States v. Cioffi, 493 F.2d 1111, 1119 (2d Cir. 1974); *cf.* United States v. Farrell, 126 F.3d 484 (3d Cir. 1997) (under § 1512, no). There are two provisions—§§ 1512(e) (which, prior to 2002, was numbered § 1512(d)) and 1515(c)—which are intended to safeguard lawyers from prosecution for allegedly "obstructive" activities related to legitimate advocacy. The first, § 1512(e) provides an affirmative defense as to which the defendant has the burden of proof by a preponderance of the evidence. Section 1512(e) provides that a person may lawfully engage in the prohibited means of influencing testimony or withholding documents if his conduct "consisted solely of lawful conduct and . . . the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully." Second, § 1515(c) was added to the statutory scheme in 1986. It provides: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding." 18 U.S.C. § 1515(c) (2000). Note that the "chapter" referred to includes §§ 1503, 1505, 1510, 1512, 1519, and 1520.

The reason neither of these sections would seem to save someone like Amil Cueto, however, is that they do not actually add anything to the statutory scheme. If a "corrupt" motive makes otherwise legitimate lawyering unlawful, then the provisions giving safe harbor to "lawful" advocacy activities by definition do not apply. That, at least, is the way that the government has read them. *See* Government's Memorandum of Law in Opposition

Courts do not explain why it is appropriate to read this statute to violate a foundational rule of criminal law. Nothing on the face of the statute would seem to *require* a reading that allows a "corrupt" motive to render otherwise innocent conduct—like filing legal papers or advising one's client to claim his constitutional rights—criminal. It may be that judges have relied upon their moral intuitions rather than their criminal-law learning. In moral theory,

> although a good motive does not excuse a bad intention, a bad ulterior motive does render an otherwise good action impermissible. In contrast, the orthodox legal doctrine holds that motives in general are irrelevant, be they good or bad. (Thus an executioner does not do wrong in executing a man for motives of personal vengeance).[229]

While judges' judgments may be correct as a matter of moral theory, it is not their role to embody that morality in law; that job is emphatically the province of the legislature.

At the very least, given the centrality of the term "corrupt" in separating entirely legal activity from activity that will be subject to criminal sanction, one would think that courts would by now have arrived at a particular and uniform definition of that critical word. Not so: judging by the case law, "corruptly" is word of many meanings.[230] Justice Scalia approved one definition in his dissent in *Aguilar*: "An act is done corruptly if it's done voluntarily and intentionally to bring about either an unlawful result or a lawful result by some unlawful method, with a hope or expectation of either financial gain or other benefit to oneself or a benefit of another person."[231] This definition's emphasis on financial gain or other benefit makes it more apposite to public corruption cases than to many obstruction cases. Subsequently, the Supreme Court noted in *Andersen* that the Fifth Circuit Pattern Jury Instructions define "corruptly" for purposes of § 1503 as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity" of a proceeding."[232] In *Andersen*, the Supreme Court also (for purposes of determining what "*knowingly* . . . corruptly" meant in § 1512) noted that the dictionary defines "corrupt" and "corruptly"

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to Andersen's Motion for a Judgment of Acquittal or a New Trial, *supra* note 216, *as reprinted in* O'SULLIVAN, *supra* note 11, at 459-60.

[229] *See, e.g.*, Kaufman, *supra* note 220, at 334.

[230] *See, e.g.*, Eric J. Tamashasky, *The Lewis Carroll Offense: The Ever-Changing Meaning of "Corruptly" Within the Federal Criminal Law*, 31 J. LEGIS. 129 (2004); Daniel A. Shtob, Note, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal Obstruction of Justice Provision*, 57 VAND. L. REV. 1429 (2004).

[231] United States v. Aguilar, 515 U.S. 593, 616-17 (1995) (citation omitted).

[232] Anderson v. United States, 125 S. Ct. 2129, 2136 (2005).

as normally associated with "wrongful, immoral, depraved, or evil."[233] Probably the most common way of expressing the meaning of "corruptly" under § 1503 is acting with "an improper motive."[234] Other popular formulations are (the circular) acting with a "corrupt motive,"[235] or (the vague) with an "evil or wicked purpose."[236] Glanville Williams said it best: "[a] layman might find it painfully ridiculous that, after a thousand years of legal development, lawyers should still be arguing about the expressions used to denote the basic ideas of our legal system."[237]

How can it be that Congress has invited judges and juries to delve into the defendant's psychology to determine his *motive* and to apply their own notions of what is "evil" or "improper" to judge his actions? How can it be that judges have decided that an "evil" or "improper" motive can convert an otherwise blameless act into something that warrants jail time? How can it be that courts are unable to arrive at a uniform and reasonably specific meaning for the word "corruptly" in § 1503 given that this one word separates entirely legal conduct from conduct that could send one away for ten years? And why *is* this a ten-year count, anyway? The same offense was punishable by a maximum of *three months* in 1892[238] and five years in 2005—is this incarceration inflation based on any rational judgment? My belief is that there are no satisfactory answers to these questions, and that the American public deserves better.

2. "Corruptly" Under 18 U.S.C. § 1505

While § 1503 applies to obstruction in the context of pending judicial proceedings, § 1505[239] is addressed to obstruction of administrative agency proceedings and congressional inquiries; otherwise, these two statutes are very similar in terms of structure and elements. The requisites for a conviction under § 1505 are that the defendant, (1) knowing that there is a proceeding pending before a department or agency of the United States or an inquiry or investigation being had before either House, any committee of either House, or a joint committee of the Congress; (2) corruptly; (3)

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[233] *Id.*

[234] *See* O'SULLIVAN, *supra* note 11, at 407.

[235] *Id.*

[236] *See* United States v. Haas, 583 F.2d 216, 220 (5th Cir. 1978); DeMarco, *supra* note 185, at 579 n.58.

[237] GLANVILLE L. WILLIAMS, THE MENTAL ELEMENT IN CRIME 9 (1965); *see also* Morissette v. United States, 342 U.S. 246, 252 (1952) (Jackson, J.) (bemoaning the "variety, disparity and confusion" of "definitions of the requisite but elusive mental element").

[238] *See* Pettibone v. United States, 148 U.S. 197, 197 (1892).

[239] For the full text of 18 U.S.C. § 1505, see *supra* note 166.

endeavors; (4) to influence, obstruct, or impede the "due and proper administration of the law" under which the pending agency proceeding is being had, or "the due and proper exercise of the power" of the congressional inquiry.[240] We do not yet know whether the government must demonstrate a specific intent to obstruct and an *Aguilar* "nexus" in a § 1505 case. Given the close correspondence between § 1503 and § 1505, however, the government would be well advised to plead and prove these judge-made elements.

Whatever "corruptly" means for purposes of § 1503, one would think that the same meaning would control in § 1505 but this assumption would be wrong, at least until Congress intervened. In 1990, a jury convicted Admiral John Poindexter, President Reagan's National Security Advisor, of, *inter alia*, two counts of obstruction of justice in violation of § 1505 for making false or misleading statements to congressional committees, participating in the preparation of a false chronology, deleting information from his computer, and arranging a meeting with members of Congress at which Oliver North gave false statements.[241] In *United States v. Poindexter*, the D.C. Circuit reversed Poindexter's § 1505 convictions, ruling that § 1505 was unconstitutionally vague as applied to the false and misleading statements to Congress. The court found that the word "corruptly," in § 1505 but not § 1503, did not meet due process standards for two reasons.[242]

First, the D.C. Circuit concluded that to apply § 1505 to Poindexter's false and misleading statements would require an "intransitive" reading of the word "corruptly" (i.e., the defendant corrupts or the defendant becomes corrupt) rather than a "transitive" meaning (i.e., the defendant corrupts *another* by causing the *other* person to act corruptly), and on its face, the statute favored a transitive reading.[243] The court favored a transitive reading of the statute in part because

> [t]he other terms in the disjunctive series in which it appears are "by threats," "[by] force," and "by any threatening letter or communication," all of which are transitive—indeed all of which take as their object a natural person. In addition, to read "corruptly" in an intransitive sense as "wickedly" or "immorally" would appear to render the other methods of violating the statute superfluous: surely the use of force to influence a congressional inquiry would always be "wicked" or at least "immoral."[244]

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[240] *See* O'SULLIVAN, *supra* note 11, at 409.

