

## ARTICLES

### Overcriminalization's New Harm Paradigm

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*The harms of overcriminalization are usually thought of in a particular way—that the proliferation of criminal laws leads to increasing and inconsistent criminal enforcement and adjudication. For example, an offender commits an unethical or illegal act and, because of the overwhelming depth and breadth of the criminal law, becomes subject to too much prosecutorial discretion and faces disparate enforcement or punishment. But there is an additional, possibly more pernicious, harm of overcriminalization. Drawing from the fields of criminology and behavioral ethics, this Article makes the case that overcriminalization actually increases the commission of criminal behavior itself, particularly by white collar offenders. This occurs because overcriminalization, by lessening the legitimacy of the criminal law, fuels offender rationalizations. Rationalizations are part of the psychological process necessary for the commission of crime—they allow offenders to square their self-perception as “good people” with the illegal behavior they are contemplating,*

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*thereby allowing the behavior to go forward. Overcriminalization, then, is more than a post-act concern. It is inherently criminogenic because it facilitates some of the most prevalent and powerful rationalizations used by would-be offenders. Put simply, overcriminalization is fostering the very conduct it seeks to eliminate. This phenomenon is on display in the recently decided Supreme Court case Yates v. United States. Using Yates as a backdrop, this Article presents a new paradigm of overcriminalization and its harms.*

I.	INTRODUCTION .....	1192
II.	AN OVERVIEW OF OVERCRIMINALIZATION .....	1197
	A. <i>Defining Overcriminalization</i> .....	1197
	B. <i>Overcriminalization’s Typical Harm Paradigm</i> .....	1201
	C. <i>Overcriminalization and White Collar Crime</i> .....	1205
III.	OVERCRIMINALIZATION’S NEW HARM PARADIGM .....	1213
	A. <i>How Rationalizations Foster Criminal Behavior</i> .....	1214
	B. <i>White Collar Rationalizations</i> .....	1218
	C. <i>How Overcriminalization Fuels Rationalizations</i> .....	1223
IV.	YATES AS AN EXAMPLE OF OVERCRIMINALIZATION’S NEW HARM PARADIGM .....	1229
	A. <i>Building Rationalizations—the Facts of Yates</i> .....	1229
	B. <i>Expressing Rationalizations—Yates’s Pre- and Post-Act Statements</i> .....	1231
	C. <i>Employing Rationalizations—Yates’s Verbalizations Allow His Conduct to Proceed</i> .....	1233
V.	CONCLUSION .....	1241

## I. INTRODUCTION

The Supreme Court recently decided *Yates v. United States*.<sup>1</sup> *Yates* has garnered a lot of attention because of its somewhat odd subject matter. The case concerns a small-town Florida fisherman convicted of 18 U.S.C. § 1519, the “anti-shredding provision” of the Sarbanes-Oxley Act, which made it a crime to destroy a “record, document, or tangible object” with the intent to obstruct a federal investigation.<sup>2</sup> Sarbanes-Oxley, of course, was not originally aimed at

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1. 135 S. Ct. 1074 (2015).

2. 18 U.S.C. § 1519 (2012). The complete text of the statute reads:

fishermen. The law was passed to curb corporate malfeasance in the aftermath of the massive accounting scandals—Enron, WorldCom, Global Crossing—of the early 2000s. And the fisherman, John Yates, was not found guilty of cooking his company’s books or lying to his shareholders—he had neither. Instead, Yates was convicted of throwing a crate of undersized red grouper overboard after a federal agent inspecting his catch instructed him to keep the fish on ice until the boat returned to port. A jury found that Yates destroyed “tangible objects” as defined under the Act, and the Eleventh Circuit affirmed. The Supreme Court granted certiorari on the question of whether Yates was deprived of fair notice that the destruction of fish fell within the meaning of § 1519.

Unsurprisingly, the popular media and legal commentators had a lot of fun with *Yates*. It was quickly dubbed the “fishy SOX case,”<sup>3</sup> and pundits asked, among other things, whether there was “something fishy in Sarbox land”<sup>4</sup> and whether the government was “going overboard.”<sup>5</sup> The Justices also had a bit of fun. During oral argument, in what can be described as a jovial, even riotous session, the litigants were interrupted fifteen times by the gallery’s laughter,<sup>6</sup> most of which was

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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.

3. Ellen Podgor, *A Fishy SOX Case*, WHITE COLLAR CRIME PROF BLOG (Apr. 22, 2014), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2014/04/sox-case-is-fishy.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2014/04/sox-case-is-fishy.html) [<http://perma.cc/B6CT-4EPG>]. See also Richard M. Re, *Yates, A Fishy Case*, PRAWFSBLAWG (Oct. 29, 2014), <http://prawfsblawg.blogs.com/prawfsblawg/2014/10/yates-a-fishy-case.html> [<http://perma.cc/TY7G-K767>]; Dan Epstein, *Fishy Business at the Supreme Court: Florida Capt. John Yates' Sad Saga*, FOX NEWS, (Nov. 05, 2014), <http://www.foxnews.com/opinion/2014/11/05/fishy-business-at-supreme-court-florida-capt-john-yates-sad-saga/> [<http://perma.cc/Z38D-6VP9>].

4. Bill Shepherd, *Something Fishy in Sarbox Land*, WALL ST. J., (Nov. 4, 2014), <http://www.wsj.com/articles/bill-shepherd-something-fishy-in-sarbox-land-1415145952> [<http://perma.cc/JAP7-T2DG>].

5. Paul F. Enzinna, *Going Overboard? A Fishy Case of Obstruction*, WHITE COLLAR CRIME WATCH (Apr. 29, 2014), <http://www.whitecollarcrimewatch.com/2014/04/going-overboard-a-fish-case-of-obstruction/> [<http://perma.cc/J3GG-6QBR>]. See also, Paul J. Larkin, Jr., *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 GEO. L.J. ONLINE 17 (2014), <http://georgetownlawjournal.org/files/2014/06/Larkin.Oversized.pdf> [<http://perma.cc/878K-RQSM>].

6. Transcript of Oral Argument at 61, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451); Todd Haugh, *Guest SCOTUS Argument Analysis: “Fish are Apparently Funny . . . and Other Quick Thoughts on Yates,”* SENTENCING LAW & POLICY (Nov. 7, 2014), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2014/11/guest-scotus-argument-analysis-fish-are-apparently-funny-and-other-quick-thoughts-on-yates.html](http://sentencing.typepad.com/sentencing_law_and_policy/2014/11/guest-scotus-argument-analysis-fish-are-apparently-funny-and-other-quick-thoughts-on-yates.html) [<http://perma.cc/JK5A-XDAN>].

the product of judicial wisecracks and one-liners.<sup>7</sup> For example, Justice Kennedy closed the argument by wryly suggesting, “Perhaps Congress should have called this the Sarbanes-Oxley Grouper Act.”<sup>8</sup>

Despite the levity, *Yates* is a serious case that presents a serious issue: overcriminalization. Definitions vary,<sup>9</sup> but overcriminalization can be described as the proliferation of criminal statutes and overlapping regulations that impose harsh penalties for unremarkable conduct (i.e., conduct that should be governed by civil statute or no statute at all). Those most closely studying the phenomenon regard it as a vexing problem of the criminal justice system; some say it is the most pressing problem in criminal law today.<sup>10</sup>

Indeed, we now know that is why the Supreme Court took the case. Although *Yates* offered “no circuit split, no transgression of Supreme Court precedent, and no special national interest justifying immediate resolution,” cert was granted.<sup>11</sup> *Yates*, supported by a host of *amici*, put the issue of overcriminalization squarely before the Court, arguing that applying Sarbanes-Oxley to fishing was “absurd”<sup>12</sup> and contending that the “evils” of overcriminalization weighed in favor of overturning his conviction.<sup>13</sup> This line of argument seemed to resonate

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7. See, e.g., Transcript, *supra* note 6, at 30. An illustrative exchange went as follows:

CHIEF JUSTICE ROBERTS: You make him [Yates] sound like a mob boss or something. I mean, he was caught --

(Laughter.)

CHIEF JUSTICE ROBERTS: The fish were -- how many inches short of permitted were the fish?

MR. MARTINEZ: The fish were -- it varied fish by fish, Your Honor.

(Laughter.)

*Id.*

8. *Id.* at 54.

9. See *infra* Section II.A. See also, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) (defining overcriminalization as “the abuse of the supreme force of a criminal justice system—the implementation of crimes or imposition of sentences without justification”); Zach Dillon, *Foreword: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2012) (citing Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967), for the definition of overcriminalization as “the use of the criminal law to pursue public policy objectives for which it is poorly suited”).

10. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 n.1, 538 (2012) (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) and quoting DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2008)).

11. Re, *supra* note 3.

12. Transcript, *supra* note 6, at 22.

13. Brief for Eighteen Criminal Law Professors as *Amici Curiae* In Support of Petitioner at 2, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451) (identifying two “chief” evils: “the quantitative expansion of federal law to include countless, and often redundant, criminal provisions”; and the qualitative breadth of those provisions). It should be noted that the author was a signatory to this brief. *Id.* at A3. See also Reply Brief of Petitioner at 24–25, *Yates v. United*

with the Court. At least six Justices asked questions about overcriminalization's impact on Yates's arrest and conviction,<sup>14</sup> and Justice Kennedy, the Court's regular swing vote, commented that the argument had "considerable force."<sup>15</sup>

The Court's opinion reveals the same. Although there was a surprising mix of Justices making up the 5-4 plurality that overturned Yates's conviction, the issue of overcriminalization bound the individual opinions together.<sup>16</sup> The last few paragraphs of Justice Kagan's dissent candidly summed this up. She wrote that the "the real issue" of the case was "overcriminalization and excessive punishment in the U.S. Code."<sup>17</sup> While she differed with the plurality on how to read § 1519 and whether the courts are the proper place to curb excessive criminalization and punishment, she ardently agreed that "broad and undifferentiated" statutes with "too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion"—the essence of overcriminalization—make bad law.<sup>18</sup> She went further, stating that "§1519 is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code."<sup>19</sup>

While that is almost assuredly true, and the Court was right to take a case so directly addressing the issue of overcriminalization, the Court's ultimate analysis was incomplete. The Justices, as well as the litigants, viewed the harms associated with overcriminalization in the typical way. They approached overcriminalization through the paradigm that links the proliferation of criminal laws to increasing and inconsistent *post-act* criminal enforcement and adjudication.

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States, 135 S. Ct. 1074 (2015) (No. 13-7451) (arguing that the government's reading of the statute "would bring a whole host of innocent remedial measures or otherwise run-of-the-mill inventory management situations within the purview of the anti-shredding provision").

14. Transcript, *supra* note 6, at 24–54 (Chief Justice Roberts and Justices Ginsburg, Kennedy, Breyer, Sotomayor, and Scalia asked questions concerning the breadth of § 1519, how it interacted with overlapping obstruction statutes, the harshness of its twenty-year maximum sentence, and the government's off-balance exercise of its charging discretion).

15. *Id.* at 5. To be fair, Justice Kennedy also raised concerns about Yates's reading of the statute. *Id.*

16. Justice Ginsburg, joined by Chief Justice Roberts and Justices Breyer and Sotomayor, found that §1519 did not apply to Yates's conduct because the statute's "tangible object" language could not be read more expansively than an object "used to record or preserve information." Yates v. United States, 135 S. Ct. 1074, 1079 (2015). To do otherwise, Justice Ginsburg wrote, would "cut § 1519 loose from its financial-fraud mooring." *Id.* Justice Alito, who served as the crucial vote via his concurring opinion, found the issue a close one, but ultimately "tip[ped] the case in favor of Yates." *Id.* at 1089 (Alito, J., concurring). Justice Kagan, joined by Justices Scalia, Thomas, and Kennedy, dissented. She found the term "tangible object" to be "broad, but clear," covering all physical objects of all kinds—fish included. *Id.* at 1091 (Kagan, J., dissenting).

17. *Id.* at 1100 (Kagan, J., dissenting).

18. *Id.* at 1101.

19. *Id.*

Overcriminalization's ills were seen as flowing from how criminal law is applied *after* an offender's conduct occurs—whether, for example, an offender is subject to too much prosecutorial discretion or faces disparate punishment.<sup>20</sup>

While that paradigm is useful and the harms it identifies are real, it is also too limited. Drawing from the fields of criminology and behavioral ethics, this Article contends that overcriminalization's harms are more expansive—temporally and substantively—than typically understood. That is because overcriminalization actually *increases the commission of criminal behavior*, particularly by white collar offenders. Overcriminalization increases criminal behavior by lessening the legitimacy of the criminal law, which fuels offender rationalizations. Rationalizations are a key component in the psychological process necessary for the commission of white collar crime—without them offenders like Yates are unable to square their self-perception as “good people” with the illegal behavior they are contemplating, and therefore their criminal conduct does not go forward.<sup>21</sup> Overcriminalization, then, is more than a post-act concern. It is inherently criminogenic because it facilitates some of the most prevalent and powerful rationalizations used by would-be offenders, completing the psychological circuit that allows for criminal violations. Instead of deterring crime, overcriminalization fosters the very conduct it seeks to eliminate. This phenomenon, which presents a new way of understanding overcriminalization and its harms, is on display in *Yates*. The case, therefore, offers a compelling and prominent vehicle through which to explore the full scope of overcriminalization's detriments.

Part II of this Article provides an overview of overcriminalization and its typically understood harms. Part III argues that there is an additional, possibly more pernicious harm in the way overcriminalization impacts an offender's pre-act psychological process. Relying on criminological and behavioral ethics research, this part explains how rationalizations help foster criminal behavior and sets out the most common ones used by white collar offenders, those most likely

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20. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 519–20 (2001) (identifying mismatches in enforcement and adjudication as important consequences of overcriminalization).

21. See generally Vikas Anand, Blake E. Ashforth & Mahendra Joshi, *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, ACAD. MGMT. EXECUTIVE, Nov. 2005, at 9, 10–17 (discussing how employees perpetrating corrupt acts engage in “rationalizing tactics” and identifying six tactics); Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*, 32 CRIME & JUST. 221, 228–34 (2005) (providing an overview of rationalization/neutralization theory and its place in criminology).

to rationalize their behavior in order to commit unethical or criminal acts. This part also demonstrates how overcriminalization delegitimizes criminal law, which fuels rationalizations and increases anti-normative behavior. Part IV brings the theoretical and practical together through the *Yates* case. A close look at the facts reveals that overcriminalization helped create an environment rich with rationalizations, which Yates employed as part of his pre-act mental process, thereby allowing his criminal behavior to proceed without disrupting the belief that he did nothing wrong.

## II. AN OVERVIEW OF OVERCRIMINALIZATION

Before addressing what this Article contends is a new paradigm of overcriminalization, it is necessary to understand the current one. As others have commented, the “[over]criminalization phenomenon has been the topic of legal scholarship for years.”<sup>22</sup> That scholarship has attempted to define overcriminalization and catalog its “vices,”<sup>23</sup> usually followed by proposals to rectify them.<sup>24</sup> This Article begins along a similar path, except that its aim is not to offer solutions, but instead to provide the background necessary to understand the full scope of overcriminalization’s harms.

### A. Defining Overcriminalization

For a phenomenon that has received so much sustained attention by legal scholars, identifying an accepted definition of overcriminalization is surprisingly difficult. In the Introduction, this Article offered one possible definition,<sup>25</sup> but it is by no means definitive. Douglas Husak’s version—“too much punishment, too many crimes”—is popular and probably the most succinct.<sup>26</sup> Paul Larkin also offers a tidy definition: “the overuse and misuse of the criminal law to punish

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22. Luna, *supra* note 9, at 712. See also Sanford Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 18 (1968) (commenting that unless overcriminalization was addressed, “some of the most besetting problems of criminal-law administration are bound to continue”).

23. Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005).

24. Recent scholarship on overcriminalization can be found in three symposia volumes. See *Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525 (2012); *Symposium, Overcriminalization 2.0: Developing Consensus Solutions*, 7 J.L. ECON. & POL’Y 565 (2011); *Symposium, Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005).

25. See *supra* note 9 and accompanying text.

26. HUSAK, *supra* note 10, at 4.

conduct traditionally deemed morally blameless.”<sup>27</sup> While these definitions benefit from brevity, they also fail to do justice to the broad array of issues that overcriminalization encompasses.

That breadth has caused others to take a more expansive definitional approach. Erik Luna, one of the most innovative scholars working in the area, suggests overcriminalization includes a range of concerns, such as what should be denominated as a crime, when crime should be enforced, who falls within the law’s strictures, and what are the proper punishments for classes of crimes and in specific cases.<sup>28</sup> This long list leads Luna to define overcriminalization as “a broad phenomenon encompassing a multiplicity of concerns but always involving the unjustifiable use of the criminal justice system.”<sup>29</sup> While this definition has its benefits, it too is somewhat unsatisfying. The lack of specifics invites so many follow-up questions that it somewhat defeats the purpose.

