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SOX ON FISH: A NEW HARM OF OVERCRIMINALIZATION

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INTRODUCTION

On November 5, 2014, the Supreme Court heard argument in *Yates v. United States*.[1] *Yates* is somewhat of an oddball case. It deals with a small-town Florida fisherman convicted of the "anti-shredding provision" of the Sarbanes-Oxley Act (commonly referred to as SOX), a law passed to curb corporate malfeasance in the aftermath of the massive accounting scandals—Enron, WorldCom, Global Crossing—of the early 2000s. However, the fisherman, John Yates, was not found guilty of cooking his company's books or lying to his shareholders. Instead, Yates was convicted of throwing a crate of undersized fish overboard after a federal agent inspecting his catch told him not to. A jury found this constituted destroying "tangible objects" as defined under the Act, and the Eleventh Circuit affirmed. The Supreme Court will now decide just how closely red grouper relates to Enron in what some have dubbed the "fishy SOX case."[2] Oddball indeed.

But as is often true at the Supreme Court, there is more to *Yates* than its headnotes suggest. What may have prompted the Court to take the case, which in many ways offers only a modest question of statutory interpretation, is the issue of overcriminalization. Overcriminalization is 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.[3] And for the many reasons

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[1] United States v. Yates, 733 F.3d 1059 (11th Cir. 2013), *cert. granted in part*, 134 S. Ct. 1935 (2014) [http://perma.cc/KM32-D2TY].

[2] *E.g.*, 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://perma.cc/L9VB-TQDU].

[3] Overcriminalization is defined in various ways, but most definitions center on the misuse of the criminal law and the resulting harms. *See, e.g.*, Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 745 (2014) [http://perma.cc/4GZC-RQJR].

explained in numerous articles on the subject, it is a real problem.[4] Yates and a host of amici argue that applying Sarbanes-Oxley to fishing is quintessential overcriminalization, and its evils weigh in favor of overturning his conviction.

I certainly agree.[5] But this Essay is not specifically about the merits of *Yates*. Instead, it is about another harm of overcriminalization, one that has received little attention thus far. Drawing from the fields of criminology and behavioral ethics, this Essay makes the case that overcriminalization actually increases the *commission of criminal acts*, particularly by white-collar offenders. This is different from how we usually think of overcriminalization's ills—that the proliferation of criminal laws leads to increasing and inconsistent *post-act criminal adjudication*. Overcriminalization increases the commission of criminal acts by fueling offender rationalizations, which are part of the psychological process necessary for the commission of crime. Without rationalizations, white-collar 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. 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.

This phenomenon, which presents a new way of understanding the harms of overcriminalization, is on display in *Yates*. Therefore, the case—regardless of how the Court decides it—offers a useful vehicle through which to explore the full scope of overcriminalization's detriments.

Part I of this Essay introduces the concept of rationalizations and the way in which they allow for criminal conduct. Part II shows how overcriminalization delegitimizes the criminal law, particularly in the white-collar context, and, in turn, increases the opportunities for offender rationalizations. Part III then discusses *Yates* as an illustration of this new harm of overcriminalization.

I. THE ROLE OF RATIONALIZATIONS IN WHITE-COLLAR CRIME

Before understanding how overcriminalization increases criminal acts, it is necessary to understand how rationalizations affect criminality. While not receiving much focus in legal scholarship, experts have long understood the role rationalizations play in unethical and criminal behavior. In the

[4] *See, e.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005) [http://perma.cc/K56G-UYKP]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

[5] The author is a signatory to an amicus brief supporting the petitioner. Brief for Eighteen Criminal Law Professors as *Amici Curiae* in Support of Petitioner at A3, Yates v. United States, No. 13-7451 (S. Ct. July 7, 2014) [http://perma.cc/LS6U-QYRL].