[241] United States v. Poindexter, 951 F.2d 369, 377 (D.C. Cir. 1991).

[242] *Id.* at 379.

[243] *Id.* at 377-86.

[244] *Id.* at 379.

Thus, the court "found that the defendant could not constitutionally be convicted under § 1505 for his own independent lies. . . . [T]he term 'corruptly' . . . commands a 'transitive' interpretation (A corrupts B), in contrast with an "intransitive" interpretation (A is or becomes corrupt) [required by the Poindexter indictment]."[245]

Second, the D.C. Circuit, after examining various definitions of the term "corruptly," found that term was too vague to provide sufficient notice that it forbade lying to Congress.[246] The court indicated that "corruptly" might not be deemed unconstitutionally vague if applied transitively to reach the "core behavior" at which the statute was addressed, i.e., a case in which the defendant, "for the purpose of influencing an inquiry, influences *another* person (through bribery or otherwise) to violate a legal duty."[247] It concluded, however, that "[e]ven if that statute may constitutionally be applied to all attempts to influence or to obstruct a congressional inquiry by influencing another to violate his legal duty, it would still not cover the conduct at issue on this appeal—making false and misleading statements [directly] to Congress."[248] Although the word "corrupt," defined as acting with an "improper motive," certainly is vague, it is hard to credit the D.C. Circuit's conclusion that the word was unconstitutionally vague in Poindexter's case. Thus, we will not dwell on the court's outlandish suggestion that a senior Executive Branch official could not constitutionally be charged with knowing that he is acting with an "improper" motive when he intentionally lies to Congress about important matters of U.S. policy.

The D.C. Circuit's first ground for decision is facially more plausible, but upon closer examination makes no sense given the statutory scheme as a whole and its holdings under § 1512 and § 1503. As noted above, in 1982 Congress created § 1512, which was specifically aimed at witness tampering—that is, transitive activity whereby a defendant acts upon *another person*. When it created § 1512, Congress shifted "many activities that were formerly prohibited by §§ 1503 and 1505" to § 1512.[249] The Act "deleted the word 'witness' from § 1503 and deleted the first clause (prohibiting corruptly etc. influencing etc. a witness) from § 1505."[250] It left the omnibus provision of § 1505 untouched.[251] In view of this congressional activity, which preceded the *Poindexter* case, it makes little

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[245] United States v. Kelley, 36 F.3d 1118, 1127 (D.C. Cir. 1994).

[246] *Poindexter*, 951 F.2d at 378.

[247] *Id.* at 385 (emphasis added).

[248] *Id.* at 386.

[249] *Id.* at 382.

[250] *Id.*

[251] *Id.*

sense to hold that § 1505 was specifically and solely concerned with witness tampering of the sort § 1512 was designed to address, while lying to Congress was not covered by either § 1505 or § 1512.

Further, the *Poindexter* court's statutory analysis would counsel that § 1503 also apply only transitively—apparently excluding persons such as perjurers, document destroyers, and other "intransitive" offenders heretofore regularly sanctioned under that statute. And, one would assume, the word "corruptly" in this statute is just as vague as the word "corruptly" in its cousin, § 1505. The D.C. Circuit, however, has rejected a vagueness challenge to § 1503's use of the term "corruptly" in a case in which the defendant was convicted under that statute for lying before a grand jury.[252] In *United States v. Russo*, the court did not discuss *Poindexter*'s statutory construction argument, or rehearse the *Poindexter* court's problems with the inherent vagueness of the word "corruptly."[253] Rather, the *Russo* court explained that

> [w]hile the portion of § 1503 at issue here, and the portion of § 1505 at issue in *Poindexter*, are very nearly identical, the settings in which the provisions apply are vastly different. One can imagine any number of non-corrupt ways in which an individual can intend to impede the work of an agency or congressional committee. [One example is] an executive branch official calling the chairman of a congressional committee and stating, "We both know this investigation is really designed to embarrass the President (or a Senator), not to investigate wrongdoing. Why don't you call it off?" The problem for the *Poindexter* court, then, was to discern some special meaning in the word "corruptly," some meaning "sufficiently definite, as applied to the conduct at issue on this appeal, *viz.* lying to Congress, to be the basis of a criminal conviction." Otherwise, "the statute would criminalize all attempts to 'influence' congressional inquiries—an absurd result that the Congress could not have intended in enacting the statute." We have no such problem in this case.
>
> Anyone who intentionally lies to a grand jury is on notice that he may be corruptly obstructing the grand jury's investigation. Whatever the outer limits of "corruptly" in § 1503, Russo's acts of perjury were near its center. . . . [As we have said in other contexts,] "very few non-corrupt ways to or reasons for intentionally obstructing a judicial proceeding leap to mind." This is why . . . "the *Poindexter* court [] drew a sharp distinction between § 1505 and § 1503, and repeatedly warned that the provisions were too 'materially different' for the construction of one to guide the other.[254]

The D.C. Circuit's acceptance of an as-applied vagueness challenge in *Poindexter* was, to put it charitably, extremely questionable, resting as it did on the apparent premise that a senior Executive Branch official who (*inter*

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[252] United States v. Russo, 104 F.3d 431 (D.C. Cir. 1997).

[253] *Id.* at 437.

[254] *Id.* at 436 (second alteration in original); *see also* United States v. Brenson, 104 F.3d 1267, 1280 (11th Cir. 1997) (rejecting similar attempt to apply *Poindexter* to § 1503).

alia) knowingly lied to or misled Congress could not have had notice that his conduct was "corrupt." One could justifiably ask whether a great many "non-corrupt ways to or reasons for" impeding a congressional investigation by *intentionally lying* to Congress "leap to mind." This author cannot think of any.

The point, however, is that this construction was open to the court by virtue of the vagueness and lack of definition inherent in the statute and the statutory scheme generally. In this one instance, Congress responded to the decision by adding § 1515(b) to the code in an effort to overrule *Poindexter*.[255] Section 1515(b) states that "[a]s used in Section 1505, the term 'corruptly' means acting with an improper purpose, *personally or by influencing another*, including *making a false or misleading statement*, or withholding, concealing, altering, or destroying a document or other information."[256] Thus, § 1515(b) puts persons chargeable under § 1505 on notice "that Congress intended the word 'corruptly' . . . to be used in both the transitive and intransitive sense, that is, both a defendant who corrupts herself and a defendant who corrupts another can be prosecuted under Section 1505."[257] It also, by specifying certain types of activity that are deemed "corrupt," gives defendants like Poindexter notice that lying to or misleading Congress is proscribed in § 1505. This correction, by its terms, applies only to § 1505 and does little to clarify the meaning of the word "corruptly" for purposes of § 1503 and § 1512. This kind of correction—as limited as it was—is all too rare, and it is perhaps no accident that it came after a politically charged (and, some would argue, a politically motivated) decision.

3. "Corruptly" Under 18 U.S.C. § 1512(b) & (c)

The Supreme Court's decision in *Andersen* is laudable in one respect: it insisted that there be consciousness of wrongdoing before a defendant can be convicted for "corruptly" obstructing justice under one portion of § 1512(b). That this should even have been an issue, let alone one that had to be litigated all the way to the Supreme Court, speaks volumes about the deficiencies of the federal "code."

The *Andersen* Court spent very little time on the facts, but its discussion indicates that it assumed that the jury decided the case based on the Andersen partners' wholesale document destruction, as charged in the indictment, rather than on Nancy Temple's email, which many jurors

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[255] *See* 142 CONG. REC. §§ 11605–02, 11607–608 (1996).