Another option is to define overcriminalization through numerics. Instead of trying to fully encapsulate Luna’s multiplicity of concerns, statistics are used to illustrate the concept. A 2010 joint report by the Heritage Foundation and the National Association of Criminal Defense Lawyers took this approach, defining overcriminalization as numerical proliferation.<sup>30</sup> Relying on data compiled by John Baker, the report found that at the end of 2007 there were at least 4,450 federal criminal statutes.<sup>31</sup> Assuming approximately 50 new statutes are added each year, which is in line with the modern average, the current total is around 5,000.<sup>32</sup> Add to that at least 10,000—but possibly upwards of 300,000—federal administrative regulations that can be enforced criminally, and the massive size of the

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27. Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 745 (2014).

28. Luna, *supra* note 9, at 712–13.

29. *Id.* at 718.

30. BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. & NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010), [http://s3.amazonaws.com/thf\\_media/2010/pdf/WithoutIntent\\_lo-res.pdf](http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf) [<http://perma.cc/332Y-SN4K>] (citing John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 LEGAL MEMO. 1, 1–2 (2008)).

31. *Id.*

32. See John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, 26 LEGAL MEMO. 1, 1–2 (2008) (finding that Congress creates approximately five hundred crimes per decade); Shana-Tara Regon, *White Collar Crime Policy*, CHAMPION (Sept. 2014). Between 2000 and 2007, Congress created, on average, one new crime per week, for each week of each year. See Baker, *supra* note 32, at 2.

criminal code becomes clear.<sup>33</sup> And that is just federal crimes. No one suggests state criminal law is any better.<sup>34</sup> This is definition by scale.

Although astonishing, the existence of an extreme number of criminal provisions fails to tell the story of what overcriminalization really *is*. Almost all agree there are too many laws on the books, and their reach is too broad, but that does not necessarily make clear what are overcriminalization's defining features.<sup>35</sup> Stephen Smith argues that the "conventional account" of overcriminalization is incomplete because it is based primarily on quantitative assessment.<sup>36</sup> He advocates for a qualitative understanding, defining the phenomenon not only as the proliferation of criminal law, but also as the degradation of its quality.<sup>37</sup> Smith sees overcriminalization's defining characteristic as an undermining of the effort "to provide just and proportional punishments for offenses."<sup>38</sup>

While Smith's approach is better than simply offering numerical tallies, and it adds specificity that broader definitions lack, it does have some weaknesses. For one, although it is more specific than Luna's definition, it still retains vague terms.<sup>39</sup> Also, the definition requires a host of examples in support, making it necessarily anecdotal. Smith is careful to use "practically important"<sup>40</sup> examples as an aid to bolstering his definition,<sup>41</sup> but others simply catalog the absurd, apparently hoping to shock the reader into an understanding.<sup>42</sup> While this has some

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33. Ellen S. Podgor, *Introduction: Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531 n.10 (2012). *See also* Stuntz, *supra* note 20, at 513–14 (explaining growth of the criminal code).

34. *See* Luna, *supra* note 9, at 713 (citing Stuntz, *supra* note 20, at 515). Stephen Smith has said that "in some respects, overcriminalization may be even more entrenched at the state level." Smith, *supra* note 10, at 542. However, he also notes that states may be in the best position to slow and even reverse overcriminalization. *Id.* at 542–43.

35. Smith, *supra* note 10, at 540. *But see* Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 5 (2012) (providing empirical support for the argument that the number of federal crimes has had little effect in the "real world of federal criminal justice enforcement").

36. Smith, *supra* note 10, at 539.

37. *Id.* at 540.

38. *Id.*

39. *Id.* (discussing overcriminalization's qualitative dimensions in terms of quality, justness, and proportionality).

40. Stuntz, *supra* note 20, at 517.

41. *See* Smith, *supra* note 10, at 555–62. *See also* Beale, *supra* note 23, at 750–65 (discussing examples related to state regulation of individual morality); Stuntz, *supra* note 20, at 517 (discussing examples from federal law regarding fraud and misrepresentation).

42. *See* HUSAK, *supra* note 10, at 35 (cataloging offenses that fail to pass the "laugh test"); Luna, *supra* note 9, at 704 (providing "motley assortment" of criminalized conduct, including training a bear to wrestle and selling perfume as a beverage); Stuntz, *supra* note 20, at 515–17 (providing examples of punishable criminal offenses, including tearing off a mattress tag or using the image of "Woodsy Owl").

rhetorical value—indeed, the *Yates* case is full of absurd examples and hypotheticals<sup>43</sup>—it also leaves those searching for a reasonable definition concerned that the whole matter is overstated.<sup>44</sup>

Possibly as a reaction to that concern, overcriminalization is often discussed in terms of what it *does*, rather than what it *is*. Smith's definition is partly of this character; so is Sara Sun Beale's. She defines overcriminalization as a series of “vices,” finding its common features to include things like excessive unchecked enforcement discretion, disparity among offenders, potential for abuse by enforcement authorities, potential to undermine significant criminal law values and procedural protections, and misdirection of scarce resources.<sup>45</sup> Most scholars analyzing overcriminalization do the same, worrying less about an all-encompassing definition than about its effects.<sup>46</sup>

Practitioners follow a similar tack. The National Association of Criminal Defense Lawyers explains that overcriminalization can take many forms and then defines it by how it most frequently occurs.<sup>47</sup> The NACDL precedes its definition with a list of overcriminalization's ills, explaining that it “backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty.”<sup>48</sup> Although expressed in slightly more direct terms, these are the same harms scholars identify.

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43. See, e.g., Transcript, *supra* note 6, at 35–37 (in questioning the government concerning the vagueness of § 1519, Justice Breyer “us[ed] a ridiculous example purposely . . . to get [the government] to focus on the question of how possibly to draw a line”); Brief for Eighteen Criminal Law Professors, *supra* note 13, at 13–14.

44. Klein & Grobey, *supra* note 35, at 5–6 (criticizing the “triviality” of examples such as the statute that prohibits using the likeness of Smokey Bear, 18 U.S.C. § 711 (2012), because such statutes are never actually used).

45. Beale, *supra* note 23, at 749.

46. See, e.g., Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 787–88 (2012); Podgor, *supra* note 33, at 530; Geraldine Szott Moohr, *Playing with the Rules: An Effort to Strengthen the Mens Rea Standards of Federal Criminal Laws*, 7 J.L. ECON. & POL'Y 685, 686–87 (2011). *But see* Luna, *supra* note 9, at 712–19 (struggling to identify a comprehensive definition).

47. National Association of Criminal Defense Lawyers, *Overcriminalization*, <http://www.nacdl.org/overcrim/> [<http://perma.cc/9XK4-VXYR>]. The NACDL says overcriminalization “can take many forms, but most frequently occurs through:

- Ambiguous criminalization of conduct without meaningful definition or limitation;
- Enacting criminal statutes lacking meaningful *mens rea* requirements;
- Imposing vicarious liability with insufficient evidence of personal awareness or neglect;
- Expanding criminal law into economic activity and regulatory and civil enforcement areas;
- Creating mandatory minimum sentences un-related to the wrongfulness or harm of the underlying crime;
- Federalizing crimes traditionally reserved for state jurisdiction; and
- Adopting duplicative and overlapping statutes. *Id.*

48. *Id.*

So where does that leave those seeking a “succinct definition encapsulat[ing] the overcriminalization phenomenon?”<sup>49</sup> Unfortunately, the answer is probably unsatisfying. There are a multitude of definitions; all have merit, but none are perfect. Yet the search for an encompassing definition is useful because it illuminates what seems to matter most to those thinking hardest about overcriminalization—not precisely what it is, but *what harms it inflicts*. This makes sense. Criminal law, at base, is about harm and how to prevent it from happening to society.<sup>50</sup> But if overcriminalization is to be principally thought of in terms of harms, understanding those harms takes on special importance. And as stated at the Article’s outset, the typical understanding is incomplete.

### *B. Overcriminalization’s Typical Harm Paradigm*

The seminal analysis of overcriminalization’s harms comes from William Stuntz.<sup>51</sup> He found that overcriminalization has created a “world in which the law on the books makes everyone a felon, and in which prosecutors and police both define the law on the street and decide who has violated it.”<sup>52</sup> Although there has been some nibbling around the edges of Stuntz’s provocative findings, no one has seriously challenged them in the almost fifteen years since they were made.<sup>53</sup> Accordingly, almost every scholar working in the area draws on Stuntz when cataloging overcriminalization’s negative impacts.<sup>54</sup> His observations define overcriminalization’s typical harm paradigm.

Stuntz used both a quantitative and qualitative approach when analyzing overcriminalization. He determined that the expansion of criminal statutes since the 1850s, but particularly in the recent past, has created criminal laws that are “deep as well as broad: that which

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49. Moohr, *supra* note 46, at 686.

50. Wayne R. LaFave, *Substantive Criminal Law*, 1 SUBST. CRIM. L. § 1.2 (2d ed., 2014).

51. Stuntz, *supra* note 20, at 519.

52. *Id.* at 511.

53. See Klein & Grobey, *supra* note 35, at 79–80 (arguing that the problem of overfederalization is a myth, but addressing only the issue of concurrent state and federal criminal jurisdiction).

54. A Westlaw search shows Stuntz’s article has been cited over 600 times, at least 200 of which concern the direct issue of overcriminalization. This includes citation by the leading scholars writing on overcriminalization. See, e.g., HUSAK, *supra* note 10, at 24; John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 743 (2012); Luna, *supra* note 9, at 712; Smith, *supra* note 10, at 537. John Coffee must be included in a list of leading scholars on overcriminalization; however, much of his writing directly on the subject occurred prior to Stuntz’s seminal article.

they cover, they cover repeatedly.”<sup>55</sup> Put another way, he saw the sheer number of state and federal criminal codes as creating a set of overlapping circles, such that a single criminal act could be treated as though the offender committed many different crimes.<sup>56</sup> According to Stuntz, this feature of modern criminal law—its “depth and breadth”—has led to three important adverse consequences.<sup>57</sup>

First, lawmaking has shifted from legislatures and courts to “law enforcers.”<sup>58</sup> Because the criminal law is so broad, it cannot be enforced as written; there are simply too many potential violators to prosecute.<sup>59</sup> Therefore, decisions about enforcement fall on the executive, specifically prosecutors and law enforcement officers. This results in enforcement on the street that differs from the “law on the books.”<sup>60</sup> Stuntz contends that this is the “criminal justice system’s real lawmak[ing].”<sup>61</sup> Government lawyers and cops are making law through their enforcement choices, not legislatures through traditional democratic governance or the courts through issuing opinions.

Second, prosecutors, not courts, adjudicate crime. With so many overlapping criminal statutes and regulations to choose from, prosecutors can charge a range of crimes governing the same conduct.<sup>62</sup> They can charge defendants with the easiest crime to prove, the crime with the highest penalty, or—by stacking multiple charges—both. This allows prosecutors to enforce laws “more cheaply,” thereby lowering the cost of convicting defendants, primarily through plea agreements.<sup>63</sup> Prosecutors are “not so much redefining criminal law . . . as deciding whether its requirements are met, case by case.”<sup>64</sup> Regardless of the individual decisions prosecutors make, they are *de facto* adjudicating outcomes.

Erik Luna describes this consequence more pointedly: “In the current reality of grotesque overcriminalization . . . prosecutorial discretion is awe-inspiring.”<sup>65</sup>

[Prosecutors] decide whether to accept or decline a case, and, on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged

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55. Stuntz, *supra* note 20, at 518.

56. *Id.* at 518–19.

57. *Id.* at 519–20.

58. *Id.* at 519.

59. *Id.*

60. *Id.*

61. *Id.* at 506.

62. *Id.* at 519.

63. *Id.* at 519–20.

64. *Id.* at 519.

65. Luna, *supra* note 46, at 793.

and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. As such, the prosecutor is the criminal justice system, in effect making the law, enforcing it against the accused, adjudicating his guilt, and determining the punishment.<sup>66</sup>

The practical effects of these two consequences of overcriminalization should be obvious. If law enforcers *are* the criminal justice system, they become free to embody that system and use it as they wish.<sup>67</sup> The inevitable result is the “selective enforcement and unequal treatment of similarly situated defendants.”<sup>68</sup> This does not necessarily occur through intentional bias or vindictiveness; a prosecutor or police officer may simply be enforcing his or her own sincerely held view of morality.<sup>69</sup> But that guarantees enforcement and adjudication of the criminal law that is at best inconsistent and arbitrary, and is at worst pretextual or discriminatory.<sup>70</sup> Moreover, excessive discretion given to law enforcers invites the erosion of procedural protections guaranteed to the accused.<sup>71</sup> Much of this stems from the power prosecutors have at the bargaining table. Law enforcers that make and adjudicate crime are able to exert considerable pressure on defendants, resulting in plea agreement rates hovering around ninety-seven percent and the “deterioration of our constitutionally protected right to trial by jury.”<sup>72</sup>

This leads to Stuntz’s third consequence, what he thought “may be the most important of all.”<sup>73</sup> It is now widely accepted that criminal law has an expressive function, that it communicates certain important societal values.<sup>74</sup> As Stuntz put it, criminal law “communicates with the

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66. *Id.* at 795.

67. *See* Luna, *supra* note 9, at 712. Douglas Husak says that “what tends to characterize many of us who have evaded punishment is not our compliance with the law but the good fortune not to have been caught [or] the discretion of authorities in failing to make arrests or bring charges.” HUSAK, *supra* note 10, at 25.

68. Beale, *supra* note 23, at 757.

69. *Id.* at 758.

70. *Id.* at 758–59.

71. *Id.* at 766–68 (“Overfederalization also increases the potential for duplicative prosecutions and penalties, reduces political accountability, and risks overwhelming the resources of the federal courts.”).

72. Dervan, *supra* note 54, at 751. This does not mean law enforcers should be stripped of their discretion, a necessary feature of the criminal justice system. But excessive discretion stemming from unchecked power to make and adjudicate criminal law creates real harms. *Id.*

73. Stuntz, *supra* note 20, at 520.

74. *Id.* at 520–21. *See also* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 420 (1999) (“The expressive theory of punishment says we can’t identify criminal wrongdoing and punishment independently of their social meanings. Economic competition may impoverish a merchant every bit as much as theft. The reason that theft but not competition is

regulated population (and particularly with those portions of the population who are most inclined to do things the rest of us find bad or dangerous), and thereby seeks to reinforce good conduct norms and attack bad ones.”<sup>75</sup>

If that is true, overcriminalization poses a problem because it disrupts the criminal law’s expressive message. This occurs because the communication society intends to send by having its elected representatives enact a criminal statute becomes garbled by selective and inconsistent application. All those broad criminal codes that are being variably enforced and adjudicated ensure inconsistent signaling.<sup>76</sup> Stuntz provides the example of a legislature passing a tough law targeting domestic violence, which is intended to send a message to would-be abusers that society takes the crime seriously.<sup>77</sup> But if there is little or inconsistent enforcement by police or prosecutors, the opposite message may be communicated—that reducing domestic abuse is only a political tool or is unimportant to law enforcement officials.<sup>78</sup> Although legislators may speak the expressive language of the criminal law, “police and prosecutors control the volume.”<sup>79</sup> Overcriminalization gives them an increasingly strong grip on the dial.<sup>80</sup>

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viewed as wrongful, on this account, is that against the background of social norms theft expresses disrespect for the injured party’s moral worth whereas competition (at least ordinarily) does not.”) (emphasis and footnote omitted). For a detailed analysis of the expressive function’s role in corporate crime, see Gregory M. Gilcrest, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 47–48 (2012):

There are two functions of expressive punishment—independent of any deterrent effect—that are useful. First, the expression of condemnation can influence the values of a society. Second, the failure to express condemnation through the imposition of criminal liability, where such condemnation is widespread, undermines the legitimacy of the criminal justice system.

75. Stuntz, *supra* note 20, at 520–21.

76. *Id.* at 521.

77. *Id.*

78. *Id.* This example is drawn from the Violence Against Women Act, which despite being enacted in 1994 with “great fanfare,” had not been the basis of a single prosecution as late as 1997, despite that the incidence of violence against women was likely unchanged. See HUSAK, *supra* note 10, at 19.

79. Stuntz, *supra* note 20, at 521. Relatedly, as the expressive “signals” become more and more muddled, it becomes “impossible for the lay person to understand what is criminal and what is not.” Podgor, *supra* note 33, at 530.

80. See Stuntz, *supra* note 20, at 521–22:

Or perhaps a better way to put it is this: once legislators speak, once a crime is formally defined, police and prosecutors face the following choice—*reinforce* the message by enforcing the new law, *negate* the message by leaving the law unenforced, or *revise* the message by enforcing it only in certain kinds of cases or against certain kinds of defendants.