1950s, criminologist Donald Cressey recognized that criminal behavior involves "motives, drives, rationalizations, and attitudes favorable to the violation of law."[6] Cressey determined that three key elements are necessary for violations of trust—the essence of almost all white-collar crime—to occur: (1) an individual possesses a "nonshareable problem," i.e., a problem the individual feels cannot be solved by revealing it to others; (2) the individual believes the problem can be solved in secret by violating a trust; and (3) the individual "verbalizes" the relationship between the nonshareable problem and the illegal solution in "language that lets him look on trust violation as something other than trust violation."[7]

Cressey believed that verbalizations—what we commonly call rationalizations—were "the crux of the problem," because they allowed the offender to keep his perception of himself as an honest citizen intact while acting in a criminal manner.[8] Importantly, Cressey found that verbalizations were not simply after-the-fact excuses offenders used to lessen their culpability upon being caught. Instead, verbalizations were "[v]ocabularies of motive," words and phrases that existed as group definitions labeling deviant behavior as appropriate, rather than excuses invented by the offender "on the spur of the moment."[9] In other words, offender verbalizations are drawn from larger society and put into use *prior to* the commission of criminal acts.

This insight—that offenders rationalize their unethical or criminal conduct *ex ante*, which then allows their conduct to proceed—has greatly influenced the study of white-collar crime and business ethics.[10] It has also

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[6] Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 664 (1957) (citing EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 77–80 (rev. by Donald R. Cressey, 5th ed. 1955)). Sutherland's book, revised by Cressey in subsequent editions, is considered a landmark text in the criminology field.

[7] Donald R. Cressey, *The Respectable Criminal*, 3 CRIMINOLOGICA 13, 14–15 (1965). Cressey used a study of embezzlers to develop his social psychological theory regarding the causes of "respectable crime." *Id.* at 13. His work built on that of Sutherland, whose groundbreaking work introduced the concept of white-collar crime. While Cressey's theories have applicability to all criminal behavior, they have particular force in explaining white-collar crime because white-collar offenders have a "greater stake in conformity" than other categories of offenders and therefore must rationalize their behavior through elaborate mental processes prior to committing offenses. Scott M. Kieffer & John J. Sloan III, *Overcoming Moral Hurdles: Using Techniques of Neutralization by White-Collar Suspects as an Interrogation Tool*, 22 SECURITY J. 317, 324 (2009) (internal quotation marks omitted); *accord* Michael L. Benson, *Denying the Guilty Mind: Accounting for Involvement in a White-Collar Crime*, 23 CRIMINOLOGY 583, 584, 591–98 (1985) (analyzing rationalizations used by four groups of white-collar offenders) [http://perma.cc/KEM2-RE4N].

[8] Cressy, *supra* note 7, at 15 (describing verbalizations as "the *words* that the potential [offender] uses in his conversation with himself").

[9] *Id.*

[10] *See e.g.*, Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, ACAD. MGMT. EXECUTIVE, May 2004, at 39, 39–53 (analyzing how organizational employees perpetrate corrupt acts by using "rationalizing tactics") [http://perma.cc/AD5V-A3AS]; Shadd Maruna & Heith Copes, *What Have We Learned from Five Decades of Neutralization Research?*,

led to the identification of a host of rationalizations commonly employed by white-collar offenders. In order to provide a sense of how these rationalizations operate, below are descriptions of three of the most prevalent.[11] These examples also prove relevant to Part III's discussion, illustrating the connection between overcriminalization and rationalizations through the *Yates* case.

Denial of injury. One of the most common ways white-collar criminals mentally relieve themselves of responsibility for their actions is by denying the injury they will cause.[12] This rationalization allows wrongdoers to believe that no one will *really* be harmed by their conduct. If an act's wrongfulness is partly a function of the harm it produces, an offender can mollify concern about the morality of her behavior if she believes no clear harm exists. The classic denial of injury rationalization in white-collar crime is an embezzler describing her actions as "borrowing" the money; in the offender's estimation, no one will be hurt because the money will be paid back.[13]

Condemning the condemners. White-collar offenders may also rationalize their behavior by shifting attention away from their conduct onto the motives of other persons, a process called "condemning the condemners."[14] In doing so, the offender "has changed the subject of the conversation[;] . . . by attacking others, the wrongfulness of [her] own behavior is more easily repressed."[15] This rationalization takes numerous forms in white-collar cases: offenders call their critics hypocrites, argue their critics are motivated by spite or personal gain, or claim selective enforcement. Regulators, prosecutors, and government agencies are the usual targets of such condemnation.

