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White Collar Overcriminalization: Deterrence, Plea Bargaining, and the Loss of Innocence

Professor Lucian E. Dervan¹

INTRODUCTION

Overcriminalization takes many forms and impacts the American criminal justice system in varying ways.² This article focuses on a select portion of this phenomenon by examining two types of overcriminalization prevalent in white collar criminal law. The first type of overcriminalization discussed in this article is Congress's propensity for increasing the maximum criminal penalties for white collar offenses in an effort to punish financial criminals more harshly while simultaneously deterring others. The second type of overcriminalization addressed is Congress's tendency to create vague and overlapping criminal provisions in areas already criminalized in

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² [The trend of overcriminalization] takes many forms, but most frequently occurs through:

- (i) enacting criminal statutes absent meaningful *mens rea* requirements; (ii) imposing vicarious liability for the acts of others with insufficient evidence of personal awareness or neglect; (iii) expanding criminal law into economic activity and areas of the law traditionally reserved for regulatory and civil enforcement agencies; (iv) *creating mandatory minimum sentences that fail to reflect actual culpability*; (v) federalizing crimes traditionally reserved for state jurisdiction; and (vi) *adopting duplicative and overlapping statutes*.

Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 15 (2010) (written statement of Jim E. Lavine, President, National Association of Criminal Defense Lawyers), *available at* http://judiciary.house.gov/hearings/printers/111th/111-151_58476.pdf (emphases added); *see* BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 5-6 (2010), *available at* <http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=17613> (discussing the already extensive number of federal criminal statutes and Congress's reactionary tendencies in continuing to pass such legislation); *see also* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 704 (2005) ("Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives.").

an effort to expand the tools available to prosecutors, increase the number of financial criminals prosecuted each year, and deter potential offenders. While these new provisions are not the most egregious examples of the overcriminalization phenomenon,³ they are important to consider due to their impact on significant statutes. In fact, they typically represent some of the most commonly charged offenses in the federal system.

While much has been written about the plethora of negative consequences resulting from overcriminalization generally,⁴ it is worth noting that not everyone believes that the potential negative consequences of the two types of overcriminalization discussed above outweigh the potential benefits. First, some argue that repeatedly increasing the statutory maximums for white collar offenses is justified because doing so means culpable individuals will receive longer prison sentences reflective of their conduct, and, in addition, others will be deterred from committing such crimes.⁵ Second, some argue that enacting broad new criminal provisions in areas already criminalized is justified because such enactments provide prosecutors with the tools necessary to ensure that creative and sophisticated white collar criminals are brought to justice in larger numbers,

³ Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage.

In Alabama, it is a felony to maim one's self to "excite sympathy" or to train a bear to wrestle, while Nevada criminalizes the disturbance of a congregation at worship by "engaging in any boisterous or noisy amusement." Tennessee makes it a misdemeanor to hunt wildlife from an aircraft, Indiana bans the coloring of birds and rabbits, Massachusetts punishes those who frighten pigeons from their nests, and Texas declares it a felony to use live animals as lures in dog racing. In turn, spitting in public spaces is a misdemeanor in Virginia, and anonymously sending an indecent or "suggestive" message in South Carolina is punishable by up to three years imprisonment. Not to be outdone, the federal government prohibits placing an advertisement on the U.S. flag (or vice versa) within the District of Columbia, as well as the unauthorized use of the "Red Cross" emblem or the characters "Smokey Bear" or "Woody Owl."

Luna, *supra* note 2, at 704 (citations omitted).

⁴ For a discussion of the negative consequences of overcriminalization, see Ellen S. Podgor, *Overcriminalization: The Politics of Crime*, 54 AM. U. L. REV. 541 (2005) and accompanying symposium articles. "[T]he common features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs)." Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 749 (2005).

⁵ *E.g.*, Kip Schlegel et al., *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions Against Securities Violators*, 28 W. ST. U. L. REV. 117, 134 (2001) (while not condoning overcriminalization, the author notes that "[o]ne could assume that at least one purpose for criminalizing acts and actors is to impose more drastic forms and amounts of punishment. A logical rationale for the extension of the criminal sanction to economic activity is the perceived need for more potent deterrents than those offered through a system of pricing.").

thereby deterring others from committing similar offenses.⁶ This article seeks to test the accuracy of the underlying premises utilized by both of these “justifications” for the overcriminalization discussed herein: (a) the assumption that increasing statutory maximums results in ever-lengthening sentences for individual white collar defendants and, therefore, acts as a deterrent; and (b) the assumption that enacting additional laws that are vague and overlapping in areas already criminalized results in increased levels of enforcement against white collar criminals and, therefore, acts as a deterrent.