Moreover, the intended expressive signal of the criminal law may not even reach its intended audience. With so many overlapping criminal and quasi-criminal provisions, few people know what the law really is.<sup>81</sup> This is certainly true for lay people, but it is also true for those who work in the criminal justice system.<sup>82</sup> And even if individuals know some of the criminal code, it is highly unlikely they know how the code differs across jurisdictions (i.e., how different parts of the citizenry might want to signal their unique worldviews).<sup>83</sup> This leads Stuntz to conclude that the depth and breadth of the criminal law means its “messages are likely to be buried, swamped by local variation and hard-to-discern . . . patterns.”<sup>84</sup> Overcriminalization makes it virtually “impossible to hear what the legal system is trying to say.”<sup>85</sup>

### C. Overcriminalization and White Collar Crime

Up until now, overcriminalization’s harms have been discussed as universal—there has been no attempt to draw out if or how those harms impact different categories of crimes. But that does not do justice to overcriminalization’s complexities. Certain areas of the criminal code are more magnetic than others when it comes to the proliferation of criminal provisions, thus inviting more of overcriminalization’s consequences.<sup>86</sup>

One of those areas is corporate and white collar crime.<sup>87</sup> White collar crime underwent the biggest expansion of federal law during the

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81. *Id.* at 522.

82. *Id.* This group includes judges, lawyers, and law professors.

83. *See* Luna, *supra* note 9, at 719–20.

84. Stuntz, *supra* note 20, at 523.

85. *Id.* at 522.

86. For example, because the areas of food, drugs, public health, housing, transportation, and the environment are heavily regulated, they have likely attracted outsized growth in related criminal provisions (along with an outsized erosion of the *mens rea* requirement). *See* Larkin, *supra* note 27, at 748. From 2000 to 2007, national security, terrorism, protection of military and law enforcement, protection of children, and controls on the Internet were the most criminalized areas. Baker, *supra* note 32, at 5.

87. There is a longstanding debate concerning the definition of “white collar crime.” *See* Gilbert Geis, *White-Collar Crime: What Is It?*, in WHITE-COLLAR CRIME RECONSIDERED 31, 31–48 (Kip Schlegel & David Weisburd eds., 1992) (explaining the origins of various definitions); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 3–13 (2004). For ease of discussion, the U.S. Sentencing Commission’s approach to defining the term is adopted. *See White Collar Sentencing Data: Fiscal Year 2005–Fiscal Year 2009*, 22 FED. SENT’G REP. 127, 127 (2009) (taking a functional approach to defining the term by including most offenses punished under the fraud, antitrust, and tax guidelines, but excluding offenses such as simple theft, shoplifting, failure to pay child support, etc.).

1970s and 1980s.<sup>88</sup> It likely took the lead again in the early 2000s.<sup>89</sup> A complete discussion of why that is falls outside this Article's scope, but suffice it to say that prosecuting white collar crime presents problems that most street crime does not—it is harder to investigate, harder to prove, and harder to deter.<sup>90</sup> This has caused the law to develop in ways to overcome these challenges, which has increased criminalization in this area. Two developments are particularly salient here.

First, in an ongoing effort to curb economic crime, Congress has been especially willing to pass, and courts have been especially willing to endorse, white collar criminal statutes with reduced *mens rea* requirements covering broad swaths of conduct.<sup>91</sup> In a recent congressional term, over forty percent of nonviolent criminal offenses offered by lawmakers created carried “weak” *mens rea* requirements, meaning the offenses required a mental state of less than “willfully.”<sup>92</sup> Twenty-five percent had no *mens rea* requirement.<sup>93</sup> For example, the Stolen Valor Act of 2013 included a provision making it a federal crime to “knowingly . . . exchange[ ] for anything of value” any Congressional medal or other badge.<sup>94</sup> While the provision's aim was laudable, to prevent the illegitimate use of military medals, it was drafted so expansively that it covers legitimate collectors and historians.<sup>95</sup> This type of “legislative creation and expansive . . . interpretation of new criminal offenses” has made it easier for federal prosecutors to combat economic crime, but it also results in many of overcriminalization's consequences.<sup>96</sup>

Mail fraud, the archetypical white collar crime, provides a more prominent example. The mail fraud statute broadly criminalizes any

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88. Stuntz, *supra* note 20, at 525.

89. See *infra* notes 105–21, and accompanying text.

90. See John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 591–95 (2005).

91. *Id.* at 601–02. See also George J. Terwilliger, III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1419 (2007) (cataloging problems caused by “explosive growth in federal regulatory prosecutions” and how changing legal doctrines have made it easier to prosecute corporations).

92. WALSH & JOSLYN, *supra* note 30, at 35–36; Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J., (Sept. 27, 2011), <http://www.wsj.com/articles/SB10001424053111904060604576570801651620000> [<http://perma.cc/SZV2-BQY5>] (detailing criminal provisions offered and passed by the 109th and 111th Congress). Acting “willfully” generally means a defendant possessed specific intent to violate the law. WALSH & JOSLYN, *supra* note 30, at 36.

93. WALSH & JOSLYN, *supra* note 30, at 13.

94. 18 U.S.C. § 704(a) (2012).

95. WALSH & JOSLYN, *supra* note 30, at 15.

96. Hasnas, *supra* note 90, at 600–01.

“scheme or artifice to defraud” that involves the use of the mail.<sup>97</sup> To establish such a scheme or artifice, the government need only prove that a defendant participated in a deliberate plan of action that was intended to deceive a person of something of value.<sup>98</sup> It is not necessary for the government to demonstrate a defendant actually obtained property, or that a victim relied on a misrepresentation.<sup>99</sup> This breadth has given the federal mail fraud statute “virtually limitless” reach,<sup>100</sup> prompting one noted jurist to comment that “[t]o federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.”<sup>101</sup>

Another example, one directly applicable to the *Yates* case, is the Sarbanes-Oxley Act. After Enron’s collapse and Arthur Anderson’s indictment for destroying evidence of the company’s wrongdoing, Congress was “anxious to participate in the national response” to the “growing financial crimes epidemic.”<sup>102</sup> The act that emerged was incredibly expansive. As Lucian Dervan explains, Sarbanes-Oxley initiated a new phase of overcriminalization as to white collar crime.<sup>103</sup> “By creating new laws and amending old fraud provisions, [Sarbanes-Oxley] took aim at *all* financial crimes in an effort to increase prosecutions and prison sentences for an enormous class of defendants, not just the limited number of officers and directors involved in the major scandals of the day.”<sup>104</sup>

In just one part of Sarbanes-Oxley, Congress created two new obstruction of justice statutes—18 U.S.C. § 1512(c) and § 1519.<sup>105</sup> The two statutes were largely redundant; they covered essentially the same conduct, requiring only slightly different mental states.<sup>106</sup> The reason these “superfluous” provisions were both included in the Act is because members of Congress were not communicating—the “rival provisions . . . were drafted by different people at different times and

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97. 18 U.S.C. § 1341 (2012).

98. Hasnas, *supra* note 90, at 603.

99. *Id.* at 603–04.

100. *Id.* at 604 (internal quotations omitted).

101. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980) (citations omitted). Judge Rakoff went on to say, “We may flirt with RICO, show off with 10b-5, and call the conspiracy law ‘darling,’ but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.” *Id.*

102. Dervan, *supra* note 54, at 727.

103. *Id.* at 726.

104. Lucian E. Dervan, *Plea Bargaining’s Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, 60 OKLA. L. REV. 451, 455 (2007) (emphasis added).

105. See 18 U.S.C. § 1512(c) (2012); 18 U.S.C. § 1519 (2012).

106. Dervan, *supra* note 54, at 729–30 (comparing text of each provision).

they both ended up in the statute.”<sup>107</sup> Moreover, Title 18 already contained at least three other obstruction statutes.<sup>108</sup> Yet, Congress felt broader-worded provisions were needed to ensure “overly technical distinctions [did not] hinder [or] prevent prosecution and punishment.”<sup>109</sup> Senator Leahy, the architect of Sarbanes-Oxley’s criminal provisions, said that he wanted § 1519 to be a “general anti-shredding provision” that applied to any acts to destroy or fabricate evidence.<sup>110</sup> As a result, there are now five overlapping federal obstruction crimes—some redundant, all wide in scope—applicable to white collar offenders. This, of course, is at the heart of the *Yates* case and what caused an exasperated Justice Scalia to say that he understands how overcriminalization happens, but not how it makes any sense.<sup>111</sup>

Sarbanes-Oxley did more than add provisions to the criminal code, however. It also raised penalties for white collar offenses. This highlights the second way in which the law has developed to increase white collar criminalization: punishments for economic offenses have steadily been raised over the years. Between the introduction of the federal Sentencing Guidelines in 1987 and the Economic Crime Package in 2001, which preceded Sarbanes-Oxley, sentencing ranges for white collar offenders were repeatedly adjusted upward as lawmakers reacted to financial crime scandals and the resulting public outcry.<sup>112</sup> This upward ratcheting of punishments occurred primarily through increases to the “loss table” in § 2B1.1 of the Guidelines, which

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107. Transcript, *supra* note 6, at 38–39. There are other examples of the “slapdash approach” in which Sarbanes-Oxley was drafted. A Congressional hearing in which legal experts were to testify on key provisions of the statute was put on hold so members could vote on the very provisions being addressed. Those provisions passed 97-0. See Fields & Emshwiller, *supra* note 92.

108. Dervan, *supra* note 54, at 729.

109. *Id.* (quoting S. REP. NO. 107-146, at 7 (2002)).

110. *Id.* at 730 & n.33 (quoting 148 CONG. REC. S7419 (daily ed. July 26, 2002)). Ironically, the other architect of Sarbanes-Oxley, Michael Oxley, representative of Ohio’s Fourth Congressional District for twenty-five years, submitted his own amicus brief in *Yates* contending that § 1519 should be read narrowly. See Brief for the Honorable Michael Oxley as Amicus Curiae in Support of Petitioner at 1, *Yates v. United States*, 135 S. Ct. 1075 (2015) (No. 13-7451):

Representative Oxley and SOX’s other supporters intended the statute to protect investors, to improve the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, including “provid[ing] for criminal prosecution of persons who alter or destroy evidence in *certain* Federal investigations or defraud investors of publicly traded securities.”

111. Transcript, *supra* note 6, at 39.

112. See Alan Ellis, et al., *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, CRIM. JUST., Winter 2011, at 34–36.

covers all economic offenses,<sup>113</sup> but also through the addition of a series of aggravating specific offense characteristics for economic crimes.<sup>114</sup>

Sarbanes-Oxley continued this trend. The statute directed the United States Sentencing Commission, the agency tasked with implementing federal sentencing policy, to consider revising the Sentencing Guidelines to ensure longer sentences for securities, pension, and accounting fraud, especially for officers and directors of public companies.<sup>115</sup> The Commission followed Congress's directive and increased sentencing ranges for "high-end corporate offenders," but also for fraud offenders convicted of crimes carrying a maximum sentence of twenty years or more.<sup>116</sup> Despite Sarbanes-Oxley's stated focus on corporate directors, the latter provision affected almost all white collar defendants because the Act also increased the maximum penalties for mail and wire fraud from five to twenty years.<sup>117</sup> This seemingly small change resulted in higher sentences for a large portion of the more than 8,000 offenders sentenced under the fraud Guideline each year.<sup>118</sup> Sarbanes-Oxley also applied the twenty-year maximum to both new obstruction statutes.<sup>119</sup> All of this has resulted in the average fraud sentence nearly doubling between 2003 and 2012.<sup>120</sup> The average white collar sentence has similarly increased and is up thirty-three percent between 2007 and 2011.<sup>121</sup>

Of course, not everyone agrees there is overcriminalization of white collar crime. According to the National White Collar Crime

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113. See U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (U.S. SENTENCING COMM'N 2014). The loss table increases the sentencing offense level as the loss to the victim increases. The current table has fifteen two-level increases, up to thirty offense levels for a loss of more than \$400 million. Each increase of six offense levels approximately doubles the sentence.

114. See Frank O. Bowman, III, *Pour Encourager Les Autres?: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 387-91 (2004).

115. Larry Bumgardner, *Reforming Corporate America: How Does the Sarbanes-Oxley Act Impact American Business?*, 6 GRAZIADIO BUS. REV. 1 (2003); Bowman, *supra* note 114, at 432-35.

116. Frank O. Bowman III, *Editor's Observations: The Sarbanes-Oxley Act and What Came After*, 15 FED. SENT'G REP. 231, 233 (2003).

117. Dervan, *supra* note 54, at 727-28. This was more than even President Bush was asking for at the time; he requested a ten-year maximum. *Id.* See also Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 373-78 (2008) (outlining Sarbanes-Oxley's newly-created criminal provisions and enhanced penalties).

118. See U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.17 (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table17.pdf> [<http://perma.cc/WA3H-TPVC>].

119. Dervan, *supra* note 54, at 729-30.

120. U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 67 (2012).

121. See U.S. SENTENCING COMM'N, WHITE COLLAR SENTENCING DATA: FISCAL YEAR 2007- PRELIMINARY FISCAL YEAR 2011, at 6 (on file with author).

Center, the public ranks economic crime as more serious than traditional crime, and almost half of U.S. citizens believe the government is not allocating enough resources to combat white collar crime.<sup>122</sup> Not surprisingly, the financial crisis has amplified these feelings. Surveys post-crisis show that approximately seventy percent of the public believes white collar crime contributed to the crisis.<sup>123</sup> Lawmakers appear to agree. The Dodd-Frank Wall Street Reform and Consumer Protection Act promulgated new criminal securities and whistle-blower protection laws, and also expanded the universe of entities and individuals who are subject to existing criminal laws.<sup>124</sup> In addition, Dodd-Frank extended the statute of limitations for securities fraud prosecutions and instructed the Sentencing Commission to once again review the recommended sentences for those convicted of securities and mortgage fraud to be sure they “reflect[ed] the intent of Congress.”<sup>125</sup>

Some scholars also dispute that white collar crimes are overcriminalized. One study found that while there has been an increase in criminal sanctions for securities offenses, it was consistent with the increase in the cases initiated.<sup>126</sup> Moreover, there was no appreciable change in punishment levels during the period.<sup>127</sup> This led the authors to conclude that “the data lend[s] little support to those advocating the ‘overcriminalization’ of white-collar crime.”<sup>128</sup> At least one noted white collar crime and sentencing jurist, Judge Jed Rakoff, concurs, stating that, “In [the] 15 years I’ve been a judge, I haven’t seen examples of overcriminalization in my court.”<sup>129</sup>

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122. NATIONAL WHITE COLLAR CRIME CENTER, NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME 22 (2010).

123. *Id.* at 26.

124. Robert M. Sanger, *The Dodd-Frank Reform Act and the Criminal Law*, SANGER SWYSEN & DUNKLE (Oct. 2010), <http://www.sangerswysen.com/articles/dodd-frank-reform-act-and-criminal-law> [<http://perma.cc/LZ66-X4DH>].

125. Peter J. Henning, *A New World Begins for Wall Street Oversight*, N.Y. TIMES: DEALBOOK, (July 19, 2010, 12:00 PM), <http://dealbook.nytimes.com/2010/07/19/a-new-world-begins-for-wall-street-oversight/> [<http://perma.cc/GD3P-XC2L>].

126. Kip Schlegel, David Eitle & Steven Gunkel, *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 140 (2001).

127. *Id.* at 140.

128. *Id.* Another group of researchers argue there is no overcriminalization in the federal system at all. See Klein, et al., *supra* note 35, at 5 (“An objective review of the evidence suggests that the number of federal proscriptions has little effect, negative or positive, in the real world of federal criminal justice enforcement.”).

129. Bruce A. Green, *Half-Baked Justice*, LAW.COM (Feb. 1, 2011), <http://law.fordham.edu/faculty/22323.htm> [<http://perma.cc/X7GY-BLGV>]. Many other current and former judges and prosecutors would disagree. See, e.g., Coffee, *supra* note 54, at 193–94; Terwilliger, *supra* note 91, at 1434 (former Deputy Attorney General arguing against the “excessive expansion of the use of

Despite such opposition, the overwhelming evidence is that white collar crime is overcriminalized. From a qualitative standpoint, this conclusion is difficult to refute.<sup>130</sup> Quantitative assessment also indicates increased criminalization of white collar crime.<sup>131</sup> Thus, the two developments discussed above—white collar criminal statutes increasing in number and scope, with concomitant increases in punishment—are not to be ignored. Critically, these developments appear to have manifested themselves as harms of overcriminalization. More and broader criminal provisions aimed at white collar offenders, which expose those offenders to higher sentences, have resulted in increasingly powerful federal prosecutors. They, not Congress or the courts, make and adjudicate white collar crime. The consequent vices have followed: excessive enforcement discretion, abuse by enforcement authorities, disparity among offenders, undermining of procedural protections, and misapplication of resources.<sup>132</sup> And because corporate and white collar crime has been the focus of overcriminalization for so long, these harms are amplified unlike most other areas of the criminal law.<sup>133</sup>

This highlights an even more profound harm caused by overcriminalization. Overcriminalization has made the criminal justice

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the criminal law for technical violations of highly complex regulations”); Larry D. Thompson, *The Reality of Overcriminalization*, 7 J.L. ECON. & POL’Y 577, 584–85 (2011).