Denial of responsibility. The denial of responsibility rationalization employed by white-collar offenders is the most prevalent and powerful. Called the "master account," this rationalization occurs whenever an offender defines her conduct in a way that relieves her of responsibility, thereby mitigating "both social disapproval and a personal sense of failure."[16] Most offenders do this by claiming their behavior is accidental or due to forces outside their control, but the rationalization is employed any time the offender views herself as "more acted upon than acting."[17] White-

32 CRIME & JUST. 221 (2005) (providing an overview of rationalization/neutralization theory and its place in criminology).

[11] For a more detailed discussion of rationalizations and their role in white-collar crime and sentencing, see Todd Haugh, *Sentencing the Why of White Collar Crime*, 82 FORDHAM L. REV. 3143 (2014) [http://perma.cc/ESK2-CF8J].

[12] Maruna & Copes, *supra* note 10, at 232.

[13] Cressey, *supra* note 7, at 15.

[14] Maruna & Copes, *supra* note 10, at 233.

[15] Sykes & Matza, *supra* note 6, at 668.

[16] Maruna & Copes, *supra* note 10, at 231–32.

[17] Sykes & Matza, *supra* note 6, at 667.

collar offenders may deny responsibility by pleading ignorance, suggesting they were acting under orders, or contending larger economic conditions caused them to act unethically. Researchers have found that the complexity of laws regulating business and the hierarchical structure of companies offer white-collar offenders numerous ways to deny their responsibility.[18]

II. THE ROLE OF OVERCRIMINALIZATION IN FUELING WHITE-COLLAR OFFENDER RATIONALIZATIONS

With that understanding, the harms of overcriminalization may be more fully appreciated. Overcriminalization's evils typically have been viewed through the lens of the enforcement and adjudication of criminal laws *after* the offender's conduct occurs—whether, for example, an offender was subject to too much prosecutorial discretion or faced disparate enforcement or punishment. This Essay suggests there is an additional, possibly more pernicious, harm in the way overcriminalization impacts an offender's psychological process *before* he takes action. That is because overcriminalization facilitates the rationalizations that allow criminal acts, particularly those committed by white-collar offenders, to go forward. In other words, overcriminalization not only causes unnecessary criminal violations through unjustified enforcement and adjudication, but it also *causes criminal behavior itself*. Would-be white-collar offenders draw on the rationalizations that are created by overcriminalization, and then employ those rationalizations to complete the critical psychological step that results in criminal behavior.

How overcriminalization causes illegal behavior is not only a function of the way in which rationalizations operate, but also of where they originate. As Cressey explained, rationalizations are not created in a vacuum; offenders do not invent them in the spur of the moment. Instead, offenders find their vocabularies of motive within their own environments. Cressey suggested that rationalizations are "taken over" from "popular ideologies that sanction crime in our culture."[19] He pointed to commonplace sayings that suggest wrongdoing is acceptable in certain situations: "Honesty is the best policy, but business is business" and "All people steal

[18] *See, e.g.*, DAVID MATZA, DELINQUENCY AND DRIFT 61 (1964) (with its reliance on lack of intent defenses, "[t]he law contains the seeds of its own neutralization"); Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 314 (2009) (describing "ambiguous areas of moral wrongdoing sometimes associated with white-collar misconduct") [http://perma.cc/GKC5-SEHY]; Benson, *supra* note 7, at 588 ("The widespread acceptance of such concepts as profit, growth, and free enterprise makes it plausible for an actor to argue that governmental regulations run counter to more basic societal values and goals. Criminal behavior can then be characterized as being in line with other higher laws of free enterprise.").