[256] 18 U.S.C. § 1515(b) (2000) (emphasis added).

[257] United States v. Kanchanalak, 37 F. Supp. 2d 1, 4 (D.D.C. 1999).

indicated was the true basis for the conviction. In any case, the Court was principally called upon to decide whether the district court's jury instructions, reproduced in Part II(1)(b) above, were correct. It determined that the jury instructions were incorrect in three respects.

First, the Court emphasized that its traditional restraint in assessing the reach of federal criminal statutes was particularly appropriate where, as in *Andersen*, "the act underlying the conviction—'persua[sion]'—is by itself innocuous."[258] The Court argued that "'persuad[ing]' a person 'with intent to . . . cause' that person to 'withhold' testimony or documents from a Government proceeding or Government official is not inherently malign"[259] and emphasized that "[t]he [jury] instructions . . . diluted the meaning of 'corruptly' so that it covered innocent conduct."[260] Accordingly, the Court held that "[o]nly persons conscious of their wrongdoing can be said to 'knowingly . . . corruptly persuad[e].'"[261] While this decision might be thought groundbreaking in that it finally clears up the meaning of the word "corruptly" for obstruction purposes, that is not the case. The opinion emphasizes that the Court is interpreting the term "*knowingly* . . . corruptly," which is *only* used in the particular code section at issue in *Andersen*: § 1512(b)(2).

The Court's second and third holdings are related and somewhat puzzling. Congress specifically provided in § 1515(e)(1) that an official proceeding "need not be pending or about to be instituted at the time" of the offense for prosecution under § 1512. Yet the Court ruled that an official proceeding must be "foreseeable" and that the government must prove an *Aguilar* "nexus" between the knowingly corrupt persuasion and the foreseeable official proceeding.[262] In so doing, the Court relied on *Aguilar*, with no explanation, or seeming recognition, of the significant differences between § 1503 and § 1512.

One can surmise that the Court was worried about the potential application of § 1512, as read by the prosecutors and the district court, to document retention (i.e., destruction) policies and other non-culpable instances of legitimate document purges performed in the normal course of business. The Court specifically noted that "[i]t is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances."[263] The *Andersen* Court's

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[258] Anderson v. United States, 125. S. Ct. 2129, 2134 (2005).

[259] *Id.*

[260] *Id.* at 2136.

[261] *Id.*

[262] *Id.* at 2136-37.

[263] *Id.* at 2135.

requirement of consciousness of wrongdoing, a foreseeable official proceeding, and proof of a nexus between the act of destruction and the official proceeding were apparently designed to protect such managers and other "innocents."

I have no disagreement with what the Court was trying to achieve. What I find troubling is, first, that a company could be indicted and convicted—thus destroying the company and the livelihoods of thousands of people—on the mistaken assumption of the prosecutor, jury, and trial judge that a "corrupt" intent did not require proof of any consciousness of wrongdoing. Second, the decision may have—too tardily, to be sure—done justice in the case of Andersen, but it is an extremely narrow *mens rea* decision. This piecemeal fix to one specific subsection is unlikely to affect the ingrained mistakes courts have made in applying the "corrupt" intent requirement in other statutory sections. Finally, the Court attempted to "correct" a potential injustice under the statute in a way that shows a disregard for the importance of *statutes*—that is, their particular language, history, and context. While I may agree with the policy result, the casual nature with which the Court decided to require a "foreseeable" official proceeding and to engraft its § 1503 "nexus" requirement onto § 1512 demonstrates that courts have become so accustomed to lawmaking that they no longer even feel the need to do so in a rigorous and careful way. These requirements, while they may "solve" problems the Court had with the *Andersen* case, may well cause unanticipated problems in future cases. The *Andersen* decision, then, serves as a worthy introduction to our discussion of the problems inherent in case-by-case judicial "fixes."

D. CASE-BY-CASE JUDICIAL "FIXES" (AKA LAW-MAKING) RESULTS IN MORE CONFUSION AND (SOMETIMES) LESS JUSTICE

Judges cannot seem to resist the urge to "rationalize" the code where they can. Rather than striking a statute as vague or overboard, judges will try to "fix" the statute by adding elements, reading existing elements narrowly, or otherwise tinkering with it. The obstruction area provides some good examples of the problems that this case-specific fixing creates. In particular, it illustrates that statute-specific fixes often cause irrational results when they run into judge-made fixes added to *other* statutory provisions.

As examples, I will reference two cases that involve the interaction between § 1503 and the false statements statute, 18 U.S.C. § 1001. At the time of the decisions we will be discussing, § 1001 made it a felony "knowingly and willfully" to make "any false, fictitious or fraudulent statements or representations" in "any matter within the jurisdiction of any

department or agency of the United States." Section 1001 is designed to deal, *inter alia*, with lies made to investigating officers. Judges concerned about the breadth of this statute in certain situations created limitations on its application not found in the language of the statute.

First, judges created what was known as the "exculpatory 'no'" exception to the § 1001 prohibition.[264] This doctrine, in simple terms, provided that a suspect's simple denial of guilt did not constitute a false statement within the meaning of the statute. There were a number of concerns underlying this "exception," one of which was that, absent such an exception, government agents could essentially manufacture crimes.

> Since agents may often expect a suspect to respond falsely to their questions, the statute is a powerful instrument with which to trap a potential defendant. Investigators need only informally approach the suspect and elicit a false reply and they are assured of a conviction with a harsh penalty even if they are unable to prove the underlying substantive crime.[265]

It was not until 1998 that the Supreme Court definitively rejected this "exculpatory 'no'" exception in *Brogan v. United States*.[266]

Judges created the "judicial function" exception to § 1001 in response to a different perceived problem. Section 1001 convictions can be secured either by proof of an affirmative false statement or by proof of the defendant's *concealment* of material information by trick, scheme or device. Judges became concerned about the potential application of § 1001 to acts of alleged "concealment" in the course of judicial proceedings. The D.C. Circuit asked in *Morgan v. United States* whether the statute might be interpreted to criminalize conduct that falls well within the bounds of responsible advocacy: "Does a defendant 'cover up . . . a material fact' when he pleads not guilty? Does an attorney 'cover up' when he moves to exclude hearsay testimony he knows to be true, or when he makes a summation on behalf of a client he knows to be guilty?"[267] In response to these concerns, the "judicial function" exception was born. This judicially-crafted exception provided that if a false statement or concealment concerned a court's "judicial function" it was *not* actionable under § 1001; if, however, the conduct was addressed only to the administrative functions of the court, it *was* actionable. The Supreme Court was silent for thirty-two years after *Morgan*—until 1995 when, in *Hubbard v. United States*, the

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[264] *See, e.g.*, Hubbard v. United States, 514 U.S. 695, 698-99 (1995).

[265] William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 325–26 (1977) (footnotes omitted).

[266] 522 U.S. 398, 408 (1998).

[267] 309 F.2d 234, 237 (D.C. Cir. 1962).

Court held that § 1001 did not, in fact, even *apply* to the judicial branch.[268] A year later, Congress responded to *Hubbard* by amending the statute to explicitly include false statements made in matters over which the judicial branch has jurisdiction and by crafting its own limited exception for certain communications made by parties or their counsel to judges.[269]

Having sketched out these judicially-created exceptions to § 1001, we can examine now their interaction with judicial interpretations of the obstruction statutes. First, one might ask why in the world prosecutors faced with lies to FBI agents did not simply charge Judge Aguilar with a false statement under 18 U.S.C. § 1001. The problem with proceeding under § 1001 was the "exculpatory 'no'" exception. The Ninth Circuit below in *Aguilar* recognized that the conduct alleged in Aguilar's case "is governed not by section 1503 but by 18 U.S.C. § 1001," but acknowledged that in the Ninth Circuit Aguilar's prosecution under § 1001 would have been barred by the "exculpatory 'no'" doctrine."[270] *Brogan v. United States*, in which the Supreme Court rejected the "exculpatory 'no'" exception, was not decided until four years *after* the Ninth Circuit's decision in *Aguilar* and obviously not soon enough to provide prosecutors with the appropriate tool to address Aguilar's lies.[271]

Accordingly, the prosecutors stretched to bring an obstruction case. The Supreme Court, apparently disturbed by the possibility that all lies to investigators might be brought as obstruction cases, responded by doing a little "fixing" of its own: that is, engrafting a new element, the "nexus" requirement, onto § 1503 which would apply in all cases—whether they involved lies to investigators or not. So Judge Aguilar's conduct—although it clearly ought to have been subject to criminal sanction (at least in the view of this author)—was not covered by either § 1001 or § 1503 due to judicial "fixing."