130. See Paul J. Larkin, Jr., *Finding Room in the Criminal Law for the Desuetude Principle*, 67 RUTGERS L. REV. COMMENTS. 1, 1 & nn.2–3 (2014) (collecting articles from “[n]umerous members of the academy, former senior Justice Department officials, and the American Bar Association” arguing that there is overcriminalization in white collar and other crime and providing examples of its consequences).

131. See KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY: A TREATISE ON THE CRIMINAL LIABILITY OF CORPORATIONS, THEIR OFFICERS AND AGENTS 77 (1984) (finding that white collar criminal prosecutions rose from eight percent of the total number of federal criminal prosecutions in 1970 to twenty-four percent of the total number in 1983); WALSH & JOSLYN, *supra* note 30, at 7–10, 15–16; TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, CRIMINAL JUSTICE SECTION, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW 13–14 (1998) (detailing growth of federal criminal justice system).

132. Beale, *supra* note 23, at 749.

133. See Hasnas, *supra* note 90, at 663 (suggesting the unique evolution of white collar criminal law has resulted in it becoming a “portion of the criminal law . . . significantly divorced from the law’s internal morality”). For a real world illustration of prosecutorial power stemming from overcriminalization in the white collar context see Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL’Y 645, 653–55 (2011). Dervan explains how prosecutors pressured Lea Fastow, wife of Enron CFO Andrew Fastow, to plead guilty to filing a false tax return in exchange for her cooperation and to ensure her husband stayed committed to his plea agreement. Lea Fastow was originally charged with conspiracy to commit wire fraud, conspiracy to defraud the United States, money laundering, aiding and abetting, and filing a false tax return, exposing her to a ten-year sentence. With two young children at home and a husband sure to spend years in jail, “the reality of her situation removed any free will she might have had to weigh her options.” *Id.* at 655.

system more uncoordinated and illogical, more *unjustifiable*. When society is faced with the inconsistent enforcement and overly harsh adjudication of criminal laws, it affects how the public views the criminal justice system as a whole. It erodes the criminal law's legitimacy. This is one of the reasons overcriminalization is so problematic—it “tends to degrade the quality of criminal codes . . . jeopardizing the quality of the justice the system generates.”<sup>134</sup> Douglas Husak puts it more simply: “the increase in criminalization is destructive of the rule of law itself.”<sup>135</sup>

Certainly this is true for white collar criminal law. Decades of overcriminalization have left the public unsure of the criminal law's validity with respect to corporate and white collar crime.<sup>136</sup> The public sees a “legal order that is deeply compromised” in this area.<sup>137</sup> How this happened relates directly to the criminal law's expressive function. Criminalizing a particular economic or white collar act should signal to everyone—would-be offenders as well as the general public—that society deems that act harmful enough to warrant the full application of the government's power.<sup>138</sup> But when so many economic acts are criminalized, and in terms that broadly sweep in conduct with weak *mens rea* requirements, consistent and fair enforcement is impossible. The signal is disrupted.<sup>139</sup>

This has two related effects. One is that the public concludes that unpunished conduct is actually “sanctioned wrongdoing,” and is therefore not as blameworthy as the “real crime” being enforced.<sup>140</sup> The

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134. Smith, *supra* note 10, at 589–90.

135. HUSAK, *supra* note 10, at 13. Unfortunately, testing this proposition empirically is problematic. As Husak points out, it is not possible to conduct a controlled experiment comparing the amount of respect for the law in two jurisdictions that differ only in the amount of law they contain. Yet, a lack of empirical certainty does not doom the contention; there is an ample theoretical basis supported by significant anecdotal evidence. *Id.*

136. See Stuart P. Green & Matthew B. Kugler, *Public Perceptions of White Collar Crime Culpability: Bribery, Perjury, and Fraud*, 75 LAW & CONTEMP. PROBS. 33, 34 (2012) (finding a disconnect between the public's perception of white collar criminal law and its reality); Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 190–91 (2015) (citing Andrea Schoepfer, Stephanie Carmichael & Nicole Leeper Piquero, *Do Perceptions of Punishment Vary Between White-Collar and Street Crimes?*, 35 J. CRIM. JUST. 151, 160 (2007) (findings suggesting educated and wealthier individuals have more experience with white collar crime and perceive it to go “largely undetected”)).

137. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1662 (2012). See also Podgor, *supra* note 33, at 529–30.

138. Stuntz, *supra* note 20, at 520–21.

139. *Id.* See also Gregory M. Gilchrist, *The Special Problem of Banks and Crime*, 85 U. COLO. L. REV. 1, 17–18 (2014) (discussing failures of the expressive function of white collar criminal statutes).

140. Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1335 (2001). See also Mary Kreiner Ramirez, *Criminal*

issue is further complicated because many white collar statutes criminalize conduct that may not be morally blameworthy—it is *mala prohibita*, or wrongful only because it is illegal.<sup>141</sup> This has led some to question whether statutes aimed at white collar crime are “significantly divorced from the law’s internal morality.”<sup>142</sup>

The second effect is that would-be white collar offenders do not “acknowledge the moral culpability of their actions” because “they develop expectations that certain conduct will not be treated criminally even though it is covered by a criminal statute.”<sup>143</sup> Put another way, the criminal law’s signal is so confused that it causes those who are intended to be deterred the most to not be deterred at all.<sup>144</sup> By disrupting white collar criminal law’s expressive function, overcriminalization “undermines the integrity of the larger effort of financial crimes enforcement.”<sup>145</sup> Not only does this greatly lessen the legitimacy of white collar criminal law, it also leads to a new harm of overcriminalization.

### III. OVERCRIMINALIZATION’S NEW HARM PARADIGM

With that background, it is now appropriate to turn to this Article’s central claim—that overcriminalization’s typically understood

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*Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 871 (2013) (arguing that not punishing white collar crime “undermine[s] the rule of law, diminish[es] confidence in government, and promote[s] further costly criminality”).

141. Donald J. Newman, *White-Collar Crime*, 23 LAW & CONTEMP. PROBS. 735, 738 (1958)

In the first place, most white-collar laws have been legislatively-created as of a given date, and some of them are in derogation of common-law principles. These, then, are *mala prohibita*, crimes created by legislative bodies, in contrast to most of the conventional criminal code, which is viewed as merely a legislative expression of ‘natural’ crimes, *mala in se*;

Smith, *supra* note 10, at 538 (citing white collar regulatory offenses specifically).

142. Hasnas, *supra* note 90, at 663.

143. Brown, *supra* note 140, at 1335.

144. Haugh, *supra* note 136, at 190 (discussing attitude of some on Wall Street that misconduct is replete and laws are unenforced (citing Ted Kaufman, *Why DOJ Deemed Bank Execs Too Big To Jail*, FORBES, July 29, 2013, <http://www.forbes.com/sites/tedkaufman/2013/07/29/why-doj-deemed-bank-execs-too-big-to-jail/> [<http://perma.cc/TAU4-5SWZ>])).

145. *Id.* at 191; *see also* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104 (2006) (demonstrating that procedural justice, the perception that the law is being applied equally and fairly, is key to public perception of the law’s legitimacy). This Article does not attempt to distinguish between procedural and moral legitimacy. *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 213–19 (2012) (differentiating between Tyler’s procedural legitimacy and “moral credibility”). Both are negatively impacted by overcriminalization, and given they are often mutually reinforcing, both would also serve to foster rationalizations if lessened, although possibly in different ways and at different amplitudes. *Id.* at 275.

harms are broader, both temporally and substantively, than commonly understood. That is because overcriminalization, particularly in the white collar context, exacts additional harm in the way it impacts an offender's psychological process *before* he undertakes an unethical or criminal act. By delegitimizing the criminal law, overcriminalization fosters the rationalizations offenders employ that allow their bad acts to go forward. Thus, overcriminalization not only creates more criminal laws, but it also creates more criminal *behavior*, which undermines its deterrent goals. This understanding represents a new paradigm of overcriminalization's harms.

### *A. How Rationalizations Foster Criminal Behavior*

To demonstrate the contours of overcriminalization's new harm paradigm, it is necessary to understand how rationalizations affect criminality more generally. Rationalization theory begins with the work of criminologist Donald Cressey.<sup>146</sup> Cressey used a study of embezzlers to develop a social psychological theory regarding the causes of "respectable" crime.<sup>147</sup> Building on Edwin Sutherland's theory of differential association, which posited that criminal behavior involves "motives, drives, rationalizations, and attitudes favorable to the violation of law,"<sup>148</sup> Cressey determined that three key elements are necessary for violations of a financial trust—the essence of all white collar crime—to occur.<sup>149</sup>

First, Cressey theorized that an individual must possess a nonshareable financial problem, *i.e.*, a financial problem the individual

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146. This Article uses the terms rationalization and neutralization more or less interchangeably, albeit using the former much more than the latter. This is consistent with criminological and behavioral ethics literature. *See, e.g.*, Anand et al., *supra* note 21, at 10–17; Maruna & Copes, *supra* note 21, at 234–39. *But see* Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 666–67 (1957) (using the term "rationalization" to mean post-act justification or excuse and "neutralization" to mean pre-act vocabulary of motive).

147. DONALD R. CRESSEY, *OTHER PEOPLE'S MONEY: A STUDY IN THE SOCIAL PSYCHOLOGY OF EMBEZZLEMENT* 12 (1973) [hereinafter CRESSEY, *OTHER PEOPLE'S MONEY*]; Donald R. Cressey, *The Respectable Criminal*, 3 CRIMINOLOGICA 13, 14–15 (1965) [hereinafter Cressey, *Respectable Criminal*].

148. *See* Sykes & Matza, *supra* note 146, at 664; *see also* EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME* 240 (1983). Sutherland, whose groundbreaking work "invented the concept" of white collar crime, was Cressey's dissertation adviser at Indiana University. For a succinct discussion of Sutherland's theories and how they relate to white collar crime, *see* Edwin H. Sutherland & Donald R. Cressey, *A Sociological Theory of Criminal Behavior*, in *DELINQUENCY, CRIME, AND SOCIAL PROCESS* 426, 429–43 (Donald R. Cressey & David A. Ward eds., 1969).

149. Cressey, *Respectable Criminal*, *supra* note 147, at 14.

feels cannot be solved by revealing it to others.<sup>150</sup> Second, the individual must believe that the financial problem can be solved in secret by violating a trust, typically by appropriating funds to which the individual has access through his employment.<sup>151</sup> Third, the individual must verbalize the relationship between the nonshareable financial problem and the illegal solution in “language that lets him look on trust violation as something other than trust violation.”<sup>152</sup> Put another way, the individual uses words and phrases during an internal dialogue that makes the behavior acceptable in his mind (such as telling himself he is “borrowing” the money and will pay it back), thus keeping his perception of himself as an honest citizen intact.<sup>153</sup>

Cressey called verbalizations “the crux of the problem.”<sup>154</sup> He believed that the words a potential offender uses during his conversations with himself were “actually the most important elements in the process which gets him into trouble, or keeps him out of trouble.”<sup>155</sup> Cressey did not view these verbalizations as simple, after-the-fact excuses that offenders used to relieve their culpability upon being caught. Instead, he found that verbalizations were *vocabularies of motive*, words and phrases not invented by the offender “on the spur of the moment,” but that existed as group definitions labeling deviant behavior as appropriate.<sup>156</sup> Importantly, this meant that an offender’s rationalizations were created *before* acting. As Cressey put it, “[t]he rationalization is his motivation”—it not only justifies his behavior to others, but it makes the behavior intelligible, and therefore actionable,

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150. *Id.* at 14–15. Cressey explained that the problem may not seem dire from the outsider’s perspective, but “what matters is the psychological perspective of the potential [white collar criminal].” *Id.* Thus, problems may vary in type and severity, from gambling debts to business losses, which the individual is ashamed to reveal. Cressey’s definition of a nonshareable problem also encompasses standard notions of greed. See JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE* 195 (5th ed. 2002) (arguing that of Cressey’s three elements, the first is the “most questionable, for there appears to be no necessary reason why an embezzlement must result from a nonshareable problem instead of a simple desire for more money”).

151. See MARK M. LANIER & STUART HENRY, *ESSENTIAL CRIMINOLOGY* 168 (3d ed. 2004); Cressey, *Respectable Criminal*, *supra* note 147, at 14–15.

152. Cressey, *Respectable Criminal*, *supra* note 147, at 15.

153. *Id.*

154. *Id.*

155. *Id.*

156. See *id.* Cressey’s discussion of vocabularies of motives drew from the work of C. Wright Mills’s and Sutherland’s “definitions favorable to violations of law.” CRESSEY, *OTHER PEOPLE’S MONEY*, *supra* note 147, at viii.

to himself.<sup>157</sup> Thus, verbalizations permit behavior to proceed that would otherwise be unavailable or unacceptable to an offender.<sup>158</sup>

Shortly after Cressey published his theories, two other criminologists, Gresham Sykes and David Matza advanced a sophisticated theory regarding how juvenile delinquents rationalize their behavior. Like Cressey, Sykes and Matza found that while rationalizations might occur following deviant behavior, they also preceded behavior and made it possible.<sup>159</sup> By rationalizing their conduct *ex ante*, offenders are able to limit the “[d]isapproval flowing from internalized norms and conforming others in the social environment.”<sup>160</sup> Sykes and Matza called these rationalizations “techniques of neutralization,” and they believed neutralizations explained the episodic nature of delinquent behavior more completely than competing theories.<sup>161</sup> Neutralization techniques—what are commonly called rationalizations—explained how offenders could “remain[ ] committed to [society’s] dominant normative system,” yet qualify that system’s imperatives in a way to make periodic violations “‘acceptable’ if not ‘right.’”<sup>162</sup> Rationalization theory and its core idea—that the psychological mechanisms offenders use to rationalize their behavior are a critical component in the commission of crime—has greatly influenced the study of both white collar crime and business ethics.<sup>163</sup>

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157. CRESSEY, *OTHER PEOPLE’S MONEY*, *supra* note 147, at 94, 95. Cressey explained that his interviews of embezzlers revealed “significant rationalizations were always present *before* the criminal act took place, or at least at the time it took place, and, in fact, after the act had taken place the rationalization often was abandoned.” *Id.* at 94 (emphasis added).

158. *See id.* at 153. Cressey conducted interviews with inmates at two penitentiaries who were incarcerated for crimes defined as the criminal violation of financial trust. Although criminological studies such as Cressey’s often rely on such qualitative interviews, concerns regarding sample selection and generalizability should not be ignored. *See* Maruna & Copes, *supra* note 21, at 260–70 (discussing the pros and cons of interview-based, survey-based, and quantitative rationalization research).

159. Sykes & Matza, *supra* note 146, at 666.

160. *Id.*

161. *See id.* at 667. For a catalog of mainstream criminology’s theoretical approaches to understanding the causes of crime, see FRANK E. HAGAN, *INTRODUCTION TO CRIMINOLOGY: THEORIES, METHODS, AND CRIMINAL BEHAVIOR* 146 (2011). *See also* James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 *AM. J. SOC’Y* 406, 406–09 (1987) (integrating multiple theories).

162. Sykes & Matza, *supra* note 146, at 667. Key to neutralization theory is the concept of “drift,” which Matza developed in his solo work. The idea is that offenders are able to drift in and out of delinquency by using neutralization techniques that “free[ ] the individual from the moral bind of law and order.” Maruna & Copes, *supra* note 21, at 231.

163. *See* Maruna & Copes, *supra* note 21, at 222. Criminologists Shadd Maruna and Heith Copes state that the “influence of this creative insight has been unquestionable.” *Id.* Indeed, Sykes and Matza’s article is one of the most-cited explanations of criminal behavior in the first part of the twenty-first century, and their theories have been applied in a variety of contexts. *Id.* at 222–

Although rationalization theory has applicability to all criminal behavior, it has particular force in explaining white collar crime. As an initial matter, rationalization theory has its roots in the study of “respectable” crime. The theory stems from Cressey’s ideas regarding the verbalizations that trust-violators employ, which he identified as the most important of the elements necessary for white collar crime.<sup>164</sup> Indeed, Sykes and Matza recognized that rationalizations are used not only by juveniles, but also might be used by adults engaged in general forms of deviance, including those committing economic crimes in the workplace.<sup>165</sup>

More fundamentally, rationalization theory is especially applicable in describing the causes of white collar crime because “almost by definition white-collar offenders are more strongly committed to the central normative structure.”<sup>166</sup> They are older, more educated, better employed, and have more assets than other offenders.<sup>167</sup> These factors suggest that white collar offenders are able to conform to normative roles and have a self-interest in doing so—they have a “greater ‘stake’ in conformity” than many other categories of offenders.<sup>168</sup> Therefore, it is reasonable to conclude that white collar offenders must rationalize their behavior through “elaborate . . .