To analyze the accuracy of these assumptions, this article examines Congress’s “get tough on crime” response to white collar offenses following the collapse of Enron in 2001. In particular, this article considers the effect of the two types of overcriminalization discussed above within the Sarbanes–Oxley Act of 2002 (“Sarbanes–Oxley” or “Act”).⁷ First, Congress’s propensity for increasing the maximum criminal penalties will be examined through analysis of the Act’s provisions increasing the maximum penalty for mail and wire fraud from five years to twenty.⁸ This article will examine whether these statutory amendments resulted in white collar criminals receiving dramatically longer prison sentences. Second, this article considers Congress’s tendency to enact vague and overlapping criminal provisions through analysis of Sarbanes–Oxley’s creation of two new obstruction of justice provisions as compliments to those already in existence.⁹ This article will explore whether these new statutory offenses resulted in a dramatic increase in the number of obstruction of justice prosecutions. By examining the impact of these reforms, this article seeks

6 See, e.g., John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can be Done About It*, 101 YALE L.J. 1875, 1876 (1992) (“The law can deter in different ways and to different degrees. Borrowing terms coined by Professor Robert Cooter, I would suggest that in its characteristic operation, the civil law ‘prices,’ while the criminal law ‘sanctions.’ The difference between a price and a sanction is at bottom the difference between, on one hand, a tax that brings private and public costs into balance by forcing the actor to internalize costs that the actor’s conduct imposes on others and, on the other, a significantly discontinuous increase in the expected cost of the behavior that is intended to dissuade the actor from engaging in the activity at all.”). While the above quotation from Professor Coffee is not cited to imply he condones overcriminalization, I believe his description of the perceived deterrent effect of criminalization itself is helpful.

7 Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

8 *Infra* Part II. Not only have maximum penalties increased, so too has the quantity of codified offenses. HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT*, at xxxi (2009) (noting that a study by the Federalist Society in 2007 concluded there were more than 4450 criminal offenses in the U.S. Code, an increase of 1450 since 1980); Luna, *supra* note 2, at 713 (“A recent report concluded that the erratic body of federal law has now swelled to more than four thousand offenses that carry criminal punishment, and other works have noted similar upsurges in the number of crimes at the state level.”).

9 *Infra* Part II.

to understand whether new crimes and punishments really achieve their intended goals and, if not, what this means for the overcriminalization debate and the overcriminalization “justifications” discussed above.

I. ENRON AND THE ROAD TO SARBANES–OXLEY

The road to Sarbanes–Oxley and a new round of overcriminalization began with the collapse of Enron in 2001.¹⁰ In October of that year, Enron announced to the world that during the third quarter it would take charges in excess of one billion dollars due to “soured investments.”¹¹ By December 2001, Enron was forced to file bankruptcy, a petition that admitted the existence of \$13.15 billion in company debt, a number that was overshadowed by an estimated \$27 billion in off–balance sheet liabilities.¹² Far from an innocent corporate failure, mounting evidence quickly showed that the Enron bankruptcy was the result of systemic corruption and fraud that reached the highest levels of the corporate structure. The complex fraud that saw the demise of one of America’s largest and fastest growing corporations led the President of the United States to discuss corporate crime in his 2002 State of the Union address to Congress. “Through stricter accounting standards and tougher disclosure requirements,” stated President George W. Bush, “corporate America must be made more accountable to employees and shareholders and held to the highest standards of conduct.”¹³ Interestingly, both President Bush and Securities and Exchange Commission Chairman Harvey Pitt argued that the road to such reforms be advanced through administrative agencies, not through legislative reform.¹⁴ In testimony before Congress on March 21, 2002,

¹⁰ See Linda Chatman Thomsen & Donna Norman, *Sarbanes–Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. L. 393, 394 (2008) (“The story behind [the Sarbanes–Oxley Act] begins with the fraud at Enron Corporation, which led to its December 2001 filing of what was then the largest bankruptcy in U.S. history.”).

¹¹ HAROLD S. BLOOMENTHAL, *SARBANES–OXLEY IN PERSPECTIVE* § 1:1 (2012).

¹² *Id.*

¹³ *Id.* § 1:2.

¹⁴ *Id.* § 1:9. As further support for the proposition that legislative intervention was not desired by the executive branch, the President released a ten point proposal for responding to the crisis. *Id.* § 1:4. None of the ten points requested or required legislative intervention from Congress. *See id.* § 1:4. The list requires:

(1) Each investor should have quarterly access to the information needed to judge a firm’s financial performance, condition, and risks; (2) Each investor should have prompt access to critical information; (3) CEOs should personally vouch for the veracity, timeliness, and fairness of their companies’ public disclosures, including their financial statements; (4) CEOs or other officers should not be allowed to profit from erroneous financial statements.; (5) CEOs or other officers who clearly abuse their power should lose their right to serve in any corporate leadership positions; (6) Corporate leaders should be required to tell the public promptly whenever they buy or sell company stock for personal gain; (7) Investors should have complete confidence in the independence and integrity of companies’ auditors; (8) An independent regulatory board should ensure that the accounting profession is held to the highest ethical standards; (9) The authors of accounting standards must

Chairman Pitt discussed the administrative reforms being implemented by the SEC and made clear that legislative action was not necessary.¹⁵

Regardless of the desire of the executive branch to limit the legislative response to Enron, Congress was anxious to participate in the national response to Enron. By March 2002, there were over thirty bills in Congress purporting to address the growing financial crimes epidemic.¹⁶ Perhaps sensing that congressional intervention was inevitable, President Bush attempted to refocus Congress's attention by asking for legislation that would "double the maximum prison terms for those convicted of financial fraud from five to 10 years."¹⁷ Presumably, the President and many others believed that increasing the maximum punishments available for white collar criminals under federal statutes would lead to dramatically longer sentences for those convicted and, as a result, establish a greater deterrence to those considering similar conduct.¹⁸

On July 20, 2002, President Bush signed Sarbanes–Oxley into law.¹⁹ While the bill contained much more than the President had requested, this article will focus on just two of the legislative enactments contained in the Act: (a) the increase in the maximum prison sentences for financial

be responsive to the needs of investors; (10) Firms' accounting systems should be compared with best practices, not simply against minimum standards.