Another example of the problems that arise from case-by-case "fixes" is the case of *United States v. Wood*.[272] In *Wood*, a defendant allegedly made false statements to FBI agents who were "acting under the authority

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[268] 514 U.S. 695, 715 (1995).

[269] *See* 18 U.S.C. § 1001(b) (2000) ("Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statement, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.") This revision obviously does not accept the line between "judicial" functions and "administrative" functions drawn by the courts; rather, it seems to give a free pass to parties and their counsel for *any* communication while providing no haven for non-party communications regardless of the context.

[270] United States v. Aguilar, 21 F.3d 1475, 1483 (9th Cir. 1994).

[271] 522 U.S. 398 (1998).

[272] 958 F.2d 963 (10th Cir. 1992).

of the Phoenix grand jury." The court of appeals affirmed the dismissal of a § 1001 count brought against the defendant because his statements were made in the course of a judicial proceeding and thus were exempt from prosecution under the judge-made "judicial function" exception. At the same time, however, the court affirmed dismissal of the § 1503 count because the defendant's statement failed the *Aguilar* nexus standard—that is, it would not have the natural and probable effect of impeding the pending grand jury investigation.

E. THE OVERLAPS IN, AND IRRATIONAL GRADING OF, OBSTRUCTION OFFENSES *OVER*-EMPOWERS PROSECUTORS

To illustrate the power that prosecutors derive from the vagueness, redundancy, and over breadth of the obstruction statutes, let us take a couple of representative fact situations and assess the extent to which the obstruction statutes offer prosecutors charging choices. Readers will recall that such choices mean that prosecutors' leverage over defendants is augmented by their ability to choose offenses with greater or lesser sentencing exposure or other consequences. The irrationalities in grading reflected in random statutory maximums is particularly acute in the obstruction area and gives prosecutors unwarranted power to force dispositions. These characteristics also mean that prosecutors may be able to bring cases under one statute, that, for evidentiary or other reasons, would fail under a statutory provision intended to specifically address the conduct at issue. Sometimes this may serve the interests of justice in permitting punishment of an obviously culpable individual. In this context, however, given the judicial constructions of the statutes discussed above, it may well result in prosecutors being able to successfully convict persons who should not be subjected to criminal sanction.

1. Assume that a Defendant Is Alleged To Have Intentionally Lied Under Oath Before a Grand Jury or During a Congressional Investigation

In addition to whatever perjury counts could be brought under 18 U.S.C. §§ 1621 and 1623, the defendant may be prosecuted under either § 1503's omnibus clause or (assuming judges do not adopt a limiting construction) § 1512(c)(2)'s new omnibus clause. Section 1512(c)(2)'s omnibus clause was added to § 1512 in 2002, as a part of the flurry of changes designed to respond to the *Andersen* case. Sections 1512(c)(1) and (2) are intransitive provisions—that is, they apply to obstructive activity performed directly by the defendant, rather than obstructive activity the defendant persuades, threatens, or misleads others to do. This new section, then, converts § 1512 from it original function—a pure witness tampering

statute—into an amalgam that apparently substantially overlaps with other code sections. I say "apparently" because courts may try to find limiting constructions for § 1512(c)(2) so as to avoid the most egregious overlap in coverage—an overlap that would probably eliminate use of § 1503 in favor of § 1505(c)(2) in cases to which both apply.[273]

The overlap between the two sections is pronounced: both cover cases in which the defendant acted "corruptly" to "influence," "obstruct," or "impede." Section 1503 requires that the object of this activity must be the "due administration of justice" in a pending judicial proceeding, and the Supreme Court has added the requirements that the government prove a specific intent to obstruct and an *Aguilar* "nexus" to secure a § 1503 conviction. Section 1512(c)(2) applies more broadly. The object of the obstructive activity may be an "official proceeding," which is defined to include not only judicial proceedings, but also proceedings before Congress or federal agencies.[274] While the Supreme Court has mandated that, under § 1503, the defendant must know of the pending judicial proceeding, Congress dictated that the "official proceeding" need not be pending for purposes of § 1512 prosecutions.[275] (The *Andersen* Court did indicate, however, that the official proceeding must at least be foreseeable for purposes of § 1512(b)).[276] We simply do not know whether the Supreme

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[273] One could rely, for example, on the interpretive canon of *ejusdem generis*, which "limits general terms which follow specific ones to matters similar to those specified." Section 1512(c)(2)'s new, very general, omnibus provision follows immediately after § 1512(c)(1), which focuses only on defendant's intransitive efforts to destroy documents. Because of this Congressional choice, counsel may attempt to craft a theory that limits the omnibus clause to similar activities. Whether such an effort would fly, however, is hard to forecast. *See, e.g.*, United States v. Aguilar, 515 U.S. 593, 614-15 (1995) (Scalia, J., dissenting) (rejecting argument that *ejusdem generis* required § 1503's omnibus clause to be read narrowly).

[274] Sections 1512(b)(1), (b)(2)(A)-(D), and (c)(1)-(2) all require that the proscribed conduct occur in the context of an "official proceeding." Section 1515(a) defines "official proceeding" as a proceeding in any federal court (including those conducted before bankruptcy judges) and before a federal grand jury, "a proceeding before the Congress," "a proceeding before a Federal Government agency which is authorized by law," or a proceeding involving (interstate) insurance businesses. Thus, § 1512 is much more broadly applicable than § 1503, which may be invoked only when the due administration of justice in *judicial* proceedings (such as grand jury or court proceedings) is threatened.

[275] "In contrast to section 1503, 'an official proceeding need not be pending or about to be instituted at the time of the offense'" for a defendant to be convicted under § 1512(b). United States v. Frankhauser, 80 F.3d 641, 651 (1st Cir. 1996) (quoting 18 U.S.C. § 1512(f)(1) (2000), which at the time was numbered § 1512(e)(1)). "Because an official proceeding need not be pending or about to be instituted at the time of the [allegedly obstructive conduct], the statute obviously cannot require actual knowledge of the proceeding." *Id.*; *see also* United States v. Kelley, 36 F.3d 1118, 1128 (D.C. Cir. 1994).

[276] Arthur Andersen LLP v. United States, 125 S. Ct. 2129, 2136-37 (2005).

Court will add to § 1512(c)(2) a specific intent to obstruct element. The *Andersen* Court did add to § 1512(b)'s elements the "nexus" requirement, but it is unclear whether that ruling also applies to § 1512(c). Only in one respect is § 1503 more attractive: it outlaws "endeavors," while § 1512 covers only "attempts," a marginally more demanding standard.

So what if prosecutors enjoy a choice of charges? What difference does it make? In terms of bargaining power, a lot. Under § 1503, the maximum penalty is ten years if no killing or other special circumstances are involved. Under § 1512(c), however, the maximum penalty is twenty years for, in many cases, the same conduct. Note that § 1512(c)(2)'s new omnibus provision also substantially overlaps with § 1505's prohibition on obstruction in the context of congressional and agency investigations. Here the disparities in statutory maximums is even more pronounced: under § 1505, in the absence of proof that the offense involves terrorism, the statutory maximum penalty is five years' imprisonment. It may be worth asking at this point whether obstruction in the context of agency or congressional proceedings is less dangerous or blameworthy than obstruction in other contexts (e.g., judicial proceedings under § 1503)? What rationale could be advanced for a fifteen-year difference in the defendant's potential sentencing exposure for obstructive conduct in the agency or congressional context dependent only on whether a prosecutor chooses to proceed under § 1505 or § 1512(c)(2)?