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23 (“It is clear that neutralization theory ‘transcends the realm of criminology.’” (quoting Moshe Hazani, *The Universal Applicability of the Theory of Neutralization: German Youth Coming to Terms with the Holocaust*, 15 CRIME L. & SOC. CHANGE 135, 146 (1991))). This includes the area of business ethics. See Blake E. Ashforth & Vikas Anad, *The Normalization of Corruption in Organizations*, 25 RES. ORG. BEHAV. 1, 2–5 (2003) (applying rationalization theory to business law and ethics in a widely cited work).

164. See Cressey, *Respectable Criminal*, *supra* note 147, at 14, 16. While acknowledging his theories were developed only to fit the crime of embezzlement, Cressey believed “the verbalization section . . . will fit other types of respectable crime as well.” *Id.* at 16.

165. Sykes & Matza, *supra* note 146, at 666; see also William A. Stadler & Michael L. Benson, *Revisiting the Guilty Mind: The Neutralization of White-Collar Crime*, 37 CRIM. JUST. REV. 494, 496 (2012) (explaining the applicability of Sykes and Matza’s theories to white collar offending).

166. Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 587 (1985). Of course, defining what exactly is society’s central normative structure is difficult. As used here, it means only a law-abiding structure.

167. See MICHAEL L. BENSON & SALLY S. SIMPSON, *WHITE-COLLAR CRIME: AN OPPORTUNITY PERSPECTIVE* 51–52 (2009).

168. Scott M. Kieffer & John J. Sloan, III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects as an Interrogation Tool*, 22 SEC. J. 317, 324 (2009); see also Vilhelm Aubert, *White-Collar Crime and Social Structure*, in DELINQUENCY, CRIME, AND SOCIAL PROCESS 92, 97 (Donald R. Cressey & David A. Ward eds., 1969) (“But what distinguishes the white-collar criminal in this respect is that his group often has an elaborate and widely accepted ideological rationalization for the offenses, and is a group of great social significance outside the sphere of criminal activity . . . .”); Frank Hartung, *The White-Collar Thief*, in DELINQUENCY, CRIME, AND SOCIAL PROCESS 1109, 1112 (Donald R. Cressey & David A. Ward eds., 1969) (explaining differences between trust violators and “career delinquents” in using rationalizations).

processes prior to their offenses.”<sup>169</sup> Without employing rationalizations, white collar offenders would be unable to “bring [their] actions into correspondence with the class of actions that is implicitly acceptable in . . . society.”<sup>170</sup> Not surprisingly, numerous studies have documented the use of rationalizations by white collar offenders.<sup>171</sup>

### *B. White Collar Rationalizations*

While rationalization theory does much to explain how white collar criminal behavior occurs, it is also important to understand the specific rationalizations white collar offenders employ to effectuate their crimes. This Article highlights eight of the most prominent rationalizations used by white collar criminals.<sup>172</sup> These are also some of the key rationalizations Yates employed that allowed him to toss dozens of fish overboard against the explicit instructions of a federal agent, all while maintaining he did nothing wrong.<sup>173</sup>

*Denial of Responsibility.* Called the “master account,” the denial of responsibility rationalization occurs when the offender defines her conduct in a way that relieves her of responsibility, thereby mitigating “both social disapproval and a personal sense of failure.”<sup>174</sup> Generally, offenders deny responsibility by claiming their behavior is accidental or

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169. Benson, *supra* note 166, at 587.

170. *Id.* at 588.

171. See Maruna & Copes, *supra* note 21, at 223; see also Anand et al., *supra* note 21, at 40–47 (analyzing how organizational employees perpetrate corrupt acts by using “rationalizing tactics”); Benson, *supra* note 166, at 591–98 (finding antitrust, tax, financial trust, fraud, and false statements offenders were “nearly unanimous” in rationalizing their criminal conduct by “denying basic criminality”); Petter Gottschalk, *Rotten Apples Versus Rotten Barrels in White Collar Crime: A Qualitative Analysis of White Collar Offenders in Norway*, 7 INT’L J. CRIM. JUST. SCI. 575, 580–81 (2012) (applying rationalization theory in a study of Norwegian white collar offenders); Kieffer & Sloan, *supra* note 168, at 318–24 (arguing that rationalizations are particularly important for white collar offenders); Stadler & Benson, *supra* note 165, at 495–98 (listing the domains in which researchers have explored the use of rationalizations, including occupational deviance, corporate crime, and other forms of white collar offending); Nicole L. Piquero, Stephen G. Tibbetts & Michael B. Blankenship, *Examining the Role of Differential Association and Techniques of Neutralization in Explaining Corporate Crime*, 26 DEVIANT BEHAV. 159, 181 (2005) (“Findings from this study also support the use of techniques of neutralization in that several of the neutralization measures . . . had significant effect on decisions to commit corporate crime.”).

172. Sykes and Matza originally identified five major types of rationalization techniques. See Sykes & Matza, *supra* note 146, at 667–70. As research has progressed, some criminologists have criticized the list as not being conceptually distinct enough. See Maruna & Copes, *supra* note 21, at 284 (arguing that the original list of five techniques is not theoretically precise). Currently, researchers have identified between fifteen and twenty rationalization techniques. See *id.* at 234; Stadler & Benson, *supra* note 165, at 496–98.

173. See *infra* Section IV.C.

174. Maruna & Copes, *supra* note 21, at 231–32.

due to forces outside their control.<sup>175</sup> White collar offenders deny responsibility by pleading ignorance, suggesting they were acting under orders, or contending larger economic conditions caused them to act illegally.<sup>176</sup> The complexity of laws regulating white collar crimes and the hierarchical structure of companies offer offenders numerous ways to deny their responsibility.<sup>177</sup>

*Denial of Injury.* This rationalization focuses on the injury or harm caused by the illegal or unethical act.<sup>178</sup> White collar offenders may rationalize their behavior by asserting that no one will really be harmed.<sup>179</sup> If an act's wrongfulness is partly a function of the harm it causes, an offender can excuse or mollify her behavior if no clear harm exists.<sup>180</sup> The classic use of this technique in white collar crime is an embezzler describing her actions as "borrowing" the money—by the offender's estimation, no one will be hurt because the money will be paid back.<sup>181</sup> Offenders may also employ this rationalization when the victim is insured or the harm is to the public or market as a whole, such as in insider trading or antitrust cases.<sup>182</sup>

*Denial of the Victim.* Even if a white collar offender accepts responsibility for her conduct and acknowledges that it is harmful, she may insist that the injury was not wrong by denying the victim in order to neutralize the "moral indignation of self and others."<sup>183</sup> Denying the victim takes two forms. One is when the offender argues that the

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175. *Id.* at 232; Sykes & Matza, *supra* note 146, at 667 ("By learning to view himself as more acted upon than acting, the delinquent prepares the way for deviance from the dominant normative system without the necessity of a frontal assault on the norms themselves.").

176. *See* Kieffer & Sloan, *supra* note 168, at 320–21 (explaining how white collar offenders blame violations on personal problems, such as alcoholism, drug addiction, or perceived financial difficulties); Maruna & Copes, *supra* note 21, at 232; Sykes & Matza, *supra* note 146, at 667.

177. *See* Maruna & Copes, *supra* note 21, at 232 (describing how an engineer at B.F. Goodrich failed to inform his supervisor of the reporting of false documents because he "learned a long time ago not to worry about things over which [he] ha[d] no control"); *see also* Benson, *supra* note 166, at 594 (reporting that an income tax offender referred to criminal behavior as "mistakes" resulting from ignorance or poor bookkeeping). As the "master account," the denial of responsibility rationalization necessarily encompasses aspects of all rationalizing techniques. *See* COLEMAN, *supra* note 150, at 196–97.

178. Sykes & Matza, *supra* note 146, at 667.

179. Maruna & Copes, *supra* note 21, at 232.

180. *Id.*

181. *See* Cressey, *Respectable Criminal*, *supra* note 147, at 15; Kieffer & Sloan, *supra* note 168, at 321–22.

182. *See* COLEMAN, *supra* note 150, at 206 (providing an example of a price-fixing offender asserting that while his conduct may have been "illegal," it was "not criminal" because "criminal action meant damaging someone, and we did not do that"); Benson, *supra* note 166, at 598 (providing an example of a bank fraud offender arguing there was no harm because "[t]he bank didn't lose any money . . . . What [he] did was a technical violation.").

183. Sykes & Matza, *supra* note 146, at 668.

victim's actions were inappropriate and therefore he deserved the harm.<sup>184</sup> The offender claims rightful retaliation or punishment, and then denies the victim aggrieved status.<sup>185</sup> The second is when the victim is "absent, unknown, or abstract," which is often the case with property and economic crimes.<sup>186</sup> In this instance, the offender may be able to minimize her internal culpability because there are no visible victims "stimulat[ing] the offender's conscience."<sup>187</sup> White collar offenders may use this rationalization in frauds against the government, such as false claims or tax evasion cases, and other crimes in which the true victim is abstract.<sup>188</sup>

*Condemning the Condemners.* White collar offenders may also rationalize their behavior by shifting attention away from their conduct on to the motives of other persons or groups, such as regulators, prosecutors, and government agencies.<sup>189</sup> By doing so, the offender "has changed the subject of the conversation"; by attacking others, "the wrongfulness of [her] own behavior is more easily repressed."<sup>190</sup> This rationalization takes many forms in white collar cases: the offender calls her critics hypocrites, argues they are compelled by personal spite, or asserts they are motivated by political gain.<sup>191</sup> The claim of selective enforcement or prosecution is particularly prominent in this rationalization.<sup>192</sup> In addition, white collar offenders may point to a biased regulatory system or an anticapitalist government.<sup>193</sup>

*Appeal to Higher Loyalties.* The appeal to higher loyalties rationalization occurs when an individual sacrifices the normative demands of society for that of a smaller group to which the offender belongs.<sup>194</sup> The offender does not necessarily reject the norms she is violating; rather, she sees other norms that are aligned with her group as more compelling.<sup>195</sup> In the white collar context, the group could be

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184. Maruna & Copes, *supra* note 21, at 232.

185. See Kieffer & Sloan, *supra* note 168, at 322 (describing physicians committing Medicare fraud as claiming the excess reimbursements they submitted were "only what they rightfully deserved for their work"); Sykes & Matza, *supra* note 146, at 668 ("By a subtle alchemy the delinquent moves himself into the position of an avenger and the victim is transformed into the wrong-doer.").

186. Maruna & Copes, *supra* note 21, at 233; Sykes & Matza, *supra* note 146, at 668.

187. Maruna & Copes, *supra* note 21, at 233.

188. See Kieffer & Sloan, *supra* note 168, at 322.

189. Maruna & Copes, *supra* note 21, at 233; Sykes & Matza, *supra* note 146, at 668.

190. Sykes & Matza, *supra* note 146, at 668.

191. See Kieffer & Sloan, *supra* note 168, at 323.

192. See *id.*

193. See *id.*

194. Sykes & Matza, *supra* note 146, at 669.

195. Maruna & Copes, *supra* note 21, at 233.

familial, professional, or organizational. Offenders rationalizing their behavior as necessary to provide for their families, protect a boss or employee, shore up a failing business, or maximize shareholder value are employing this technique.<sup>196</sup> Notably, female white collar offenders have been found to appeal to higher family loyalties more than their male counterparts.<sup>197</sup>

*Metaphor of the Ledger.* White collar offenders may accept responsibility for their conduct and acknowledge the harm it caused, yet still rationalize their behavior by comparing it to their previous good behaviors.<sup>198</sup> By creating a “behavior balance sheet,” the offender sees her current negative actions as outweighed by a lifetime of good deeds, both personal and professional, which minimizes moral guilt.<sup>199</sup> It seems likely that white collar offenders employ this technique, or at least have it available to them, as evidenced by current sentencing practices—almost every white collar sentencing is preceded by a flood of letters to the court supportive of the defendant and attesting to her good deeds.<sup>200</sup>

*Claim of Entitlement.* Under the claim of entitlement rationalization, offenders justify their conduct on the grounds they deserve the fruits of their illegal behavior.<sup>201</sup> This rationalization is particularly common in employee theft and embezzlement cases, but is also seen in public corruption cases.<sup>202</sup>

*Claim of Relative Acceptability/Normality.* The final white collar rationalization entails an offender justifying her conduct by comparing it to the conduct of others. If “others are worse” or “everybody else is doing it,” the offender, although acknowledging her conduct, is

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196. See Kieffer & Sloan, *supra* note 168, at 323 (describing an antitrust offender who justified his conduct by “saying, ‘I thought . . . we were more or less *working on a survival basis* in order to try to make enough to keep our plant and our employees’” (citing JOHN E. CONKLIN, CRIMINOLOGY 187 (8th ed. 2004))).

197. Kathleen Daly, *Gender and Varieties of White-Collar Crime*, 27 CRIMINOLOGY 769, 789 (1989) (finding female embezzlers were twice as likely to justify their conduct based on family needs than male embezzlers).

198. See ENCYCLOPEDIA OF WHITE-COLLAR & CORPORATE CRIME 913 (Lawrence M. Salinger ed., 2013); Paul Michael Klenowski, “Other People’s Money”: An Empirical Examination of the Motivational Differences Between Male and Female White Collar Offenders 79–80 (May 2008) (unpublished Ph.D. dissertation, Indiana University of Pennsylvania) (on file with author).

199. See ENCYCLOPEDIA, *supra* note 198, at 803.

200. See, e.g., Ron Kampeas, *Sharansky, 173 Others Plead Leniency for Libby*, JWEKLY.COM (June 8, 2007), <http://www.jweekly.com/article/full/32649/sharansky-173-others-plead-leniency-for-libby> [<http://perma.cc/E4K6-HW46>] (describing the Scooter Libby sentencing, in which Libby submitted 174 letters appealing for leniency when facing just a thirty-seven-month sentence).

201. COLEMAN, *supra* note 150, at 208.

202. *Id.* (describing a former city councilman who explained his involvement in corruption as due to his low salary and lack of staff); Klenowski, *supra* note 197, at 209–11.

able to minimize the attached moral stigma and view her behavior as aligned with acceptable norms.<sup>203</sup> In white collar cases, this rationalization is often used by tax violators and in real estate, accounting, and insider trading frauds.<sup>204</sup>

The above discussion highlights a few additional points about rationalization theory. First, although there seems to be a compulsion among criminologists and behavioral ethicists to categorize rationalizations, that there are differing types is not all that remarkable. In fact, if it is true, as some argue, that rationalizing bad behavior is “part of being human,”<sup>205</sup> it follows that the list of rationalizations will continue to grow as researchers study more offenders in differing roles and occupations. Put another way, what is interesting about rationalizations is what they do, “not the flavors [they] come[ ] in.”<sup>206</sup>

Second, rationalizations are not “one size fits all.” Offenders employ them in different degrees, combine them with other rationalizations, and use them at different times. Moreover, the exact verbalizations an offender uses to rationalize her behavior will be specific to her circumstances, because they are part of her internal dialogue influenced by her unique environment.<sup>207</sup> The above list suggests that some rationalizations will overlap and that offenders may use multiple rationalizations to fully minimize their behavior.

Finally, it is often questioned how researchers can be sure that an offender’s rationalizations are occurring *prior* to the unethical or criminal act, thereby allowing the behavior to proceed, versus occurring *after* the act, rendering the rationalizations mere excuses.<sup>208</sup> Longitudinal studies demonstrate the presence of *ex ante* rationalizations, yet the “sequencing question” persists in the criminological literature.<sup>209</sup> As to white collar crime, however, the question need not be answered definitively because it creates a false dichotomy. Criminologists Shadd Maruna and Heith Copes have

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203. COLEMAN, *supra* note 150, at 208; Klenowski, *supra* note 197, at 67, 209–10.

204. See COLEMAN, *supra* note 150, at 207 (describing a real estate agent rationalizing fraud as rampant); Benson, *supra* note 166, at 594 (describing tax offenders claiming that “everybody cheats somehow on their taxes”).

205. Maruna & Copes, *supra* note 21, at 285 (quoting STANLEY COHEN, STATES OF DENIAL 37 (2001)).

206. *Id.* at 284.