Id. Further, on June 17, 2002, SEC Chairman Pitt reported to the President regarding the progress that had been made on each of the ten points. *Id.* In this letter response, no mention was made of a desire or need for legislative reform in addressing the crisis. *See id.*

15 *Id.* § 1:9.

16 *Id.*; see also Beale, *supra* note 4, at 755–56 (“[Federal criminal law] contains what some have called the *crime du jour*—legislation drafted in response to whatever crime is the focal point in the media—even if that offense is already defined and punished harshly and effectively under state law. For example, a high profile carjacking in a suburb near Washington, D.C., led to the rapid enactment of a federal carjacking statute. The passage of the federal law was not a response to any gap in either state law or the state enforcement system: the perpetrators of the publicized offense were apprehended, convicted, and sentenced to life imprisonment for murder.”).

17 See BLOOMENTHAL, *supra* note 11, § 10:1.

18 For a discussion of the various statements made by politicians, law enforcement personnel, and scholars regarding the predictive impact of Sarbanes–Oxley in lengthening prison sentences for white collar defendants, see Lucian E. Dervan, *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post–Enron World*, 60 OKLA. L. REV. 451, 453–67 (2007). “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.” *Id.* at 455.

19 Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.). For further discussion on the legislative process that accompanied the creation and passage of Sarbanes–Oxley, see Roberta Romano, *The Sarbanes–Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Ann Marie Tracey & Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes–Oxley Act*, 25 N. ILL. U. L. REV. 125 (2004).

criminals, and (b) the addition of two new obstruction of justice provisions in Title 18 of the U.S. Code.

First, the President requested that white collar criminals be punished more harshly in response to the corporate frauds of 2001 and 2002.²⁰ Congress not only granted the President's request, but went above and beyond his specific proposal with regard to two of the most commonly charged white collar offenses: mail and wire fraud.²¹ Prior to Sarbanes–Oxley, mail and wire fraud each carried a maximum sentence of five years in prison.²² Under Section 903 of Sarbanes–Oxley, the maximum punishment for each offense was increased to twenty years in prison.²³ Echoing the President's and Congress's belief that these amendments would significantly impact sentences, Attorney General John Ashcroft proclaimed in July 2002 that "executives and companies face tough penalties including *longer jail sentences for individuals.*"²⁴ Deputy Attorney General Larry Thompson repeated these sentiments several months later:

[T]hese [financial] crimes are particularly pernicious and appropriately the subject of intense—and that is what they are getting—law enforcement focus and action. . . . Our goal is to separate the offenders from law-abiding companies. *In many cases, that separation will be physical and for an extended term of years.*²⁵

The question to be addressed herein is whether the changes to the maximum punishments available for mail and wire fraud actually had the desired result of dramatically increasing the average prison sentences of individual white collar defendants and, if so, whether such increases could effectively deter future criminal conduct.

Second, Congress's response to the corporate scandals in 2001 and 2002 involved more than increasing the available punishments for white collar criminals. As observed by one scholar, "Congress did not simply increase penalties [in Sarbanes–Oxley]. Congress also plugged some gaps in existing law, made proof requirements easier on prosecutors, and embraced as

20 See BLOOMENTHAL, *supra* note 11, § 10:1.

21 18 U.S.C. § 1341 (2012); 18 U.S.C. § 1343 (2012).

22 Dervan, *supra* note 18, at 455.

23 Pub. L. No. 107-204, § 903(a)–(b), 116 Stat. 745, 805 (2002); *see also* Thomsen & Norman, *supra* note 10, at 399 ("For individuals, [Sarbanes–Oxley] extended the maximum jail terms for securities violations from ten to twenty years and increased the maximum fines from \$1 million to \$5 million.").

24 Press Release, Dep't of Justice, Attorney Gen. Statement on Corp. Responsibility and the Creation of the Corp Fraud Task Force (July 9, 2002) (emphasis added), *available at* http://www.justice.gov/opa/pr/2002/July/02_ag_388.htm.

25 Larry D. Thompson, Deputy Attorney Gen., A Day with Justice (Oct. 28, 2002), *available at* <http://www.justice.gov/archive/dag/speeches/2002/102802daywithjustice.htm> (emphasis added).

criminal a wider range of behavior.”²⁶ One such example is the expansion of obstruction of justice laws. 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*).²⁷ Despite the existence of these various obstruction of justice provisions, Congress determined in the aftermath of Enron that additional laws were necessary. According to one Senate Report, statutory changes were necessary in this already criminalized area to ensure that “when a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical distinctions [will] neither hinder nor prevent prosecution and punishment.”²⁸ As such, Congress passed, and the President signed, Sarbanes–Oxley, which contained two new obstruction of justice statutes.²⁹

The first new obstruction of justice provision was 18 U.S.C. § 1512(c):

Whoever corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.³⁰

18 U.S.C. § 1512(c) is similar to 18 U.S.C. § 1512(b), but is broader in scope because it reaches beyond the conduct of managerial agents and applies to anyone who engages in document destruction.³¹

²⁶ Tracey & Fiorelli, *supra* note 19, at 135.