These overlaps obviously give prosecutors a huge club with which to induce pleas or cooperation. While the use of such "clubs" is not constitutionally troubling,[277] one has to ask whether prosecutors should be required to bargain based on the strength of their cases, not the vagaries the code hands them. More troubling is the possibility that, faced with the difference between a possible penalties of five years and twenty years, defendants may, even in truly contestable or borderline cases, choose to plead rather than seek a resolution before a jury.

2. Assume that a Defendant Is Alleged To Have Lied To—That Is, Tried To Mislead—A Witness Called Before a Grand Jury or Congressional Committee

Defendants indicted under § 1503 for witness tampering that could be prosecuted under § 1512 often make the argument that Congress's creation of § 1512 repealed by implication the application of § 1503's "omnibus" provision to witness tampering. The Second Circuit stands alone in accepting this argument, holding that prosecutors must pursue witness

[277] *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978).

tampering under § 1512, not § 1503's "omnibus" provision.[278] All other circuits to consider the issue have held to the contrary.[279] The statutes available to prosecute this type of witness tampering, then, will depend on whether the defendant acted within or without the Second Circuit.

In most federal circuits, one could proceed under either § 1503 or § 1512 in the case posited. Under § 1503, the government would have to show that the defendant, knowing that a judicial proceeding was pending, corruptly endeavored to influence, obstruct or impede the due administration of justice, with a specific intent to obstruct, and in circumstances where it was foreseeable that the defendant's lies would have the natural and probable effect of impeding justice. Under § 1505, of course, many of the same elements would be required in the context of congressional or agency investigations, although we do not yet know whether § 1505 requires the government to prove a specific intent to obstruct or an *Aguilar* "nexus." Finally, again depending on how courts read § 1512(c)(2), it may be that this new omnibus provision would apply as well.

All of these statutes require proof of at least "corrupt" intent. By contrast, under § 1512(b), the government need only prove that the defendant *knowingly* engaged in misleading conduct toward another person with intent to influence, delay or prevent the testimony of any person in an official proceeding. I will assume that *Andersen*'s additional requirements that a "nexus" be proven and that the official proceeding be foreseeable would apply. The *Andersen* Court's requirement that the defendant be conscious of his wrongdoing—which the Court read into the "knowingly . . . corruptly" persuasion element of § 1512(b)—certainly does *not* apply here, however, where the charge is that the defendant "knowingly" misled another witness. Absent further judicial "fixing," the only *mens rea* requirements are that the defendant *knew* he was engaged in misleading conduct and *intended* to influence that person's testimony.

What does this overlap mean? When it has a choice, the government would rationally choose § 1512(b) because of its more forgiving *mens rea* standard, the fact that an official proceeding need only be foreseeable, and its perfectly ample ten-year maximum. Prosecutors may not always be able to sufficiently master the welter of obstruction statutes to choose wisely, however. For example, at the time Aguilar was charged, the "misleading" conduct portion of § 1512 was available to the government. Yet, in *Aguilar*, the government lost under the Supreme Court's reading of § 1503

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[278] *See* United States v. Masterpol, 940 F.2d 760 (2d Cir. 1991).

[279] *See, e.g.*, United States v. Ladum, 141 F.3d 1328 (9th Cir. 1998); United States v. Mullins, 22 F.3d 1365, 1369 (6th Cir. 1994).

when it almost certainly could have secured a conviction under § 1512(b) for Aguilar's attempt to "mislead" the agents where an official proceeding was foreseeable. This is another cost of an incoherent code: the amount of time and training (and resources spent litigating these issues) that must be devoted in order to give prosecutors, defense lawyers and courts a chance of dealing intelligently with these statutes.

For the defendant, a critical affect of this overlap lies in the power it gives prosecutors to manipulate the potential sentencing consequences of its charge. Again, a defendant may be sentenced (outside the Second Circuit) for: up to five years under § 1505 for misleading witnesses during a pending congressional investigation; up to ten years under § 1503 for misleading a witness in the context of a pending judicial proceeding; up to ten years under § 1512(b); and up to twenty years under the newly minted § 1512(c)(2) omnibus provision. And again, one has to ask what penal purpose is serving by permitting identical conduct to be prosecuted under a number of statutes specific to the subject-matter when the grading of these offenses is so disparate?

3. Assume that the Defendant Destroyed or Concealed Documents that He Knew Would Shortly Be Subpoenaed by a Grand Jury or by a Congressional Committee

Sections 1503 (or 1505) and 1512(c)(1) substantially overlap in this context, yet a defendant might get a sentence of: up to five years under § 1505 for destroying materials needed for a pending congressional investigation (after Congress revised the statute to respond to the unfortunate *Poindexter* decision); up to ten years under § 1503 for document destruction in the context of a pending judicial proceeding; and up to twenty years under the newly added § 1512(c)(1) for corruptly altering, destroying, mutilating, or concealing a document or other object with the intent to impair the object's integrity or availability for use in judicial proceedings, congressional investigations, or other pending or *foreseeable* "official proceedings."

Not content with providing prosecutors with this array of choices, Congress also responded to the *Andersen* case by enacting 18 U.S.C. §§ 1519 and 1520.[280] Although § 1519[281] is hardly a model of clarity, it

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[280] *See, e.g.*, Dana E. Hill, Note, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519 (2004).

[281] 18 U.S.C. § 1519 (2000) (Destruction, alteration, or falsification of records in Federal investigations and bankruptcy) provides,

appears to apply in the context of executive branch or agency investigations (overlapping with § 1505) and bankruptcy proceedings (thus overlapping to that extent with § 1503).[282] Section 1519 is clearly intransitive and thus should be measured against the intransitive provisions of § 1512(c).[283]

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

[282] Section 1519 is restricted to circumstances in which the destruction or alteration of physical evidence takes place in connection with "any matter within the jurisdiction of any department or agency of the United States" or a bankruptcy case under title 11 (as opposed to § 1503, which requires knowledge of a pending judicial proceeding, or § 1512(c), which applies to obstructive activity pertinent to an "official proceeding"). What does this jurisdiction provision mean? The definitions of § 1515(a) do not apply; by that subsection's terms, it is confined to sections 1512 and 1513. The reference to "any department or agency of the United States" may be drawn from the portion of § 1505 proscribing obstruction in connection with federal agency proceedings. That portion of § 1505 has been confined in application to proceedings before executive branch departments (e.g., Department of Justice, IRS, Customs Service) or federal agencies (e.g., SEC). *See also* 18 U.S.C. § 6 (2000).

It also may be notable that the language here echoes the language of 18 U.S.C. § 1001 (2000) before that statute was amended in 1996. Prior to 1996, § 1001 outlawed false statements "within the jurisdiction of any department or agency of the United States." The Supreme Court, in *Hubbard v. United States*, 514 U.S. 695 (1995), read the words "any department or agency of the United States" to exclude the judicial branch. The *Hubbard* Court's reasoning also indicated that the Court would read the language to exclude false statements made to the legislative branch. *See, e.g.*, United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997). Congress overruled the *Hubbard* decision by amending § 1001 to include false statements made "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." 18 U.S.C. § 1001 (2000). Given this recent judicial and legislative interchange, one must presume that Congress intentionally chose language that would be read to *preclude* application of § 1519 to the judicial or legislative branches. It appears, then, that this statute is aimed at obstructive activity that affects the investigation, or proper administration, of any matter within the jurisdiction of *the executive branch or the independent agencies*. This limitation is consistent with the context in which the statute was enacted: Congress was, at least in part, concerned with the obstructive activity of Andersen that was said to impede the investigation of Enron's financials by the SEC. Also, given the similarity in language, it seems likely that courts will turn to the Supreme Court's broad interpretation of the term "jurisdiction" under § 1001 and hold that that term includes "all matters confided to the authority of an agency or department." United States v. Rodgers, 466 U.S. 475, 479 (1984).