207. See LANIER & HENRY, *supra* note 151, at 169–70.

208. See Maruna & Copes, *supra* note 21, at 271 (calling this the “lingering ‘chicken-or-the-egg’ debate”).

209. See, e.g., Robert Agnew, *The Techniques of Neutralization and Violence*, 32 CRIMINOLOGY 555, 564–73 (1994) (engaging in a longitudinal study supporting rationalization theory’s *ex ante* sequencing).

explained that even if white collar offenders commit criminal acts “in the absence of definitions favorable to them” (*i.e.*, without using verbalizations that minimize moral guilt), those definitions “get applied retroactively to excuse or redefine the initial deviant acts. To the extent that they successfully mitigate . . . self-punishment, they become discriminative for repetition of the deviant acts and, hence, precede the future commission of the acts.”<sup>210</sup> In other words, a rationalization may start off as an after-the-fact excuse, but necessarily becomes the rationale that facilitates future offending. Because almost no white collar offenses are truly singular acts, but instead are made up of a number of smaller acts occurring over time, there is little concern that an offender may be employing an after-the-fact excuse that did not somehow rationalize her course of criminal conduct. Rationalizations, then, regardless of when they are expressed, reflect a white collar offender’s *pre-* and *inter-act* thinking.<sup>211</sup>

### C. How Overcriminalization Fuels Rationalizations

Overcriminalization’s evils typically have been viewed through the lens of the enforcement and adjudication of criminal laws *after* the offender’s conduct occurs—these are the first two of Stuntz’s three consequences and they lead to a host of more specific detriments.<sup>212</sup> But that conception is incomplete because it ignores overcriminalization’s role in fueling the *ex ante* rationalizations that allow white collar criminal acts to go forward. Overcriminalization not only causes

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210. Maruna & Copes, *supra* note 21, at 271.

211. The persistence of the sequencing question seems to be derived from two concerns. One is that offenders explaining their rationalizations after being caught are gaming the system by offering after-the-fact excuses. This concern can be addressed by investigating offenders’ pre-act statements. If an offender’s pre- and post-act statements are consistent, it is likely a rationalization expressed post-act operated as a pre-act vocabulary of motive. The other concern is that an offender may behave unethically or criminally for unknown reasons, even to herself. Any post-act rationalization would thus be “empty,” revealing little about her pre-act motivations. While that scenario is possible, it would be odd indeed for an offender to offer an after-the-fact rationalization that had no connection to her pre-act thinking. To suggest otherwise would assume an offender was conjuring up a rationalization for the first time from a completely blank slate. But, that is inconsistent with what we know—our own rationalizations related to everyday life are not created at the spur-of-the-moment, but are drawn from well-worn popular ideologies present in our culture. That said, human thinking is undoubtedly complex; determining the exact moment that a thought enters a person’s mind and if it changes overtime is difficult, if not impossible. Because of this, the question of sequencing will likely persist unanswered for some time. Compare Agnew, *supra* note 209, at 555, with Paul Cromwell & Quint Thurman, *The Devil Made Me Do It: Use of Neutralizations by Shoplifters*, 24 *DEVIANT BEHAV.* 535, 547 (2003) (“No one . . . has yet been able to empirically verify the existence of pre-event [as opposed to post-event] neutralizations . . .”).

212. See Beale, *supra* note 23, at 749; Stuntz, *supra* note 20, at 519–20.

unnecessary criminal violations through increased and unjustified enforcement and adjudication, but it also causes criminal behavior itself.

How overcriminalization fuels rationalizations is a product of both *how* rationalizations operate and *where they originate*. In his study, Cressey found that the rationalizations embezzlers used to minimize the disconnect between their behavior and their self-perception were not “invented . . . on the spur of the moment” by them “or anyone else.”<sup>213</sup> Instead, Cressey found that before a vocabulary of motive could be taken over and used by a would-be embezzler, it must “exist as [a] group definition[ ] in which the behavior in question, even crime, is in a sense *appropriate*.”<sup>214</sup> He concluded that rationalizations are, in effect, swirling around in society, waiting to be assimilated and internalized by individuals contemplating solving their nonshareable problems by violating a trust.<sup>215</sup>

Cressey further explained that rationalizations originate from “popular ideologies that sanction crime in our culture.”<sup>216</sup> He pointed to commonplace sayings that suggest wrongdoing is acceptable in certain situations, such as, “Honesty is the best policy, but business is business” and “All people steal when they get in a tight spot.”<sup>217</sup> Once verbalizations such as these have been adopted by individuals, they transform into powerful, context specific rationalizations: “I’m only going to use the money temporarily, so I am borrowing, not stealing” (denial of injury); or “I have tried to live an honest life but I’ve had nothing but troubles, so to hell with it” (claim of entitlement).<sup>218</sup>

Building on this idea, Sykes and Matza found that rationalizations originate from an even more specific location: the criminal law itself. According to them, great flexibility exists in criminal law because of its variability—“it does not consist of a body of rules held to be binding under all conditions.”<sup>219</sup> Citing defenses to criminal liability such as necessity, insanity, compulsion, and self-defense, Sykes and Matza viewed application of the criminal code as an exercise in avoidance.<sup>220</sup> They argued that if an individual “can prove that criminal

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213. Cressey, *Respectable Criminal*, *supra* note 147, at 15.

214. *Id.*

215. *See id.*

216. *Id.* Cressey argued that once antinormative verbalizations are assimilated and internalized by an individual, they take on a more personal bent, allowing the individual to act without disrupting her self-perception as an honest person. *See id.*

217. *Id.*

218. *Id.*

219. Sykes & Matza, *supra* note 146.

220. *Id.*

intent was lacking,” he can “avoid moral culpability for his criminal action—and thus avoid the negative sanctions of society.”<sup>221</sup> In other words, if a would-be offender can latch on to a rationalizing “defense” to his behavior, he can “engage in delinquency without serious damage to his self-image.”<sup>222</sup> This led Sykes and Matza to one of their most important findings: that much anti-normative behavior is based on “what is essentially an unrecognized extension of [legal] defenses to crimes, in the form of justifications for deviance that are seen as valid by the delinquent but not by the legal system or society at large.”<sup>223</sup> To put it more succinctly, the law contains the seeds of its own rationalization.<sup>224</sup>

If rationalizations are drawn from an offender’s environment, which includes from the criminal law itself, overcriminalization has a significant role in fostering unethical and criminal behavior. As discussed above, inconsistent enforcement and overly harsh adjudication of criminal laws—the primary consequences of overcriminalization—causes the criminal justice system to become more uncoordinated and illogical.<sup>225</sup> This in turn erodes the criminal law’s legitimacy.

This perceived illegitimacy provides space for would-be wrongdoers to rationalize their conduct. They see defenses to the law all around them, which they then internalize and incorporate into their own thought processes. Once this occurs, there is little stopping an offender’s future criminal conduct from going forward—there simply is no normative “check” available to the offender because it has been rationalized away. By weakening the criminal law’s legitimacy, overcriminalization provides an environment ripe for rationalizations, in turn fostering the very conduct it seeks to eliminate.<sup>226</sup>

Overcriminalization’s role in creating rationalizations may occur at both the macro and micro level. At the macro level, overcriminalization’s “breadth and depth” results in excessive, unchecked discretion by law enforcers.<sup>227</sup> This necessarily leads to selective enforcement and unequal treatment of similarly situated

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221. *Id.*

222. *Id.* at 666–67.

223. *Id.* at 666.

224. See DAVID MATZA, DELINQUENCY AND DRIFT 61 (2009); Sykes & Matza, *supra* note 146, at 666.

225. See *supra* Section II.C.

226. Importantly, an individual’s acceptance of a rationalization does not automatically lead to unethical or illegal behavior. “[Rationalizations] merely permit delinquency under certain extenuating conditions. They do not require delinquency.” Agnew, *supra* note 209, at 560.

227. Beale, *supra* note 23, at 776–79; Stuntz, *supra* note 20, at 512–19.

defendants, as well as the erosion of procedural protections.<sup>228</sup> The public's reaction to a criminal justice system with these attributes might be to denounce the system and its agents—"all cops and prosecutors are 'corrupt, brutal, and unfair.'"<sup>229</sup> This fosters the condemning the condemners rationalization in which attention is shifted from the wrongdoers' misdeeds by attacking others.<sup>230</sup> The public's reaction might also be to assume that unenforced laws are unimportant or that breaking them is tolerable—"Everybody is doing it!" or "There are others worse than me."<sup>231</sup> This fosters the claim of relative acceptability/normality rationalization, which justifies bad acts by comparing them to others' conduct.<sup>232</sup> The public could also react by viewing the criminal justice system as rigged, either wholly or against their identified group—"I'm the real victim."<sup>233</sup> This fosters the denial of victim rationalization that suggests there was no real harm.<sup>234</sup> A host of other reactions are plausible, but almost all will foster one or more rationalizations. Although more direct empirical data regarding the public's adoption of specific rationalizations is needed, opinion polls demonstrate that most people feel white collar crime enforcement is varied and inadequate.<sup>235</sup> And recent studies suggest that those segments of the public most likely to encounter white collar crime deem its detection and punishment as uncertain.<sup>236</sup>

The same thing may happen at the micro, or individual, level. Consider one of Cressey's "respectable" criminals: the tax cheat. He is faced with a financial dilemma that can be solved by violating a trust—reducing the amount of taxes he must pay by failing to report some of his income. He knows lying and cheating is wrong, and he does not see himself as a criminal. In fact, he sees himself as just the opposite, a

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228. Beale, *supra* note 23, at 757, 767.

229. Klenowski, *supra* note 198, at 56.

230. See Maruna & Copes, *supra* note 21, at 233; Sykes & Matza, *supra* note 146, at 668.

231. Klenowski, *supra* note 198, at 67.

232. See COLEMAN, *supra* note 150, at 197–98; Benson, *supra* note 166, at 594.

233. Klenowski, *supra* note 198, at 56.

234. Sykes & Matza, *supra* note 146, at 668.

235. Donald J. Rebovich & John L. Kane, *An Eye for an Eye in the Electronic Age: Gauging Public Attitude Toward White Collar Crime and Punishment*, J. ECON. CRIME MGMT., Fall 2002, at 4–12.

236. Schoepfer et al., *supra* note 136, at 160 ("More educated and wealthier individuals were less likely to view white-collar crimes as being more certain of detection and less likely to be punished than street crimes, especially with regard to how they perceived the criminal justice system currently operated."). That white collar crime may be underenforced does not lessen the opportunity for rationalizations; in fact, it likely increases it. Underenforcement coupled with harsh penalties for those who are prosecuted increases the perceived illegitimacy of white collar crime, thus fostering rationalizations.

“pillar of the community, a respected, honest employee” who would “look at [you] in horror” if it was suggested he commit a crime.<sup>237</sup>

But, if he begins rationalizing his potential bad conduct, he starts to reconcile the disconnect between his self-perception as an upstanding person and the crime he is considering committing. For example, he may think about how complex the tax code is—there are literally thousands of pages of rules and regulations.<sup>238</sup> It is doubtful he would even know if he was doing anything wrong (denial of responsibility). He may also think that all of those rules, most of which apply to others, make filing taxes essentially a game that rewards being shrewd (denial of injury). Even if he did fudge the numbers a bit, he might say to himself, it is not a real crime—at best it is a regulatory issue (denial of injury). Everyone cheats a little on his or her taxes anyway (claim of relative acceptability/normalcy). Besides, he may say, the government only goes after big tax evaders, not hardworking people just cutting a corner or two (claim of entitlement). In fact, he has never even heard of a tax prosecution of someone in the middle-class (claim of relative acceptability/normalcy). In any event, the government is so big now it will never miss one filer’s income (denial of the victim). Even if it did, the government does not deserve his money—it is so bloated and wasteful, he is not about to contribute to the problem (condemning the condemners). After all, he has worked hard his whole life (metaphor of the ledger), and he and his family should get to enjoy that hard work (appeal to higher loyalties).

In the span of a few minutes, the would-be tax cheat has gone from someone who would never think of committing a crime to being on the verge of committing tax fraud. He is free to go forward with his illegal conduct “without serious damage to his self image” because he has rationalized his behavior *ex ante*.<sup>239</sup>

Importantly, many of the rationalizations the would-be tax offender relied upon are available—or are available in greater frequency and strength—because of increased criminalization in the tax arena.<sup>240</sup> The IRS’s Tax Crimes Handbook has grown to over 150 pages

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237. Cressey, *Respectable Criminal*, *supra* note 147, at 15.

238. The *Washington Times* reports that, “At 3,951,104 words long, the U.S. Tax Code is seven times the length of Leo Tolstoy’s ‘War and Peace’ . . . twice the length of the King James Bible plus the entire works of Shakespeare combined.” Jennifer Harper, *4 MILLION WORDS: The U.S. Tax Code Is Seven Times the Length of ‘War and Peace,’* WASH. TIMES, (Apr. 15, 2014), <http://www.washingtontimes.com/news/2014/apr/15/4-million-words-us-tax-code-seven-times-length-war/> [<http://perma.cc/X7KL-UCH7>].

239. Sykes & Matza, *supra* note 146, at 667.

240. See Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1981, 2025 (2014) (listing new tax laws in North Carolina and the infrequency with which they are charged); Paul J. Larkin, Jr., *Fighting Back Against Overcriminalization*, LEGAL MEMORANDUM 92

long; there are thirteen substantive statutes and dozens of applicable “secondary offenses” governing the reporting and collection of taxes.<sup>241</sup> Many of these provisions, despite the criminal tax code’s comparatively strict *mens rea* requirements, are quite broad.<sup>242</sup> Further, criminal tax enforcement is lax—only about two percent of filers are audited, and only a tiny portion of those are penalized, even less so criminally.<sup>243</sup> This necessarily means the IRS’s criminal enforcement agents are exercising significant discretion in what the law is and how it is enforced. Yet, when that law is enforced, the penalties imposed are significant.<sup>244</sup> The result is a waning of the tax law’s legitimacy in the eyes of the public.<sup>245</sup> This leads to the many consequences discussed above, including the

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(Heritage Found., Washington, D.C.), June 12, 2013, at 2, <http://www.heritage.org/research/reports/2013/06/fighting-back-against-overcriminalization-the-elements-of-a-mistake-of-law-defense> [<http://perma.cc/47FQ-RLZ9>] (explaining that in a “complex regulatory regime” such as the tax code, defendants should fight back against “unwittingly run[ning] afoul of the criminal law” by asserting a mistake of law defense).

241. INTERNAL REVENUE SERV., OFFICE OF CHIEF COUNSEL, CRIMINAL TAX DIV., TAX CRIMES HANDBOOK (2009), [http://www.irs.gov/pub/irs-utl/tax\\_crimes\\_handbook.pdf](http://www.irs.gov/pub/irs-utl/tax_crimes_handbook.pdf) [<http://perma.cc/YL8J-MAP5>]; Hasnas, *supra* note 90, at 609 (stating that secondary offenses, such as money laundering and obstruction of justice, are “offenses that consist entirely of actions that make it more difficult for the government to prosecute other substantive criminal offenses”). It is important to note that many tax crimes overlap with more traditional white collar crimes, thus allowing prosecutors significant enforcement discretion. See Geraldine Szott Moohr, *Introduction: Tax Evasion as White Collar Fraud*, 9 HOUS. BUS. & TAX L. J. 207, 211–13 (2009).

242. See Ray A. Knight & Lee G. Knight, *Criminal Tax Fraud: An Analytical Review*, 57 MO. L. REV. 175, 178 (1992) (“Because the statutory definition of criminal tax evasion is extremely broad, the decision as to who should or should not be prosecuted on this charge has been mainly an administrative one.”); Moohr, *supra* note 241, at 210–11.

243. Eric Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1783–84 (2001). But see Kelley Phillips Erb, *IRS Investigations, Prosecutions for Tax Crimes Up in 2013*, FORBES, (Feb. 26, 2014), <http://www.forbes.com/sites/kellyphillipserb/2014/02/26/irs-investigations-prosecutions-for-tax-crimes-up-in-2013> [<http://perma.cc/4WXE-JMZV>] (reporting a continuing upward trend in IRS criminal tax investigations, prosecutions, and convictions).

244. Hon. J. Skelly Wright, *Sentencing the Income Tax Violator: Statement of a Basic Problem*, 30 F.R.D. 185, 302–06 (1961) (urging fellow judges to sentence tax violators to prison terms for deterrence purposes); Moohr, *supra* note 241, at 215–16 (describing tax evasion cases resulting in multi-year prison terms); Janet Novack, *Federal Judges Are Cutting Rich Tax Cheats Big Sentencing Breaks*, FORBES, (May 14, 2014), <http://www.forbes.com/sites/janetnovack/2014/05/14/federal-judges-are-cutting-rich-tax-cheats-big-sentencing-breaks> [<http://perma.cc/UL3M-U5PP>] (reporting that the average prison term for federal tax related crimes rose from “21 months in 2004 to 31 months in 2013,” but also suggesting judges are departing downward from the applicable Sentencing Guidelines in an increasing number of tax cases).

245. See, e.g., Robert Mason & Lyle D. Calvin, *Public Confidence and Admitted Tax Evasion*, 37 NAT’L TAX J. 489, 489 (1984).