²⁷ 18 U.S.C. §§ 1503, 1505, 1512(b) (2012).

²⁸ S. REP. NO. 107–146, at 7 (2002).

²⁹ See 148 CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy) (discussing that with Sarbanes–Oxley, Congress sought to “clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.”); see also Tracey & Fiorelli, *supra* note 19, at 133 (“Recent business scandals, such as those referenced herein, did not occur in a legislative environment that condoned such activity. To the contrary, many federal laws addressed and prohibited conduct occurring in these scenarios, such as obstruction of justice, intimidating witnesses, destroying evidence, and various types of fraudulent activity.”).

³⁰ 18 U.S.C. § 1512(c) (2012).

³¹ Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the “Delete” Key: §§ 802 and 1102 of the Sarbanes–Oxley Act*, 41 AM. CRIM. L. REV. 67, 78 (2004).

This new subsection to § 1512 essentially duplicates § 1512(b)(2)(B), with a few significant changes. First, the new subsection eliminates reference to persuasion, intimidation, or threat, thus reaching beyond the conduct of those in supervisory roles and subjecting the individual shredder to criminal penalties. Second, the new subsection adds language specifically referring to documents and records. Finally, it increases the statutory maximum penalty from 10 to 20 years, in line with the penalty provision of § 1519.

The second new obstruction of justice provision was 18 U.S.C. § 1519:

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.³²

18 U.S.C. § 1519 is particularly broad and was created in hopes of providing prosecutors the ability to bring charges against a more expansive group of potential defendants, thereby increasing the number of white collar prosecutions each year.³³ Senator Patrick Leahy, an architect of the Sarbanes–Oxley criminal provisions, stated that 18 U.S.C. § 1519 “is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede, or influence the investigation” of a matter within the jurisdiction of the United States.³⁴ As with the mail and wire fraud amendments in Sarbanes–Oxley, the question to be addressed herein is whether the new and overlapping obstruction of justice provisions in this already criminalized area had the desired result of dramatically increasing the number of white collar defendants prosecuted in subsequent years and whether such increased enforcement could effectively deter future criminal conduct.

II. THE TRUE IMPACT OF SARBANES–OXLEY ON WHITE COLLAR CASES

A. *Analysis of the Harsher Punishments Justification for Overcriminalization*

The first “justification” advanced by some for ignoring the negative consequences flowing from Sarbanes–Oxley’s overcriminalization measures is that an increase in the statutory maximum sentences for mail and wire fraud will result in dramatically harsher punishments for individual criminals, creating a strong deterrent effect for others.³⁵ The Bureau of

Id.

³² 18 U.S.C. § 1519 (2012).

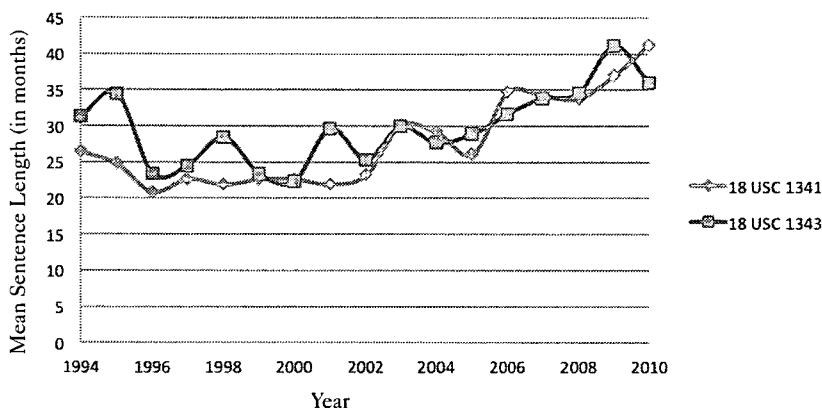
³³ See 148 CONG. REC. S7419 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy) (characterizing § 1519 as “a new general anti shredding provision”).

³⁴ *Id.*

³⁵ See *supra* INTRODUCTION; see also Schlegel et al., *supra* note 5, at 119 (“In spite of the attention directed toward overcriminalization, very little empirical evidence has been produced to actually demonstrate that these initiatives and reforms have resulted in a toughened posture against business malfeasance.”).

Justice Statistics maintains records regarding the mean length of sentence for defendants convicted of mail and wire fraud by year.³⁶

Graph A:
Mean Length of Sentence (in months) for Defendants Convicted
of Mail and Wire Fraud Offenses



As Graph A indicates, the mean sentences for defendants convicted of mail and wire fraud have risen significantly since 2002, the year in which the Sarbanes–Oxley amendments took effect. In particular, between 2002 and 2010, the mean sentence for mail fraud increased by eighteen months, while the mean sentence for wire fraud increased by ten months. These upward shifts alone, however, might not support the general proposition that the congressional enactments increasing the statutory maximums had the intended effects.

First, while the mean sentence for a defendant convicted of mail or wire fraud is now between forty–two and seventy–eight percent higher than in 2002, it is important to observe that these increases are still much less than the 400% increase in the statutory maximums enacted.³⁷ Further, mean sentences for mail and wire fraud continue to remain significantly lower than the pre–2002 statutory maximum of five years in prison. Second, rather than reflecting a broad shift in sentences for all mail and wire fraud defendants, it is possible that the elevated mean sentences observed above are the result of a skewing effect due to a handful of enormous sentences imposed on defendants who engaged in large frauds. For instance, Bernard Madoff, the infamous ponzi–schemer convicted of mail and wire fraud, was

³⁶ See *Federal Criminal Case Processing Statistics*, BUREAU JUST. STAT., <http://bjs.gov/fjsrc/> (last visited Apr. 12, 2013).