[19] Cressey, *supra* note 7, at 15; *accord* Benson, *supra* note 7, at 588 ("[The offender] must bring his actions into correspondence with the class of actions that is implicitly acceptable in his society. For this reason, [rationalizations] should not be thought of as solely individual inventions.").

when they get in a tight spot."[20] Once verbalizations such as these have been "assimilated and internalized by individuals," they form powerful rationalizing constructs that allow illegal behavior to go forward.[21]

Building on this idea, two other criminologists, Gresham Sykes and David Matza, found that offender verbalizations originate from an even more specific location: the criminal law itself. According to Sykes and Matza, great "flexibility" exists in criminal law; even if a defendant commits a bad act, he may avoid punishment if he provides a legally valid justification or defense.[22] Citing defenses to criminal liability such as necessity, insanity, and self-defense, Sykes and Matza viewed application of the criminal law as variable, a circumstance they found offenders incorporate into their psychological processes.[23] Sykes and Matza determined that most anti-normative behavior was 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."[24] Put another way, would-be lawbreakers use verbalizations to rationalize their behavior in order to fit it within a "defense" to the law that they deem valid, but that society or a court may not.

If rationalizations are drawn from an offender's environment, which includes from the criminal law itself, overcriminalization has a significant role in creating unethical and criminal behavior. Here it is helpful to more specifically identify how overcriminalization impacts the criminal law.

William Stuntz, one of the most thoughtful scholars writing about overcriminalization, found that the overwhelming depth and breadth of the criminal law has led to two related consequences.[25] First, lawmaking has shifted to prosecutors. Because the criminal law is so broad, it cannot be enforced as written; therefore, enforcement on the streets differs from the "law on the books."[26] Decisions about enforcement—the "criminal justice system's real lawmak[ing]"—fall to prosecutors and police.[27] They make law through their enforcement choices, not legislatures through traditional democratic governance or courts through issuing opinions. The inevitable

[20] Cressey, *supra* note 7, at 15.

[21] *Id.*

[22] Sykes & Matza, *supra* note 6, at 666.

[23] *Id.*

[24] *Id.* (emphasis omitted).

[25] Stuntz, *supra* note 4, at 519. Stuntz identified a third consequence, that overcriminalization undermines the "expressive potential" of criminal law, but he saw it as flowing from the first two. *Id.* at 520.

[26] *Id.* at 519.

[27] *Id.* at 506.

result of prosecutor and police lawmaking is selective, arbitrary, and discriminatory application of the criminal code.[28]

Second, prosecutors, not courts, adjudicate crime.[29] With so many overlapping criminal statutes and regulations to choose from, prosecutors can charge a range of crimes governing the same conduct. 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. Prosecutors are "not so much redefining criminal law . . . as deciding whether its requirements are met, case by case."[30] Regardless of the decisions prosecutors make, they are de facto adjudicating outcomes. This leads to, among other things, the circumvention of procedural protections guaranteed to the accused.[31]

These consequences of overcriminalization are serious in their own right, but the common thread running through them reveals something more profound: overcriminalization makes the criminal justice system more uncoordinated and illogical, more *unjustifiable*. Whether it is inconsistent enforcement or overly harsh adjudication, overcriminalization lessens the law's overall legitimacy. It is this perceived illegitimacy that 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.

Consider a common "respectable" criminal: the tax cheat. He is faced with a financial dilemma that can be solved by violating a trust—reducing the amount of taxes he will pay by failing to report some of his income. He knows lying and cheating are wrong, and he does not see himself as a criminal.[32] 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. Can he really be expected to follow the rules perfectly (denial of responsibility)? He may also think that all of those rules

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[28] Beale, *supra* note 4, at 757–58, 765–67.

[29] Stuntz, *supra* note 4, at 519.

[30] *Id.*

[31] *See* Lucian E. Dervan, *White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence*, 101 KY. L.J. 723, 751 (2013) (concluding that overcriminalization in the white-collar arena has "continued [the] deterioration of our constitutionally protected right to trial by jury"); Beale, *supra* note 4, 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.").