There is a widespread belief, held both by tax administrators and the general public, that growing dissatisfaction with the tax system is responsible for increased tax evasion. And unless a sense of fairness is restored to the tax system, one can expect evasion to grow and tax gaps to widen. The basic cause of tax fraud, according to this argument, lies in the belief that the tax system is unfair.

*Id.* (citations omitted).

fostering of rationalizations to be used by “respectable” tax cheats. Given the development of white collar criminal law, the same analysis holds true for most white collar crimes.

#### IV. *YATES* AS AN EXAMPLE OF OVERCRIMINALIZATION’S NEW HARM PARADIGM

Thus far, this Article has attempted to present a more complete understanding of overcriminalization and its harms, albeit in a mostly theoretical manner. However, *Yates* provides a ready practical example of how overcriminalization fuels offender rationalizations, thereby facilitating criminal behavior. By looking closely at what John Yates did—and more importantly how he verbalized his conduct—overcriminalization’s criminogenic nature becomes apparent. *Yates* serves as a useful and prominent vehicle through which to explore the full scope of overcriminalization’s harms.

##### A. *Building Rationalizations—the Facts of Yates*

Although the litigants spent little time in their briefs and at oral argument discussing the factual background of Yates’s conviction, the specifics of his case are critical to understanding overcriminalization’s harms. At the time of his indictment, John Yates was a 58-year-old commercial fisherman living in Holmes Beach, Florida, a town of approximately 4,000 people.<sup>246</sup> He had been married to his wife, Sandy, for thirty-seven years and had been a member of the community for at least half that time.<sup>247</sup> Yates captained a boat called the *Miss Katie* out of nearby Cortez, where he had fished for more than thirteen years.<sup>248</sup> By all accounts, Yates was an unassuming, hardworking, and articulate boat captain that made “a living doing what [he] love[d] to do.”<sup>249</sup>

In August 2007, Yates and a small crew were fishing for red grouper in the Gulf of Mexico.<sup>250</sup> On the fourth day of what was expected to be a two-week trip, a Florida Fish and Wildlife boat stopped them for

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246. Kathy Prucnell, *HB Fisher Serves Jail Time, Appeals Conviction*, ISLANDER (Jan. 2012), <http://www.islander.org/2012/01/hb-fisher-serves-jail-time-appeals-conviction> [http://perma.cc/B2SZ-HH3V].

247. *Id.*; Transcript of Sentencing at 8, *United States v. Yates*, No. 10-CR-66-FtM-29SPC, 2011 WL 3444093 (M.D. Fla. Aug. 8, 2011) (No. 144).

248. Prucnell, *supra* note 246.

249. John Yates, *A Fish Story*, POLITICO (Apr. 24, 2014), <http://www.politico.com/magazine/story/2014/04/a-fish-story-106010.html> [http://perma.cc/27KC-5AQZ]; see also, Shepherd, *supra* note 4.

250. Norman L. Reimer, *Whether Fish or Fowl—Prosecutorial Overreach Is a Poisonous Aspect of Overcriminalization*, CHAMPION, Sept. 2014, at 8.

a routine safety inspection.<sup>251</sup> John Jones, the field officer that boarded the *Miss Katie*, had been cross-deputized as a federal agent by NOAA, the National Oceanic and Atmospheric Administration.<sup>252</sup> After undertaking a cursory inspection for illegal fishing gear, he saw what he believed were undersized grouper. This prompted him to spend the next four hours in rolling seas inspecting Yates's more than 3,000-fish catch.<sup>253</sup> During that time, Yates argued with Jones and questioned how he was measuring the grouper.<sup>254</sup> Ultimately, Jones found seventy-two fish below the twenty-inch limit,<sup>255</sup> the smallest of which was eighteen and three-quarters inches.<sup>256</sup>

After his inspection was complete, Officer Jones issued Yates a civil citation for harvesting undersized fish, subjecting Yates to a fine or the possible suspension of his fishing permits.<sup>257</sup> Before leaving the *Miss Katie*, Jones put the seventy-two undersized fish in wooden crates, which were then placed inside the boat's "fish box," a large cooler that stored the entire catch, as well as provisions for the crew.<sup>258</sup> Jones did not secure the crates or the fish box with evidence tape, nor did he mark the fish in any way.<sup>259</sup> He ordered Yates to return to port the next day, where the fish would be destroyed.<sup>260</sup>

When the boat returned to the docks in Cortez two days later, another officer from a different federal agency met the crew to further inspect the catch.<sup>261</sup> Yates was asked whether he had all the suspect fish in the crates, and he told the officer that he did.<sup>262</sup> However, when Officer Jones inspected the catch a day later—during which Yates and his wife both argued with Jones and other officers over their method of measurement—only sixty-nine grouper were found to be less than twenty inches in length.<sup>263</sup> Believing Yates had switched the undersized fish before returning to port, the officers questioned the crew.<sup>264</sup> After

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251. Transcript of Jury Trial, Day Two at 9, *United States v. Yates*, 2011 WL 3444093 (No. 141); Reimer, *supra* note 249; Yates, *supra* note 249.

252. Yates, *supra* note 249.

253. *Id.*

254. Transcript of Jury Trial, Day Two, *supra* note 251, at 126.

255. Yates, *supra* note 249.

256. Reimer, *supra* note 250.

257. *Id.*

258. *Id.*; see also Brief of the United States at 7, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451).

259. Brief of the United States, *supra* note 258.

260. *Id.*

261. *Id.* at 8.

262. *Id.*

263. Reimer, *supra* note 250.

264. Brief of the United States, *supra* note 258, at 8.

four hours of questioning, one of the crewmembers said that Yates had ordered him to throw the undersized grouper overboard.<sup>265</sup> The crewmember reported that Yates told the crew that “he [Yates] wasn’t stupid, [and] that if the [officers] wanted to make sure that the fish were still [on board], they should have put a mark on their foreheads.”<sup>266</sup>

Seven months later, Yates was indicted for three crimes: destroying property to prevent a federal seizure in violation of 18 U.S.C. § 2232(a); destroying the undersized fish—a “tangible object”—to impede an investigation in violation of 18 U.S.C. § 1519; and making a false statement to a federal officer in violation of 18 U.S.C. § 1001(a)(2).<sup>267</sup> Represented by a federal defender, Yates refused to plead guilty and insisted on going to trial.<sup>268</sup> After hearing two days of testimony, a jury convicted Yates of both obstruction charges but acquitted him of lying to a federal officer.<sup>269</sup> Although the government requested that Yates be sentenced to twenty-one to twenty-seven months in prison, the judge departed downward from the applicable Sentencing Guidelines range and ordered Yates imprisoned for just thirty days.<sup>270</sup> Yates’s appeal to the Eleventh Circuit failed, but on April 21, 2014—almost seven years after his boat was boarded—the Supreme Court granted certiorari.<sup>271</sup> The case made national headlines as the media played up both its silly and serious aspects.<sup>272</sup> The Court’s 5-4 plurality decision overturned Yates’s conviction.<sup>273</sup>

### *B. Expressing Rationalizations—Yates’s Pre- and Post-Act Statements*

While the above facts begin to paint a picture of who John Yates is and what might have motivated his behavior aboard the *Miss Katie*, much is left to speculation. There is, however, a more direct source indicating what caused Yates’s actions: his own statements. Although

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265. *Id.*; Transcript of Jury Trial, Day Two, *supra* note 251, at 39.

266. Brief of the United States, *supra* note 258, at 7. It should be noted that Yates contended at trial that the crewmember, a novice fisherman, was either lying or was coerced by the government. See Transcript of Jury Trial, Day Two, *supra* note 251, at 246.

267. Brief of the United States, *supra* note 258, at 8.

268. See Prucnell, *supra* note 246.

269. Brief of the United States, *supra* note 258, at 9.

270. Transcript of Sentencing, *supra* note 247, at 70–71. Just before imposing the sentence, the judge commented that “both sides made a federal case out of this thing,” but “in the process, people lost sight of some common sense.” *Id.* at 70.

271. Brief of the United States, *supra* note 258, at 1, 10.

272. See, e.g., Amy Howe, *Justices Take the Measure of Fish Case: In Plain English*, SCOTUSBLOG (Nov. 5, 2014), <http://www.scotusblog.com/2014/11/justices-take-the-measure-of-fish-case-in-plain-english> [<http://perma.cc/25EG-K6YD>].

273. *Yates v. United States*, 135 S. Ct. 1074, 1089 (2015).

he did not testify at trial, Yates did allocute during his sentencing hearing. When asked by the judge whether he had anything to say on his own behalf, Yates commented that he had been fishing for fifteen years and had never seen NOAA board a boat and find a violation, but then leave the evidence.<sup>274</sup> He concluded by saying, “By them not doing their job, I feel I’m in this courthouse today.”<sup>275</sup>

In addition, just before the Supreme Court decided to take his case, Yates published an article on the website *Politico* titled “A Fish Story.”<sup>276</sup> Although the article’s main objective was to support his cert petition, it provides direct insight into Yates’s view of his case, his actions, and his adversaries.<sup>277</sup>

The article begins by describing what happened on the *Miss Katie*. Yates makes special note of Officer Jones’s status as a cross-deputized agent, how Jones sorted through 3,000 fish to find seventy-two that were undersized, and that he was issued a civil citation by armed federal agents.<sup>278</sup> He also describes being arrested at his home for destroying evidence—“yes, fish,” Yates writes—and the effects it has had on his livelihood.<sup>279</sup> And he explains, that at most, he should have incurred a nominal financial penalty or a restriction on his fishing permits; but instead, “the Department of Justice wanted a pound of flesh.”<sup>280</sup>

Throughout the article, Yates describes his case as a battle between an overreaching government and the common man. He says things like, the “Sarbanes-Oxley Act was never intended to attack unassuming, hardworking Americans” and “Congress hoped [the Act] would impede future criminal infractions on Wall Street, not civil infractions . . . let alone over something as minor as three fish.”<sup>281</sup> In one of the more combative paragraphs, Yates states that the “DOJ’s

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274. Transcript of Sentencing, *supra* note 247, at 52.

275. *Id.*

276. Yates, *supra* note 249.

277. Although certainly not as structured, Yates’s statements offer data similar to what Cressey solicited during his interviews of convicted embezzlers. See CRESSEY, OTHER PEOPLE’S MONEY, *supra* note 147, at 153.

278. Yates, *supra* note 249.

279. *Id.* (stating that he has been blacklisted by boat owners and is “now unable to make a living doing what I love to do”).

280. *Id.*

281. *Id.* Although the charges against Yates have been framed by him (and subsequently reported by the media) as centering around three undersized fish, the evidence at trial suggested Yates and his crew threw the entire crate of seventy-two undersized fish overboard. See Transcript of Jury Trial, Day Two, *supra* note 251, at 39; Brief of the United States, *supra* note 258, at 8.

criminal indictment against [him was] an inappropriate and insulting expansion of federal criminal law.”<sup>282</sup>

While Yates is careful not to directly attack Officer Jones or the prosecution team by name, he does openly question the agents’ investigation methods and the prosecutors’ charging decision.<sup>283</sup> And he goes so far as to raise a scandal dating back almost five years in which NOAA’s director of law enforcement was reprimanded for destroying agency documents.<sup>284</sup> The article concludes with the following paragraph: “It says something about federal criminal law that it can be used against unassuming, hardworking Americans for a state civil matter. It says something else that federal officials can trespass those same laws with impunity.”<sup>285</sup>

### *C. Employing Rationalizations—Yates’s Verbalizations Allow His Conduct to Proceed*

Taking the statements Yates made in the *Politico* article together with those made as part of his court case, it becomes clear that rationalizations played a significant role in his behavior, thereby allowing his criminal conduct to proceed. In fact, at least five of the eight most prevalent white collar rationalizations were employed by Yates.<sup>286</sup>

Before addressing Yates’s specific rationalizations, however, some prefatory comments are necessary. First, despite his blue-collar profession, Yates fits within the strictures of a white collar offender. Most obviously, he was charged with three white collar offenses—two obstruction counts and lying to a federal agent. All three are secondary offenses derivative to the environmental/economic regulatory violation of harvesting undersized fish.<sup>287</sup> In addition, Yates is older, married,

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282. Yates, *supra* note 249.

283. *Id.* (stating that “the agent originally measured my catch improperly and erratically” and “the Department of Justice wanted a pound of flesh”).

284. *Id.* Yates was not wrong about the facts of the scandal, however. The Commerce Department’s inspector general released a report in January 2010 that found “serious flaws in NOAA’s fisheries enforcement and law enforcement operations—describing an unbalanced system, too heavy on criminal investigation, that has created a ‘dysfunctional relationship’ between NOAA and the fishing industry.” Allison Winter, *Lawmakers Want NOAA’s Law Enforcement Chief to Quit in Wake of Scandal*, N.Y. TIMES, (Mar. 4, 2010), <http://www.nytimes.com/gwire/2010/03/04/04greenwire-lawmakers-want-noaas-law-enforcement-chief-to-61023.html> [<http://perma.cc/8JRL-PHZX>].

285. Yates, *supra* note 249 (referring to the NOAA document shredding scandal).

286. See *supra* Section III.B.

287. See 50 C.F.R. § 622.37(a)–(d) (2014) (specifying size limits for fish caught in federal waters and disallowing the sale of undersized fish).

and has a steady job in which he oversees employees and is entrusted with their safety. All these factors suggest he is able to conform to normative roles in society and has a self-interest in doing so.<sup>288</sup> It is therefore reasonable to assume that he must rationalize his behavior prior to committing a white collar offense.<sup>289</sup>

Second, Yates was in a position to rationalize. Like Cressey's embezzlers, Yates was faced with a nonsharable financial problem that could be solved by violating a trust.<sup>290</sup> When Officer Jones placed the undersized grouper back in the *Miss Katie's* fish box without marking them and ordered Yates not to remove them until the boat returned to port, it placed Yates in a position of trust. By violating that trust, Yates had an opportunity to solve his financial problem, *i.e.*, being fined and potentially losing his ability to fish, without disclosing it to others outside his immediate crew. The only thing preventing him from committing an unethical or illegal act was finding a rationalization that allowed him to maintain the image of himself as a trusted person.<sup>291</sup>

Such rationalizations were readily available, and Yates pre- and post-act statements make clear he employed them as part of his decision to commit his crimes. The most obvious rationalization Yates employed was to deny his responsibility. Just after the officers left his boat, and as he was preparing to throw dozens of fish overboard, Yates told his crew that if the officers wanted to make sure that the undersized fish remained on board, they should have marked them.<sup>292</sup> This statement is a classic vocabulary of motive. It expressed Yates internal dialogue as he contemplated his subsequent illegal act. By framing the situation as one created by the officers, Yates relieved himself of responsibility. This allowed him to keep his self-perception as an unassuming, hardworking American—how he has repeatedly described himself—intact while engaging in criminal behavior.<sup>293</sup> The denial of responsibility rationalization let Yates look on his obviously improper behavior as acceptable.

Yates also rationalized his actions by condemning his condemners. In addition to criticizing the officers' failure to mark the undersized fish, Yates also directly questioned Officer Jones on how he

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288. See Kieffer & Sloan, *supra* note 168, at 324.

289. See Benson, *supra* note 166, at 587.

290. Cressey, *Respectable Criminal*, *supra* note 147, at 14–15.

291. *Id.* at 14.

292. Brief of the United States, *supra* note 258, at 7–8. Yates's statement at his sentencing hearing—"By them not doing their job, I feel I'm in this courthouse today"—evidences similar thinking. Transcript of Sentencing, *supra* note 247, at 52. It also demonstrates the persistent and discriminative nature of rationalizations. See Maruna & Copes, *supra* note 21, at 271.

293. Yates, *supra* note 249.

was measuring each grouper. This occurred both during the on-boat inspection and back at the docks.<sup>294</sup> Yates's criticisms indicate he believed the officers were uninformed, incompetent, or improperly or selectively enforcing the fishing regulations.<sup>295</sup> This is a typical condemning the condemners rationalization. Yates was able to minimize the wrongfulness of his own behavior by attacking the conduct and motives of others.<sup>296</sup>

This rationalization can also be seen in Yates's post-act verbalizations. Throughout his court case, Yates questioned the government's legitimacy in prosecuting him, even suggesting Jones was at fault for leaving the suspect grouper on the *Miss Katie* at all.<sup>297</sup> Further, in his *Politico* article, Yates suggested the entire NOAA organization was corrupt because its director of law enforcement was caught up in a document-shredding scandal of his own. Although that has little to do with Yates's case, it allowed him to "change[ ] the subject of the conversation"—by attacking others, "the wrongfulness of his own behavior [was] more easily repressed."<sup>298</sup>

In addition, Yates relied on the denial of injury and the denial of victim rationalizations when he argued that there were bound to be some undersized grouper in his more than 3,000-fish catch and that the government was pursuing him for "something as minor as three fish."<sup>299</sup> His statements indicate he deemed possessing undersized fish to be only a minor infraction causing little or no harm to the public.<sup>300</sup> When framed this way, almost any violation of fishing regulations can be seen as warranting Yates's actions. While it is true that possessing undersized fish is a relatively minor violation, such thinking allowed Yates to rationalize the destruction of evidence—a serious criminal offense—as harming no one. In fact, even after his conviction, Yates repeatedly said that his crime was "dispos[ing] of those three

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294. *Id.*

295. *Id.* ("I believe the agent originally measured my catch improperly and erratically."); see also Prucnell, *supra* note 246 (quoting Yates as saying "[w]e challenged their methodology—how they measured the fish").