³⁷ See BLOOMENTHAL, *supra* note 11, § 10:1; see also Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, § 903, 116 Stat. 745, 805.

sentenced to 150 years in prison in 2009.³⁸ Utilizing available data regarding the number of mail and wire fraud convictions in 2009, Madoff's single sentence could increase the mean incarceration period for mail and wire fraud that year by over three months.³⁹ As such, it is likely that a handful of defendants in the years following the passage of Sarbanes–Oxley could be wholly responsible for the rise in mean sentences. Finally, one might argue that raising the statutory maximum for mail and wire fraud was at least necessary to sentence the most culpable white collar defendants to prison terms in excess of five years. However, because it is not necessary to increase the statutory maximums to sentence particularly egregious white collar criminals to staggering prison terms, this argument fails. Consider the case of Jeffrey Skilling, who was convicted based on statutes passed prior to Sarbanes–Oxley. By using consecutive sentencing rather than concurrent sentencing, the court was able to impose a term of 292 months—almost twenty-five years—in prison,⁴⁰ a term well in excess of even today's statutory maximum sentences for mail or wire fraud.

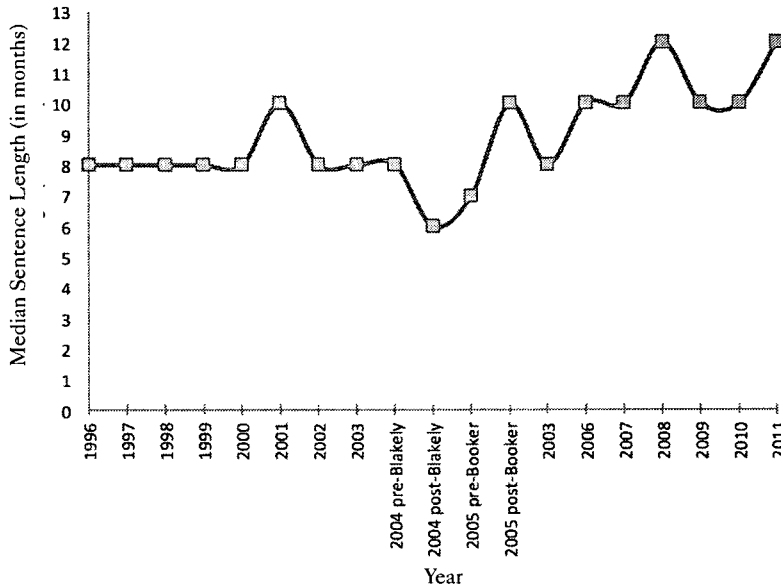
The hypothesis that Sarbanes–Oxley may not be responsible, at least in a significant manner, for the increase in mean mail and wire fraud sentences witnessed after 2002 appears to be supported by examination of the median sentences for fraud defendants in the federal system during the same time period.

38 *United States v. Bernard L. Madoff and Related Cases*, JUSTICE.GOV, <http://www.justice.gov/usao/nys/madoff.html> (last visited Apr. 12, 2013).

39 In 2009, 1062 wire and mail fraud cases were closed in the federal system (556 mail fraud cases and 506 wire fraud cases). The mean sentence for these defendants was 37.07 months for mail fraud and 41.1 months for wire fraud. Assuming mail and wire fraud were considered the most significant charges in the case for Bureau of Justice Statistics reporting purposes, if Bernard Madoff were removed from this group of defendants, the mean sentence for the remaining defendants would decrease to 33.89 months for mail fraud and 37.61 months for wire fraud, a drop of 3.17 months and 3.48 months, respectively. *See* BUREAU JUST. STAT., *supra* note 36.

40 *See* Laurel Brubaker Calkins & Thom Weidlich, *Skilling May Stay in Prison Even if He Wins Appeal (Update3)*, BLOOMBERG (Apr. 2, 2008, 10:53 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDf5bJG8hbEo&refer=us> (“U.S. District Judge Sim Lake sentenced Skilling to 10 years on each of two securities–fraud counts, to be served consecutively. He sentenced Skilling to an additional 52 months on each of the remaining 17 counts, to be served simultaneously after both 10–year sentences were completed.”).

Graph B:
Median Sentence (in months) for Federal Defendants
Convicted of Fraud Offenses



As demonstrated in Graph B, the median sentence for federal defendants convicted of fraud increased from eight months in 2002 to ten months in 2009 and twelve months in 2012. This represents a mere two-to-four month increase and is certainly not what was expected or desired in the wake of the passage of Sarbanes–Oxley.⁴¹ Further, in 2004 and part of 2005, the median sentence for fraud actually dropped to its lowest level in decades. Finally, with regard to the relatively small observed increase in median sentences, it is also worth considering whether factors other than Sarbanes–Oxley led to these increases. For instance, the United States Sentencing Commission increased the base offense level for many fraud offenses from six to seven points in 2002.⁴² This amendment alone subjected defendants to a roughly ten percent increase in their sentences.⁴³ Applying this increase to post-2002 sentencing suggests that this guidelines reform may

41 See Press Release, Dep't of Justice, *supra* note 24 (discussing the White House's vision for deterring corporate fraud by imposing tough penalties).