[32] In fact, he sees himself as just the opposite—a "pillar of the community, a respected, honest employee" who would "look at [you] in horror" if you suggested he should commit a crime. Cressey, *supra* note 7, at 15.

make filing taxes essentially a game that rewards being shrewd (denial of injury). Even if he did fudge the numbers a bit, he may say to himself that it is not a real crime—at best it is a regulatory issue (denial of injury). Besides, 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). 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 fraud.

Importantly, many of these rationalizations are available—or are available in increased strength and frequency—because of overcriminalization. The criminal tax code is now made up of over a dozen broad and overlapping substantive statutes and many more "secondary offenses."[33] Further, enforcing criminal tax laws uniformly is impossible. Only about two percent of filers are audited, and a tiny fraction of those are penalized—even fewer criminally.[34] This necessarily means the IRS's criminal enforcement agents are exercising significant discretion in what the law is and how it is enforced. This leads to the many consequences discussed above, including the fostering of rationalizations to be adopted by white-collar criminals. Overcriminalization, then, fuels an environment ripe for rationalizations, in turn fostering the very conduct the criminal law seeks to eliminate.

III. THE ROLE OVERCRIMINALIZATION PLAYED IN JOHN YATES RATIONALIZING HIS CRIMINAL CONDUCT

Thus far, this Essay has attempted to present a more complete understanding of overcriminalization's harms, but in a mostly theoretical way. However, the facts of *Yates* provide a ready practical example of how overcriminalization fuels offender rationalizations, thereby facilitating criminal behavior. As his case progressed to the Supreme Court, John Yates made a series of statements indicating that he rationalized his criminal conduct in numerous ways. Strikingly, some of his rationalizations were directly related to the overlapping and expansive nature of the law governing his conduct.

Before addressing Yates' specific rationalizations, however, some prefatory comments are necessary. First, despite his blue-collar profession, Yates clearly fits within the strictures of a white-collar criminal, the

[33] John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 609–10 (2005) (defining secondary offenses, such as money laundering and obstruction of justice, as "offenses that consist entirely of actions that make it more difficult for the government to prosecute other substantive criminal offenses") [https://perma.cc/7HJQ-LET6]. *See generally* IRS, TAX CRIMES HANDBOOK (2009) [http://perma.cc/NV2E-AE4E].

[34] Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1783–84 (2000) [http://perma.cc/J69J-EHHG].

category of offender most likely to employ rationalizations.[35] Second, Yates was in a position to rationalize. He was faced with a nonsharable financial problem—the potential loss of his fishing license for possessing undersized fish—that could be solved by violating a trust—throwing those fish overboard after being told not to by a federal agent. The only thing preventing Yates from committing a criminal act was finding a rationalization that allowed him to maintain "the image of [him]self as a trusted person."[36] Unfortunately, such rationalizations were readily available.

For example, the most obvious rationalization Yates employed was to deny his responsibility. Just after the federal agents left his boat, and as he was preparing to throw dozens of fish overboard, he told his crew that "if the [officers] wanted to make sure that the fish were still [on board], they should have put a mark on their foreheads."[37] This statement is a classic "vocabulary of motive." By minimizing his own responsibility—*it was the agent's fault, not his*—Yates was able to look on his obviously improper behavior as acceptable. This allowed him to keep his self-perception as an "unassuming, hardworking American[]" intact despite violating a clear trust.[38]

Yates also rationalized his actions by condemning his condemners. During the inspection of his catch, Yates questioned the agent—a Florida fish and game officer deputized as a federal agent—on how he was measuring each grouper.[39] He also questioned why the agent was leaving the undersized fish on the boat at all.[40] This suggests Yates believed the agent was incompetent or lazy, or was improperly or selectively enforcing the size requirements—typical condemning-the-condemners rationalizations.