[283] The Department of Justice's explanation of this provision states that "[t]his section explicitly reaches activities by an individual 'in relation to or contemplation of' any matters. No corrupt persuasion is required. New section 1519 should be read in conjunction with the amendment to 18 U.S.C. 1512 added by Section 1102 of this Act, . . . which similarly bars corrupt acts to destroy, alter, mutilate or conceal evidence, in contemplation of an 'official proceeding.'" Attorney General's Field Guidance on 2002 Sarbanes-Oxley Act, at § 802. Senate Judiciary Committee Chairman Patrick Leahy wrote a letter to Attorney General John

Section 1519, unlike § 1512(c), does not require proof of a "corrupt" intent. It punishes any "*knowing*" impairment of a physical object with the "intent" to impede, obstruct, or influence the investigation or proper administration of matter or case, or "in relation to or *contemplation*" of any such matter or case. Obviously, a proceeding need not be pending and, given the *mens rea* stated in the statute, it is unlikely that courts will require proof that the defendant acted with a specific intent or a consciousness of wrongdoing. Yet § 1519, like § 1512(c), carries a penalty of up to twenty years' imprisonment. Note that, in contrast, a conviction for other types of non-coercive witness tampering under § 1512(b) results in exposure of up to ten years' imprisonment. Is the knowing (but not necessarily corrupt) destruction, alteration, or concealment of physical evidence in contemplation of some investigation twice as culpable or dangerous as bribing witnesses to lie under oath?

Finally, if accountants' audit papers concerning a regulated corporate issuer of securities are involved, newly-enacted § 1520 may apply.[284]

Ashcroft objecting to some of the positions taken in the Justice Department's Field Guidance Memorandum. *See White Collar Crime: Leahy Faults Ashcroft Guidance On Implementation of Sarbanes-Oxley Act*, 71 CRIM. L. REP. (BNA) 583 (2002). In particular, he disagreed with the Department's assertion that §§ 1512 and 1519 should be read "in conjunction with" each other. Senator Leahy claimed that § 1519 "is plainly written to be a new, stand alone felony" that "is in no way linked" to the amendment to § 1512. *Id.* Although Senator Leahy argued that reading § 1519 in this manner "risks a significant narrowing" of the new offense, he provided no specifics to support this judgment. *Id.*

[284] Section 1520 (Destruction of corporate audit records) provides:

> (a)(1) Any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies, shall maintain all audit or review workpapers for a period of 5 years from the end of the fiscal period in which the audit or review was concluded.
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> (2) The Securities and Exchange Commission shall promulgate, within 180 days, after adequate notice and an opportunity for comment, such rules and regulations, as are reasonably necessary, relating to the retention of relevant records such as workpapers, documents that form the basis of an audit or review, memoranda, correspondence, communications, other documents, and records (including electronic records) which are created, sent, or received in connection with an audit or review and contain conclusions, opinions, analyses, or financial data relating to such an audit or review, which is conducted by any accountant who conducts an audit of an issuer of securities to which section 10A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78j-1(a)) applies. The Commission may, from time to time, amend or supplement the rules and regulations that it is required to promulgate under this section, after adequate notice and an opportunity for comment, in order to ensure that such rules and regulations adequately comport with the purposes of this section.
>
> (b) Whoever knowingly and willfully violates subsection (a)(1), or any rule or regulation promulgated by the Securities and Exchange Commission under subsection (a)(2), shall be fined under this title, imprisoned not more than 10 years, or both.

Section 1520 is notably different from § 1512(c) and § 1519 in that it does not penalize the obstructive act of compromising or destroying physical evidence in certain contexts. Instead, it establishes a positive duty to retain specified records and then penalizes the "knowing and willful" failure to meet that duty with a sentence of up to ten years' imprisonment. Note that this provision does not require a corrupt intent for criminal liability to attach, nor does it require that proceedings be pending or even contemplated.

4. Assume that a Defendant Persuaded Another To Destroy Documents Subpoenaed by a Grand Jury or a Congressional Committee

We know, after *Andersen*, that § 1512(b)(2) may apply in these circumstances. Alternatively, the government could pursue the defendant under § 1503 if the conduct involves pending judicial proceeding, or § 1505 if it involves a pending congressional or agency investigation. Once again, reference to congressional grading choices illustrates the irrationalities of this portion of the code. First, § 1503 and § 1505 can apply either where the defendant is the primary actor or (outside the Second Circuit) where the defendant acts on another to induce the other to destroy documents and the like. However, the statutory maximums for each of these statutes do not differ depending on the context. So, for example, a defendant charged under § 1503 could be sentenced to up to ten years' imprisonment for either transitive or intransitive document destruction, but he can also, at the prosecutor's election (assuming either section could be charged on the facts) be potentially subject to twenty years' imprisonment for intransitive document destruction under § 1512(c)(1). If all this occurs within the context of an agency or congressional investigation, these irrationalities are compounded. A defendant charged under § 1505 could "only" be sentenced to up to five years' imprisonment for either transitive or intransitive document destruction, but he can also, at the prosecutor's election (assuming either section could be charged on the facts) be potentially subject to ten years' imprisonment under §1512(b) if he persuades another to do his dirty work but up to twenty years' imprisonment if he does his own document destruction under § 1512(c)(1).

(c) Nothing in this section shall be deemed to diminish or relieve any person of any other duty or obligation imposed by Federal or State law or regulation to maintain, or refrain from destroying, any document.

18 U.S.C. § 1520 (2000).

III. THE U.S. SENTENCING GUIDELINES, *BOOKER*, AND THE RENEWED PROSPECTS FOR CODE REFORM

The state of the federal criminal code threatens the viability of the entire penal enterprise—that is, the law's capacity to command the respect of those who must abide by it and punish, consistent with the purposes identified by Congress and constitutional due process and equal protection norms, those who do not. What accounts for the fact that the federal criminal code is universally reviled but nothing has been done about it? Historically,[285] and lately,[286] politics has not been kind to code reform projects. "Reform of the federal criminal law is a project of awesome scope and complexity entailing not merely legal considerations but also sensitivity to history, politics, social psychology, penology and the religious, ethnic and economic tensions within this nation."[287] On the federal level, a number of forces are working against reform at any given time. Vested interests are a huge factor. Prosecutors, judges, and defense counsel are busy people with little time to focus on the larger project of rationalization. Further, they are generally disinclined to push for a new code when they have invested so much time and effort in making sense of the current code and cannot forecast whose ox will be gored by reform.[288] What "reform" is made often comes piecemeal, with amendments driven by special-interest group lobbying or the latest headline; such amendments simply further degrade the criminal code.[289]

A strange combination of forces, however, suggests that code reform now may be possible. As reference to the affiliations of the individuals and sources I have cited above may suggest, the consensus regarding the sorry state of the federal criminal code is just as strong as it was decades ago and that consensus is increasingly shared across the political spectrum. In short, that the criminal code is a disgrace is not an issue about which reasonable minds differ (although they may accord different priorities to its overhaul). What may translate widely-held disgust with the state of the federal criminal "code" into active efforts to achieve code reform is the Supreme

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[285] Gail M. Beckman, *Three Penal Codes Compared*, 10 AM. J. LEGAL HISTORY 149 (1966); Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830*, 11 AM. J. LEGAL HISTORY 234 (1967); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098 (1978).

[286] For insights into the politics surrounding recent code reform efforts, see Gainer, *Federal Criminal Code Reform*, *supra* note 3, *passim*; Joost, *supra* note 1, *passim*; Lynch, *Revising the Model Penal Code*, *supra* note 20, at 225; Schwartz, *supra* note 8, *passim*.