42 See Dervan, *supra* note 18, at 459–62.

43 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, 433 (2004).

account for most of the increases to median sentences described above, not Sarbanes–Oxley.⁴⁴

The above data suggest that average sentences have not risen dramatically as a direct result of the increases in statutory maximums found in Sarbanes–Oxley.⁴⁵ As such, the data suggests that the primary “justification” offered in defense of this type of overcriminalization—that it leads to harsher penalties reflective of financial criminals’ culpability—may be based on a false assumption regarding the impact of such legislative action on the sentences of individual defendants.⁴⁶

B. Analysis of the Increased Prosecutions Justification for Overcriminalization

The second “justification” some commentators advance for ignoring the negative consequences that naturally flow from the overcriminalization contained in Sarbanes–Oxley is that expanding prosecutors’ arsenal in already criminalized areas leads to more prosecutions. To begin the analysis of the accuracy of this assumption, Graph C illustrates the percentage of offenders in the federal system for whom the primary offense category was “Administration of Justice,” which includes obstruction of justice crimes.⁴⁷

44 *See id.* As to the effect of the increase of base level, Bowman notes:

[T]hough a one–base–offense–level increase may seem insignificant, it actually has profound effects on thousands of individual defendants. It bumps up the sentencing range of every federal fraud defendant by one level, thus increasing the minimum guideline sentence of defendants subject to imprisonment by roughly ten percent. Even more importantly, it limits judicial choice of sentence *type* in four out of ten fraud cases prosecuted in federal court.

Id.

45 While this article concludes that average sentences for fraud defendants have likely not risen dramatically since 2002 as a direct result of Sarbanes–Oxley, it is clear that sentences for the most notorious white collar defendants have increased over the years. In fact, as Professor Ellen Podgor notes in her article regarding white collar sentencing after Enron, such defendants face significant prison time today compared to the pre–Enron period. Specifically, Podgor states,

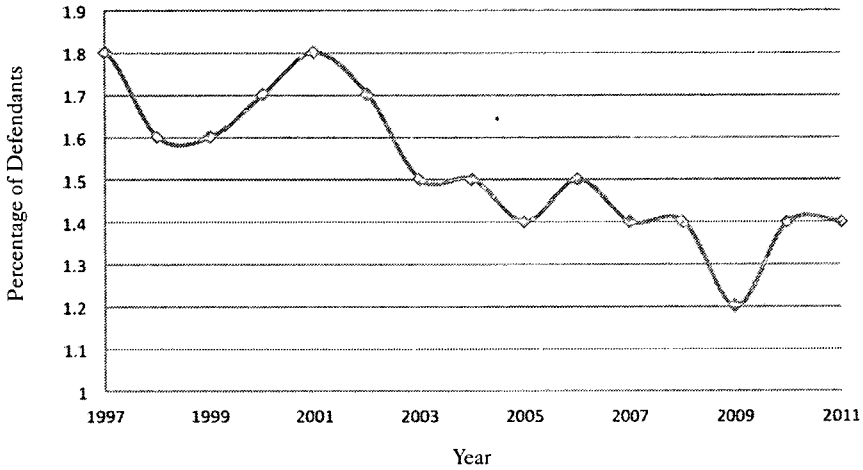
White collar offenders in the United States have faced sentences far beyond those imposed in prior years. For example, Bernard Ebbers, former CEO of WorldCom, was sentenced to twenty–five years; Jeffrey Skilling, former CEO of Enron, was sentenced to twenty–four years and four months; and Adelphia founder John Rigas received a sentence of fifteen years, with his son Timothy Rigas, the CFO of the company, receiving a twenty–year sentence.

Ellen S. Podgor, *Criminal Law: The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 731–32 (2007) (footnotes omitted).

46 *Id.* Podgor’s article does not address the impact of overcriminalization that includes mandatory–minimum sentencing.

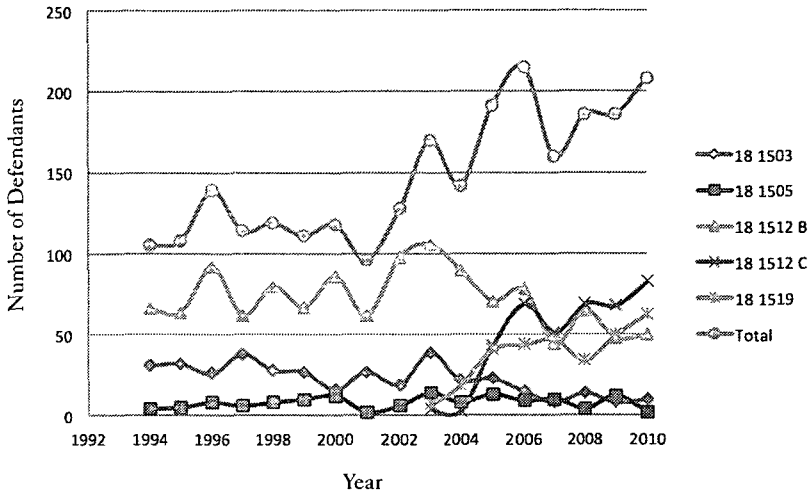
47 Examples of “Administration of Justice” offenses include “commission of offense while on release, bribery of a witness, failure to appear by offender, contempt, failure to appear by material witness, *obstruction of justice*, payment of witness, perjury or subornation of perjury, misprision of a felony, and accessory after the fact.” 2010 *Sourcebook of Federal Sentencing Statistics*, U.S. SENT’G COMM’N, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_