In addition, Yates relied on the denial-of-injury rationalization when he argued during the inspection that having a few undersized grouper in his more than 3000-fish catch was outside of his control.[41] His argument indicates that he deemed possessing undersized fish to be only a minor

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[35] *See supra* note 7. Most obviously, Yates was charged with three white-collar offenses—two obstruction counts and lying to a federal agent. In addition, he is almost sixty years old, married, and has a steady job as a boat captain responsible for the welfare of a crew, all factors suggesting he is able to conform to normative roles and has a self-interest in doing so.

[36] Cressey, *supra* note 7, at 14.

[37] Brief for the United States at 7, Yates v. United States, No. 13-7451 (S. Ct. Aug. 19, 2014) (alterations in original) [http://perma.cc/D6CJ-BFHP].

[38] 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/D8A6-NVJ2].

[39] Transcript of Jury Trial, Day Two at 10, 36, United States v. Yates, No. 2:10-CR-66-FtM-29SPC (M.D. Fla. Aug. 3, 2011).

[40] Transcript of Sentencing at 52, United States v. Yates, No. 2:10-CR-66-FtM-29SPC (M.D. Fla. Dec. 8, 2011).

[41] Transcript of Jury Trial, Day Two, *supra* note 39, at 94.

infraction for which he should not be held responsible. But that thinking also allowed him to rationalize the destruction of evidence by him and his crew—a serious criminal offense—as harming no one. This type of mental progression demonstrates the power of rationalizations.

Although Yates employed a number of other rationalizations during and after his criminal conduct, these three can be seen as flowing from overcriminalization. Each one is drawn from Yates's belief that commercial fishing and inspection law lacks legitimacy. Throughout his case, including prior to committing the acts giving rise to his conviction, he questioned the validity of the fishing regulations and the related secondary offenses with which he was charged.[42] He also questioned the exercise of discretion by the government agents and prosecutors.[43] And he questioned the criminal law's applicability to him and his behavior.[44] None of that is surprising given Yates' environment and the legal landscape he faced—a world governed by multiple laws addressing the same conduct, overlapping state and federal jurisdiction, overlapping enforcement actors, and incongruous civil and criminal penalties. This is quintessential overcriminalization, and it aided Yates in creating criminogenic rationalizations. That by no means excuses his behavior, but it does provide a new way of understanding overcriminalization's harms.

CONCLUSION

It is said that hard cases make bad law. What about odd cases? During argument on *Yates*, the Justices struggled with a criminal statute that clearly did not fit with how it was being used by the government—it was too broad, too vague, and too severe.[45] That may be enough to overturn Yates's conviction, which would be a positive step toward reducing overcriminalization's harms. Even so, the case will have little impact on the "deeply compromised" nature of our criminal justice system.[46] With almost 5000 criminal statutes, and upwards of 300,000 quasi-criminal regulatory

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[42] *Id.* (Yates stated, "I believe the agent originally measured my catch improperly and erratically," and "I should have incurred a financial penalty . . . [but] the Department of Justice wanted a pound of flesh.").

[43] *Id.* ("Nearly three years [after being issued a civil citation], the federal government charged me with the destruction of evidence—yes, fish—to impede a federal investigation.").

[44] *Id.* ("It says something about federal criminal law that it can be used against unassuming, hardworking Americans for a state civil matter.").

[45] Transcript of Oral Argument *passim*, Yates v. United States, No. 13-7451 (S. Ct. Nov. 5, 2014) [http://perma.cc/F7XR-4SWX]. Nearly all the Justices asked questions concerning the breadth of Sarbanes-Oxley as applied to Yates, 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. *Id.*

[46] Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1662 (2012) [http://perma.cc/WVK7-264Q].

provisions,[47] it is going to take a lot more "fishy SOX cases" to remedy the problem of overcriminalization. Hopefully this Essay will provide yet another reason to do so.

[47] Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 531 n.10 (2012) [http://perma.cc/PG7N-WLY7]; *cf.* Stuntz, *supra* note 4, at 513–14 (documenting the parallel growth of the criminal code at the state level).