[287] Schwartz, *supra* note 8, at 4.

[288] *See, e.g.*, Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 173-75 (2003).

[289] *Id.* at 170 (making the case for comprehensive, rather than piecemeal, reform).

Court's recent landmark decision in *Booker v. United States*, holding that the Sentencing Guidelines cannot be applied in a *mandatory* fashion.[290] While much of the ensuring commentary has been consumed with discussion of sentencing policy, commentators are increasingly coming to the conclusion that code reform must be part of any response to the upheaval in the federal criminal system occasioned by *Booker*.

This thesis requires some explanation regarding the relationship between code reform and the Sentencing Guidelines. During the 1960's and 1970's, federal code reform was a hot issue, pushed by Democratic and Republican administrations alike.[291] Despite massive efforts by many parties, including many members of Congress, code reform efforts languished and then died the 1980's. The only part of that effort to come to fruition was the attempted rationalization of sentencing through delegation of sentencing policy to the newly-created U.S. Sentencing Commission.[292] In essence, the politics and circumstances in the early 1980's meant that, although Congress did not have the political will to reform the criminal code at the front end–by sorting out crimes and statutory maximums—it decided to let an expert, specialized agency attempt to rationalize it through the back door—by attempting to make sentencing more uniform and proportional.[293] Since that time, the overwhelming majority of energy—scholarly and congressional—formerly absorbed by substantive code reform has been absorbed by debates about sentencing policy.

In the pre-Guidelines federal sentencing system (as today) prosecutors exercised broad discretion in choosing the applicable charge. Once a conviction was obtained, sentencing judges had the discretion to choose a sentence anywhere within the usually generous penalty range set by statute (e.g., 0-10 years).[294] Judges were permitted, and indeed encouraged, to consider all manner of "real" information regarding the offender and the offense, including proof of other criminal conduct for which the defendant had not been convicted.[295] The judge's discretion was circumscribed only by the minimum or maximum punishments prescribed in the statute(s) for whose violation the defendant was convicted; these congressionally-set

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[290] 543 U.S. 220, 226-27 (2005).

[291] *See* NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT: A PROPOSED NEW FEDERAL CRIMINAL CODE (1971); Gainer, *Federal Criminal Code Reform*, *supra* note 3, at 92-135; Joost, *supra* note 1, *passim*.

[292] *See, e.g.*, Joost, *supra* note 1, at 210-212.

[293] *See id.* at 210-12.

[294] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 363–64 (1989).

[295] *See, e.g.*, Williams v. New York, 337 U.S. 241, 247 (1949) ("Highly relevant . . . to [the judge's] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.").

statutory minimums and maximums provided a floor or ceiling for the judge's sentence. This statutory constraint did not in practice significantly limit judges' sentencing discretion, however, in that the statutory ranges generally were sufficiently broad to permit different sanctions to be imposed upon different defendants for the same statutory offense based upon disparities in the "real" characteristics of the offenses and the offenders.[296] "So long as the judge kept within the statutory range, there were virtually no rules about how he or she made the choice of sentence, and the sentence was effectively unreviewable by a court of appeals."[297]

The impetus behind the Sentencing Guidelines was evidence that showed that the unconstrained discretion exercised by judges resulted in disparate sentencing treatment of similarly situated defendants.[298] In the Sentencing Reform Act of 1984, Congress delegated to the U.S. Sentencing Commission the task of making more uniform, proportional, and rational federal sentencing through promulgation of *mandatory* guidelines that directly constrained the sentencing discretion of judges.[299] The mandatory Sentencing Guidelines provided sentencing formulas to be applied to the facts of offenders' cases and *required* judges to sentence offenders within the relatively narrow sentencing range (e.g., 15-2 months) dictated by the formulas absent extraordinary circumstances. The thought was that, by constraining the sentencing discretion of judges, uniform and proportionate sentencing could be achieved.

A major difficulty the Sentencing Commission faced in undertaking this mission was the chaotic nature of the criminal code and the reality that prosecutorial charging decisions based on that code could reintroduce disparities among similarly situated defendants. The Commission did not (and, given its mandate, could not) seek directly to regulate prosecutorial charging choices. It chose, however, to attempt to blunt the extent to which those choices could re-introduce sentencing disparities by creating a largely "real offense" sentencing system. This modified "real" offense sentencing system meant that the sentence to be imposed would be more a function of what the defendant "really" did than the charge the prosecutor chose to levy against him.[300]

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[296] *See, e.g.*, *Mistretta*, 488 U.S. at 364.

[297] Frank O. Bowman, III, *Departing Is Such Sweet Sorrow: A Year of Judicial Revolt on "Substantial Assistance" Departures Follows a Decade of Prosecutorial Indiscipline*, 29 STETSON L. REV. 7, 9 (1999) (footnotes omitted).

[298] *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466 (2000) (O'Connor, J., dissenting).

[299] *See* O'SULLIVAN, *supra* note 11, at 122-23 (citing sources).

[300] *See id.* at 122-36.

Three aspects of this modified "real" offense sentencing system are worthy of discussion for present purposes. First, the Sentencing Commission created its own classification scheme, meaning that it attempted to have the same sentencing calculations apply to related categories of offenses grouped largely by type of harm. For example, the Commission determined that the sentencing calculus to be applied to a defendant charged with some type of obstruction offense would (for the most part) be the same—regardless of *which* of a number of related obstruction provisions (18 U.S.C. § 1503, 1505-13, 1516, or 1510) prosecutors elected to charge.[301]

Second, the Guidelines required judges, in many cases, to consider related but *uncharged* conduct that the Guidelines deemed relevant to an assessment of offender culpability *even though the conduct was never tried to a jury and the defendant was not convicted for that conduct.* For example, assume prosecutors charged the defendant with one fraud count alleging that he bilked one victim out of $1000. The sentencing judge,

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[301] *See* U.S. SENTENCING GUIDELINES MANUAL § 2J1.2 (2005). Under § 2J1.2 (and assuming that none of the cross-references apply), defendants convicted under the above code sections started with an offense level of 14 (which, assuming no criminal history, worked out to a sentencing range of 18-24 months). Enhancements were then added for the particular circumstances of the case. If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, 8 levels was added (an offense level of 22, assuming no criminal history, yields a sentencing range of 41-51 months). If the offense resulted in a "substantial interference with the administration of justice," 3 levels were added (an offense level of 17, assuming no criminal history, yields a sentencing range of 24-30 months). Finally, if the offense (A) involved the destruction, alteration, or fabrication of a substantial number of records, documents, or tangible objects; (B) involved the selection of any essential or especially probative record, document or tangible object, to destroy or alter; or (C) was otherwise "extensive in scope, planning, or preparation," 2 levels was added (an offense level of 16, assuming no criminal history, yields a sentencing range of 21-27 months). Assuming all three of these enhancement were appropriately assessed in a case, a defendant would max out at offense level 27 which, assuming no criminal history and no other adjustments were applicable (e.g., for aggravated role, vulnerable victim or the like), meant a sentencing range of 70-87 months (approximately 6-7 years).

Another important part of the guidelines is a provision that mandates that judges assess a 3 point adjustment of a defendant's offense level if he obstructed justice during the investigation, prosecution, or sentencing of the principal offense of conviction, or recklessly endangered others in fleeing from law enforcement. *See id.* §§ 3C1.1 (Obstructing or Impeding the Administration of Justice), 3C1.2 (Reckless Endangerment During Flight). This means that where a defendant *is not convicted* of an obstruction related offense, he can be penalized for obstructive conduct that accompanies his primary crime. If the defendant is convicted of obstruction offenses and his guidelines are determined under the general provision applicable to those offenses (§ 2J1.2), discussed above, this obstruction enhancement of 3 points is *not* applicable because the conduct has already been considered in applying that guideline. *See id.*, Application Note 2.

upon finding by a preponderance of the evidence that the defendant's scheme was actually part of a larger scheme that netted him an additional (but uncharged) $100,000, would be required to compute the defendant's sentence based on the total $101,000 loss figure.[302]

Finally, in many cases, the Guidelines dictate that multiple counts relating to the same harm be aggregated, thus blunting prosecutors' ability to multiply a defendant's sentencing by bringing multiple charges. Thus, for example, the defendant posited above would receive the same sentence whether the prosecutors chose to charge him with one count specifying a loss of $1,000, or a series of counts related to the full $101,000. In sum, the Guidelines did not directly regulate prosecutorial discretion in charging, but in a variety of ways they sought to ameliorate the effect of prosecutorial charging choices on the ultimate sentences that defendants received.