Graph C:
Percent of Defendants in the Federal System for whom Administration of
Justice was the Primary Offense Category



As illustrated in Graph C, the federal government's focus on administration of justice offenses actually decreased after the passage of Sarbanes–Oxley. After reaching a high of 1.8% of all federal prosecutions in 2001, these prosecutions began steadily declining and currently rest at only 1.4% of all federal prosecutions. At the very least, this likely demonstrates a reduction in focus and asset allocation by the federal government. Nevertheless, it is difficult to ascertain what this means for obstruction of justice prosecutions specifically. Due to the collection of data by the Bureau of Justice Statistics, however, one can focus more precisely on Sarbanes–Oxley's impact on obstruction of justice cases.

Graph D:
Total Number of Defendants in Obstruction Cases
Filed by Year and Statutory Provision



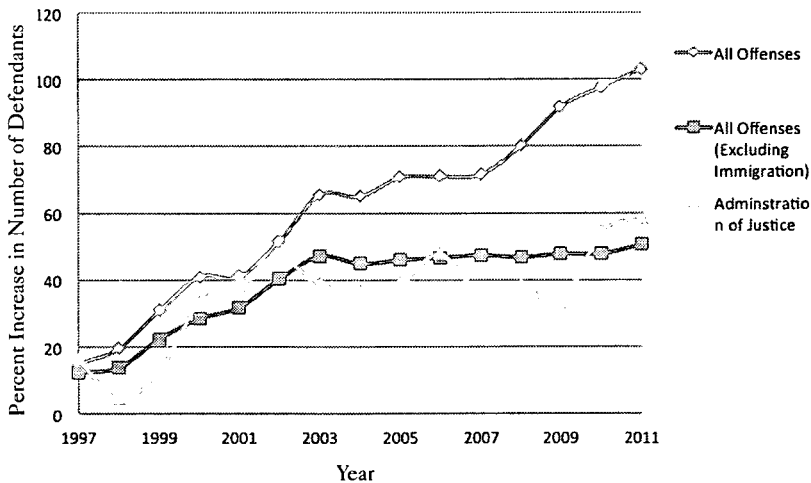
Several interesting patterns emerge from the statistical information above regarding prosecutions in which obstruction of justice was the most serious charge.⁴⁸ To begin, the total number of prosecutions did increase after Sarbanes–Oxley. In 2002, there were 129 obstruction of justice prosecutions using the three pre-existing obstruction statutes, 18 U.S.C. §§ 1503, 1505, and 1512(b). This number then increased to an average of 182 prosecutions a year using the three preexisting obstruction of justice statutes plus the two new provisions, 18 U.S.C. §§ 1512(c) and 1519. This represents an increase of fifty-three prosecutions a year, which is just over a forty percent increase. Viewed in isolation, the addition of two new broad obstruction of justice statutes appears to have succeeded in increasing the number of prosecutions in this area. Viewed in totality, though, the addition of only fifty-three prosecutions a year since the two new statutes’ creation is underwhelming, and a far weaker result than the

⁴⁸ According to the Bureau of Justice Statistics website, “All [offense specific] statistics refer to defendant–cases where the statute in question was the most serious charge involved.” See Bureau of Justice Statistics, *How to Generate Statistics*, available at http://www.bjs.gov/fjsrc/index.cfm?p=help&topic=T_SEC_HOW (last visited May 17, 2013). Recognizing this limitation in the above dataset, future research should be conducted to examine the number of obstruction of justice convictions where the obstruction charge was not the “most serious charge involved.” Such an analysis should examine whether a more dynamic increase in convictions occurred in this subset of obstruction cases after the passage of Sarbanes–Oxley and, if so, why the new obstruction statutes were more effectively utilized in those cases and whether obstruction convictions had any significant impact on sentence length in those cases.

legislature appears to have intended.⁴⁹ Consider, for instance, that in the same time period the total number of federal prosecutions per year grew by over 13,000. Further, note that as the number of prosecutions under 18 U.S.C. §§ 1512(c) and 1519 grew, the number of prosecutions applying the older, more burdensome provisions dropped. This implies that rather than bringing significant additional prosecutions using their newer and broader tools, prosecutors may simply have applied the Sarbanes–Oxley provisions to defendants who would previously have been indicted under the old provisions. If this is the case, it is likely because, as compared to the pre-existing obstruction of justice statutes, the new provisions were easier to prove and contained lower burdens of proof.

Returning to the data regarding the number of prosecutions for administration of justice violations, it also appears questionable whether the above-described increase in obstruction of justice prosecutions since 2002 was even the result of the passage of the new Sarbanes–Oxley obstruction of justice statutes.⁵⁰

Graph E:
Percent Increase in Number of Cases
Per Year Compared to Number of Cases in 1996



⁴⁹ See Grindler & Jones, *supra* note 31, at 78 (citing 148 CONG. REC. S7418–19 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy)).