296. Although less obvious, Yates's attacks against the officers also evidence an "us against them mentality," which signals the use of the appeal to higher loyalties rationalization.

297. See Transcript of Sentencing, *supra* note 247, at 52–53 (when asked whether he had anything to say before being sentenced, Yates questioned the government's procedures and commented that the officers caused his behavior).

298. Sykes & Matza, *supra* note 146, at 668.

299. Yates, *supra* note 249.

300. *Id.* (stating that even if he had disposed of undersized fish, "the federal penalty schedule indicates that I should have incurred a financial penalty beginning at \$500 or a restriction on my fishing permit. Instead, the Department of Justice wanted a pound of flesh").

groupers.”<sup>301</sup> That, of course, minimizes his offenses (both factually and legally) and those harmed by them.<sup>302</sup>

Finally, Yates appears to have employed the metaphor of the ledger rationalization. Throughout his case, Yates portrayed himself as a hardworking, unassuming man that was a victim of circumstance. He highlighted his long career as a commercial fisherman, one with no previous fishing violations.<sup>303</sup> He also highlighted his attributes as a husband and provider, and as a father figure to grandchildren that he and his wife raised “as if they were their own.”<sup>304</sup> By verbalizing this type of “behavior balance sheet,” Yates is able to see his negative actions as outweighed by a lifetime of good conduct.<sup>305</sup> This minimizes his moral guilt, allowing him to square his self-perception as a hardworking American with the reality of his status as a white collar criminal.

#### *D. Fueling Rationalizations—Overcriminalization’s Role in Fostering Yates’s Criminal Behavior*

While it is fascinating how Yates specifically rationalized his criminal conduct, it is by no means unexpected. As noted above, rationalizing bad behavior is likely part of the human condition.<sup>306</sup> And rationalization theory dictates that Yates must employ rationalizations in order to commit an unethical or illegal act.<sup>307</sup> But what is unexpected—and what demonstrates overcriminalization’s new harm paradigm—is that many of Yates’s rationalizations were fueled by the overlapping and expansive nature of the law governing his conduct. Thus, *Yates* serves as an illustration of how overcriminalization, particularly as to white collar crime, may foster criminal behavior.

Yates rationalized his illegal conduct in the ways addressed above—by denying his responsibility, condemning his condemners, denying his victims and their injuries, and employing the metaphor of the ledger. These rationalizations were drawn from his environment, which included the law governing his conduct (i.e., the law surrounding

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301. *Id.*

302. The way Yates has verbalized his actions fits squarely within the denial of victim and denial of injury rationalizations. Here, the perceived victim was the government or the public as a whole—both are often viewed by offenders as non-entities incapable of being harmed. *See* Kieffer & Sloan, *supra* note 168, at 322. Interestingly, the media’s inaccurate reporting of Yates’s offenses, as well as the Justices’ joking during oral argument, helps strengthen Yates’s post-act rationalizations and other would-be offenders’ pre-act rationalizations.

303. *See* Transcript of Sentencing, *supra* note 247, at 67.

304. *Id.* at 14.

305. *ENCYCLOPEDIA*, *supra* note 198, at 803.

306. *See* Maruna & Copes, *supra* note 21, at 285.

307. *See supra* Section III.A.

commercial fishing and inspection, including the related secondary offenses). As that law became more unjustified and illegitimate in Yates's mind, the more space was created for him to rationalize his noncompliance. Overcriminalization's critical role was to increase that delegitimization, thereby providing Yates with additional "defenses" to the law that served to foster his rationalizations, and in turn his criminal conduct.

Even a cursory look at the state of commercial fishing and inspection law indicates that it suffers from overcriminalization and its attendant ills. First, as a commercial fisherman and boat captain, Yates was subject to "a slew of regulations," everything from fish size requirements, to fishing location, to days allowed to fish.<sup>308</sup> Such regulations have been steadily increasing since the 1970s, as Congress first sought to protect fisheries from foreign competition, and then limit fishing due to dwindling stock populations.<sup>309</sup> By the early 2000s, a series of overlapping, yet ever-changing, regulations had created a "highly-charged regulatory climate."<sup>310</sup> Senator Barney Frank, whose home state of Massachusetts supports one of the largest commercial fishing ports, commented in 2009 that professional fisherman were the "most regulated workers that I know about what they can catch, where they can catch it, and how many days they can fish."<sup>311</sup> Notably, many of these regulations carry criminal penalties if violated—they are part of the massive universe of federal administrative provisions that may be enforced criminally.<sup>312</sup>

But not all applicable fishing regulations can be effectively enforced. There are too many regulations, too many fisherman, and too few enforcement agents. This necessarily means that NOAA agents tasked with policing fisherman (and the many state officers cross-deputized as federal agents) have expansive discretion to decide what regulations they enforce and against whom. Predictably, this has led to

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308. John Matson, *Are Current Fishing Regulations Misguided?*, SCI. AM. (Apr. 27, 2010), <http://www.scientificamerican.com/article/fishing-balanced-exploitation> [<http://perma.cc/76RX-TBMR>].

309. See Robert T. Lackey, *Fisheries: History, Science, and Management*, in WATER ENCYCLOPEDIA: SURFACE AND AGRICULTURAL WATER 121, 129 (Jay H. Lehr and Jack Keeley eds., 2005); Phillip Martin, *Rough Waters: History of Fishing Regulation (pt. 1)*, WGBH (Aug. 16, 2010), [http://www.wgbh.org/897/fishing\\_one.cfm](http://www.wgbh.org/897/fishing_one.cfm) [<http://perma.cc/88LJ-SX3Q>].

310. Petition for Judicial Review at 7, *Massachusetts v. Blank*, No. 13-CV-11301 (D. Mass. May 30, 2013) (No. 1).

311. Phillip Martin, *Rough Waters: History of Fishing Regulation (pt. 5)*, WGBH (Aug. 16, 2010), [http://www.wgbh.org/897/fishing\\_five.cfm](http://www.wgbh.org/897/fishing_five.cfm) [<http://perma.cc/8XKD-S9T9>].

312. See, e.g., Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1857, 1859 (2012) (setting forth criminal penalties for violations of commercial fishing regulations); Podgor, *supra* note 33, at 531.

problems. A 2010 report by the Office of the Inspector General found “a number of very serious issues” related to NOAA’s enforcement program, including that enforcement actions appeared “arbitrary and lack[ed] transparency.”<sup>313</sup> The report prompted the head of NOAA to suspend the hiring of all new criminal investigators until the agency’s enforcement procedures were overhauled.<sup>314</sup> These actions were taken specifically to address the “regulated communities concern of complex, conflicting, and excessive administrative burdens.”<sup>315</sup>

Despite the agency’s efforts, problems persisted with how NOAA’s enforcement agents imposed regulations. In 2013, Massachusetts Attorney General Martha Coakley filed a lawsuit against the agency, alleging that NOAA’s “draconian” regulations imposed a “death penalty on the fishing industry . . . [a]nd this from an agency that we know already has a history of relentless and overzealous regulation.”<sup>316</sup> While such rhetoric was undoubtedly amplified for litigation purposes, it evidences a deep-seated distrust between commercial fisherman and NOAA. Senator John Kerry has commented that the “tensions between federal regulators and the fishing community have reached a boiling point beyond anything I’ve ever witnessed in my 26 years in the Senate.”<sup>317</sup>

This was the environment Yates faced as Officer Jones boarded the *Miss Katie*. After years of increasing regulation, NOAA field officers were operating with sweeping enforcement discretion. With so many regulations to choose from, they determined whether Yates committed a violation and how it would be adjudicated. This level of discretion had already manifested itself as a “consequence” of overcriminalization, a consequence of which Yates was aware. He knew that NOAA agents were enforcing regulations arbitrarily and with little transparency, a

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313. *NOAA Fisheries Law Enforcement Programs: Hearing before the Subcomm. on Oceans, Atmosphere, Fisheries & Coast Guard of the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 3 (2010) [hereinafter *Hearing*] (statement of Jane Lubchenco, Under Sec’y of Comm. for Oceans and Atmosphere); see also Winter, *supra* note 284 (describing an unbalanced regulatory system at NOAA that is too heavy on criminal investigation).

314. *Hearing, supra* note 313, at 3.

315. *Id.* at 4.

316. Press Release, Attorney General’s Office, AG Coakley Sues NOAA to Block New Regulations that Threaten Fishing Industry (May 30, 2013), <http://www.mass.gov/agol/audioandvideo/noaa-lawsuit-transcript.pdf> [<http://perma.cc/U676-TG4W>].

317. Ira Stoll, *Obama Fishing Czar Divides Democrats: Why John Kerry and Barney Frank Are Lining up Against the Administration’s “Catch Share” Policy*, HAW. REP. (Oct. 24, 2001), <http://www.hawaiireporter.com/obama-fishing-czar-divides-democrats-why-john-kerry-and-barney-frank-are-lining-up-against-the-administrations-catch-share-policy> [<http://perma.cc/K9X7-8VST>].

view shared by many of his fellow fisherman.<sup>318</sup> As a result, Yates believed commercial fishing and inspection law, and the agents tasked with enforcing it, lacked legitimacy. This is evidenced in almost every statement he has made concerning the facts of his case—from challenging Officer Jones’s competency in measuring fish, to suggesting his crimes were a result of the officers leaving the suspect fish on his boat, to attacking NOAA for shredding documents unrelated to his case. These statements demonstrate that Yates found a series of defenses to his behavior in the space created by overcriminalization.

Second, with the passage of Sarbanes-Oxley, there were at least five overlapping obstruction crimes in the federal code that could have been applied to Yates’s conduct.<sup>319</sup> Three of those appeared to govern Yates’s actions explicitly: § 1512(c) makes it a crime to corruptly destroy an object so as to make it unavailable for use in an official proceeding; § 1519 makes it a crime to knowingly destroy a tangible object so as to obstruct an investigation or the “proper administration of any matter”; and § 2232(a) makes it a crime to knowingly destroy property to prevent the government from making a lawful seizure.<sup>320</sup> All of these provisions are broad in scope and contain weak *mens rea* requirements.<sup>321</sup> Therefore, prosecutors had the ability to charge Yates with one or all of these crimes and likely secure a conviction.

Consistent with the consequences of overcriminalization, prosecutors exercised their discretion in a way that maximized their “lawmaking” function.<sup>322</sup> Yates was charged with two separate crimes, violating §§ 1519 and 2232(a), for exactly the same conduct—throwing the seventy-two grouper overboard. Prosecutors charged Yates this way because § 1519 carries a twenty-year statutory maximum, as opposed to § 2232(a)’s five-year maximum. But if § 1519 applied, and it allowed

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318. See Prucnell, *supra* note 246 (Yates and his wife commented that the “ ‘little guys’ in commercial fishing across the country . . . are facing similar charges and being unfairly prosecuted as criminals”).

319. See Dervan, *supra* note 54, at 729. Prior to the enactment of Sarbanes-Oxley, Title 18 of the U.S. Code contained several obstruction of justice provisions, including 18 U.S.C. §§ 1503 (influencing or injuring officer or juror generally), 1505 (obstruction of proceedings before departments, agencies, and committees), and 1512(b) (tampering with a witness, victim, or an informant). *Id.* Sarbanes-Oxley created two more. 18 U.S.C. § 1512(c) (2012) (addressing “Whoever corruptly . . . 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); *id.* § 1519 (“Destruction, alteration, or falsification of records in Federal investigations and bankruptcy”). In addition, 18 U.S.C. § 2232(a), which prohibits the “[d]estruction or removal of property to prevent seizure,” applied. *Id.* Yates was charged with both § 1519 and § 2232(a).

320. §§ 1512(c), 1519, 2232(a).

321. See WALSH & JOSLYN, *supra* note 30, at 35 (defining weak, moderate, and strong *mens rea* requirements); Dervan, *supra* note 54, at 729–30 (discussing provisions’ breadth).

322. See Stuntz, *supra* note 20, at 519.

for the most pressure to be levied against Yates, why did prosecutors bother charging § 2232(a)? Because § 2232(a) carries the weakest *mens rea* requirement—all the government had to show was that Yates knowingly destroyed property subject to seizure.<sup>323</sup> By stacking the charges this way, prosecutors got the benefit of an easily provable violation, with the leverage provided by a possible twenty-year sentence. The ability of police and prosecutors to choose among broadly-worded, overlapping statutes when charging defendants, and then to use the threat of significant punishments to pressure plea agreements typifies overcriminalization's ills.<sup>324</sup> Here, it allowed federal agents and prosecutors—Stuntz's "law enforcers"—to both make and adjudicate the criminal law.

Not surprisingly, this also resulted in Yates viewing the law governing his conduct as illegitimate. Again, his statements evidence his mindset. In an early interview, before his case was accepted by the Supreme Court or even on appeal to the Eleventh Circuit, Yates expressed his belief that the government was wrong to charge him with obstructing justice related to a regulatory violation.<sup>325</sup> In the same interview, Yates referenced the growing distrust between fisherman and the government caused by aggressive criminal enforcement.<sup>326</sup> And he also questioned the prosecutors' tactics in attempting to force a guilty plea.<sup>327</sup> While these statements address events occurring after Yates's criminal behavior, they demonstrate his pre- and inter-act thinking<sup>328</sup>—that the laws surrounding commercial fishing and inspection, and those tasked with its enforcement, were not legitimate. Such thinking allowed Yates to rationalize his actions and proceed with committing a criminal act.<sup>329</sup> While none of this excuses Yates's

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323. See § 2232(a). Yates was found guilty of this charge and did not contest it on appeal.

324. See Beale, *supra* note 23, at 766–67; Dervan, *supra* note 54, at 751–52; Luna, *supra* note 46, at 795. That Yates was sentenced to only thirty days is immaterial. As Justice Scalia emphatically pointed out during oral argument, it is the risk of a lengthy sentence through which prosecutors derive power over defendants. See Transcript of Oral Argument, *supra* note 6, at 27 (“But [Yates] could have gotten 20 years. What kind of a sensible prosecution is that?”).

325. See Prucnell, *supra* note 246 (quoting Yates's wife saying: “If you come up short, it's supposed to be a civil matter. So when he got the citation, he thought, ‘pay a fine and it was over.’”).

326. See *id.*

327. *Id.*

328. See Maruna & Copes, *supra* note 21, at 271.

329. It is not necessary for Yates to have known the specifics of obstruction of justice law for overcriminalization in that area to have fostered his rationalizations. Rationalizations may come from specific understandings of the law or from more general ideologies in popular culture. See Sykes & Matza, *supra* note 146, at 666; Cressey, *Respectable Criminal*, *supra* note 147, at 15. All that is necessary is for there to be a perception that the law governing his conduct lacked legitimacy. This perception is evidenced in Yates's pre- and post-act statements—his vocabularies of motive.

conduct, it does provide a new way of understanding overcriminalization's harms.

## V. CONCLUSION

It is said that hard cases make bad law.<sup>330</sup> What about odd cases—ones that elicit equal measures of laughter and consternation from the judges that hear them? During oral argument on *Yates*, the Justices joked about the silliness of applying Sarbanes-Oxley, a statute aimed at curbing corporate wrongdoing, to a fisherman who tossed a crate of grouper off his boat. At the same time, those Justices struggled with the serious problem presented by overcriminalization, a phenomenon that exacts real harm on the criminal justice system and those subject to it. More so than any case in recent memory, *Yates* squarely placed the evils of overcriminalization before the Court.

Yet, irrespective of the final decision to overturn *Yates*'s conviction, the Court's understanding of overcriminalization was incomplete. That is because the prevailing paradigm of overcriminalization is itself incomplete. Overcriminalization is not simply a post-act concern, *i.e.*, one that imposes the consequences of excessive prosecutorial discretion and disparate enforcement or punishment on offenders *after* they commit an illegal or unethical act. Overcriminalization is also a pre-act concern—one that fosters criminal behavior *ex ante* by delegitimizing the criminal law and creating criminogenic rationalizations, particularly as to white collar crime. This view offers a new understanding of overcriminalization and cases such as *Yates*. Ultimately, *Yates* serves as an illustration of why the harms of overcriminalization are so pernicious—not only does overcriminalization lessen the legitimacy of the criminal law, it fosters the very conduct it seeks to eliminate.

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330. N. Sec. Co. v. United States, 193 U.S. 197, 229 (1904) (Holmes, J., dissenting).