To be sure, the sentencing range that the Guidelines yield was (and is) always constrained by the statutory maximum set by Congress; in this, then, the charge chosen by prosecutors would have some sway. So, for example, if a prosecutor chose a charge that carried a five-year maximum but the Guidelines range was six to seven years, the judge could not impose a sentence of over five years. But the applicable statutory maximums were generally sufficiently generous to accommodate the Guidelines range. Thus, in most cases, it was the Guidelines range that applied at sentencing, effectively eliminating many of the grading irrationalities and neutralizing the effect of many of the redundancies in the code. If a prosecutor chose to charge a five-year count (§ 1505), a ten-year count (§§ 1503, 1512), or a twenty-year count (§§ 1512(c)), the same calculus applied and the choice would often carry no sentencing consequences, at least where the sentencing range yielded by the Guidelines was below the applicable statutory maximum.[303]

One could argue that the combination of prosecutorial discretion in charging, judicial acquiescence to such prosecutorial charging choices, and the mandatory Sentencing Guidelines basically rendered criminal statutes

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[302] *See* O'SULLIVAN, *supra* note 11, at 122-36.

[303] It should be noted that these provisions were not always effective in constraining prosecutors' power over sentencing; indeed, many commentators believe that the Guidelines actually enhanced prosecutorial powers in this respect. Prosecutors sometimes could continue to manipulate the Sentencing Guidelines calculus by their choice of charge, especially in cases where the statutory maximum was low or where Congress provided for statutory minimum sentences or mandatory statutory sentencing add-ons. More importantly, prosecutors had a virtual monopoly over the information that would be used under the mandatory sentencing guidelines to arrive at a sentencing range. So, for example, in the above-posited case, the judge would only find out about the additional loss of $100,000 if the prosecutor chose to share this information.

"irrelevant."[304] Federal prosecutors could choose from a variety of vague, overbroad, and redundant statutory provisions in bringing cases; the condition of the code made it possible to shop for a code section that maximized the chance of conviction. Where prosecutors had to stretch the code to fit the case, they could be fairly confident that aggressive theories of prosecution under such statutes which resulted in a conviction—after a trial or through guilty plea—would not be challenged by the judiciary. Finally, at least in cases not involving mandatory maximums, minimums, or add-ons, the Sentencing Guidelines range, and not in most cases the statute of conviction, determined the sentence. Only in exceptional cases would the applicable statutory maximum be relevant to "cap" that sentence; in most cases it operated only to aggravate the defendant's sentencing exposure, through mandatory minimums and the like, and thus give prosecutors additional powers to force pleas. As Professor Standen has argued, in such an environment, "[s]tatutory definitions of many crimes, including the most popular ones, do not matter because they seldom provide significant limitations on charging decisions; instead they appear to serve merely as vehicles for prosecutors to label conduct and, under the [mandatory] sentencing guidelines, assign punishments."[305]

All this changed with the Supreme Court's 2005 landmark decision in *Booker v. United States*.[306] In *Booker,* the Supreme Court held that the Sixth Amendment jury trial right is violated where, *under a mandatory guidelines system*, a sentence is increased because of facts found by the judge that were neither admitted by the defendant nor found by the jury in arriving at a judgment of conviction.[307] Thus, for example, it is a violation of the defendant's jury trial right to have a system that *required* the judge to enhance a sentence based on his finding of a $101,000 loss figure when a jury had only passed on the count charging a loss of $1,000. The *Booker* Court noted, however, that where the guidelines are *not mandatory*, that is, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant."[308] Accordingly, the remedy the Supreme Court chose was to strike those portions of two statutes that make the Sentencing Guidelines binding on sentencing judges. After *Booker*, courts are required by 18 U.S.C. § 3553(a) to "consider" the applicable Sentencing Guidelines range in sentencing federal defendants, but are

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[304] *See supra* note 16 and accompanying text.

[305] *Id.*

[306] 543 U.S. 220 (2005).

[307] *Id.* at 226-27.

[308] *Id.* at 233.

permitted to "tailor" the sentence in light of other statutory considerations embodied in § 3553(a). The Guidelines, then, continue to be relevant but they are now *advisory only*.

What does this mean for code reform? First and foremost, it means that the statutory maximums set by Congress—in all their irrationality and incoherence—now (again) set the true range for judicial sentencing discretion. And when statutory maximums create the range for sentencing purposes, and prosecutors choose the statutory maximums in charging a given offense, prosecutorial power over defendants' sentencing exposure is obvious. So, for example, let us assume that prosecutors can choose between two otherwise equally applicable statutory sections applicable to obstruction of justice, 18 U.S.C. § 1505, which carries a statutory maximum of five years, and 18 U.S.C. § 1512(c), which carries a statutory maximum of twenty years' imprisonment. The Sentencing Guidelines mandate that these two sections are subject to the same sentencing calculus and the guidelines range under that calculus very rarely would exceed five years in cases of non-coercive obstruction. Before *Booker*, then, prosecutors' choice of charge would be largely meaningless as far as the sentencing calculus was concerned and judges' sentencing discretion would also be strictly limited. After *Booker*, prosecutors' power to choose between these two charges has real punch. Prosecutors can threaten a defendant with a twenty-year count if he does not plead to the five-year count. That threat will have real force because, although the Sentencing Guidelines are still relevant, judges now have the discretion to disregard the advisory guidelines range and sentence up to the full statutory maximum.

By reinvesting prosecutors and judges with the discretion to significantly affect sentencing results, the potential for differential treatment of similarly situated defendants increases exponentially. This post-*Booker* scheme almost inevitably will reintroduce the unjust sentencing disparities that plagued pre-Guidelines sentencing. For present purposes, however, the most important effect of *Booker* will be to restore the substantive criminal code to its former importance. The choice of charge will, once again, be critical to assessments of culpability in the form of sentencing consequences. Although many commentators criticized the results yielded by the Sentencing Guidelines, I would assume that all of them would have to concede that the Guidelines were a vastly more rational scheme than the existing criminal "code."

Because the irrationalities of the substantive criminal code will once more be revealed in highly-visible sentencing outcomes, it seems likely that the code will again receive the type of scrutiny it did prior to the Guidelines revolution in the 1980's. All of those fine minds who have, for the past few

decades, focused so productively on sentencing reform should begin to recognize that, post-*Booker*, the best chance for just sentencing outcomes rests on rationalizing the core of criminal justice: the substantive code. Will this be enough to spur meaningful and comprehensive code reform? I hope so. It is appropriate to end where I began—by echoing Herbert Wechsler:

> I am the last person in the world to say [if the project of producing "a thoughtful criminal code"] is really feasible. . . . I will say, without fear of contradiction, that if any problems call for thinking through, they lie in this area. Penal law suffers from the lack of that sustained and specialized attention that has nurtured the development of private law and of those aspects of the public law that regulate the basic economic interests. Important as it is that trover for a cow should lie as justice, grace and wisdom indicate, it is the penal law that safeguards our deepest human interests at the same time that it governs condemnation and disgrace and punishment, with all the suffering that they entail and their irreparable scars. It is vital, I submit, that we should bring to bear on the full body of the law of crime whatever knowledge, statesmanship, morality and effort we are able to command.[309]

[309] Wechsler, *A Thoughtful Code*, *supra* note 8, at 525.