⁵⁰ Data regarding the percentage change in prosecutions for administration of justice offenses were utilized in Graph E instead of data regarding the percentage change in prosecutions for obstruction of justice. This was done because of the limited number of obstruction of justice cases each year as compared to the number of cases in the other datasets within this particular graph.

Graph E presents data regarding the percentage change in the number of cases brought by the federal government each year in comparison to the number of cases brought in 1996. As illustrated by the graph, the total number of prosecutions has grown steadily over the past fifteen years. Interestingly, the total number of prosecutions by the federal government has risen at almost twice the rate of administration of justice prosecutions. It is worth noting that immigration offenses increased exponentially over the past decade and may have skewed the data set; removing these offenses, variations in obstruction of justice prosecutions essentially tracked federal prosecutions as a whole. As broader forces drove the absolute number of prosecutions in all categories higher over the past decade, therefore, administration of justice prosecutions merely kept pace.

This data suggests that obstruction of justice offenses did not see a dramatic surge in focus as a result of the passage of Sarbanes–Oxley. Further, though there was an increase in the absolute number of prosecutions, Congress’s desire for a striking increase in the volume of obstruction of justice cases appears to have gone unfulfilled. This once again indicates that the primary “justification” offered in defense of this type of overcriminalization—that it leads to a meaningful increase in prosecutions—may be based on a false assumption.⁵¹

III. THE GOAL OF DETERRENCE

The above analysis suggests that the passage of Sarbanes–Oxley was largely unsuccessful in achieving its two primary goals of dramatically increasing white collar defendants’ sentences and significantly increasing the number of obstruction of justice cases. However, there was an observable increase in both the mean sentence for mail and wire fraud and the absolute number of obstruction of justice prosecutions.⁵² To the extent that any of this growth was attributable to the passage of Sarbanes–Oxley, it is worth considering whether the observable increases could have then led to the ultimate legislative goal of deterring future criminality in these enforcement areas.

⁵¹ This article does not suggest that the last century’s proliferation of federal statutes did not impact the federal government’s ability to charge defendants who would previously have been outside the scope of federal jurisdiction, or that overcriminalization more broadly does not contribute to the increase in America’s prison population. Rather, this article seeks only to address the impact of creating similar and overlapping statutes in an already criminalized area, such as what occurred with regard to obstruction of justice offenses—not the creation of laws in a previously uncriminalized field.

⁵² See *supra* Graphs A, D.

The issue of deterrence has fascinated criminologists and legal scholars alike for decades.⁵³ As a result, there is a deep body of research examining the effectiveness of varying strategies on deterring future criminality. A review of these pieces clearly indicates that increasing sentencing severity, particularly where the offense is already punished with imprisonment, is ineffective at deterring others from taking a similar course.⁵⁴ A 1999 comprehensive review of research regarding the deterrent effect of increases in sentences by the Institute of Criminology at Cambridge University provides support for the conclusion that increasing the severity of sentences does not enhance deterrent effects.⁵⁵ Further, a recent review of literature on the subject by Paul Robinson & John Darley published in the *Oxford Journal of Legal Studies* is consistent with this view.⁵⁶ In particular, with regard to increasing sentencing schemes for offenses:

[T]he behavioral sciences increasingly call into question the assumption of criminal law's *ex ante* influence on conduct. Potential offenders commonly do not know the legal rules, either directly or indirectly, even those rules that have been explicitly formulated to produce a behavioural effect. Even if they know the rules, the cost–benefit analysis potential offenders perceive . . . commonly leads to a conclusion suggesting violation rather than compliance, either because the perceived likelihood of punishment is so small, or because it is so distant as to be highly discounted, or for a variety of other or a combination of reasons. And, even if they know the legal rules and perceive a cost–benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences.⁵⁷

Interestingly, studies in the same field indicate that the likelihood of apprehension and conviction does deter criminal behavior in a way that

53 See, e.g., Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143 (2003) (examining various studies of the topic).

54 See Paul R. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004). (“Having a criminal justice system that imposes sanctions no doubt does deter criminal conduct. But available social science research suggests that manipulating criminal law rules within that system to achieve heightened deterrence effects generally will be ineffective.”). *Id.* at 173

55 See ANDREW VON HIRSH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 45 (1999); see also Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1306 (2008) (“In light of discounts and the declining disutility of sanctions, numerous neoclassical accounts of deterrence support policies that increase the likelihood rather than the severity of the sanction.”).

56 *Id.*

57 *Id.* at 174; see also Doob & Webster, *supra* note 53, at 154 (noting that the proposition that differential sentencing severity does not affect crime is “widely accepted among criminologists”).

increasing sentencing severity does not. Professors Daniel Nagin and Greg Pogarsky, leaders in the field of deterrence research, state, “[P]unishment certainty is far more consistently found to deter crime than punishment severity”⁵⁸ In describing this phenomenon in the context of the American criminal justice system, Paul Robinson and John Darley, also prominent scholars in the deterrence field, contend that there is reason for concern:

Research has been done that varies the likelihood of punishment from its being certain—that is, punishment following every transgression—to a likelihood of only a probability of 0.1 per cent. For subjects at a 50 per cent punishment rate, the punishment considerably decreased the subsequent response rate, by approximately 30 per cent, from the no-punishment rate. But at a 10 per cent punishment rate, almost no suppression was observed. This suggests that the response rate will be fairly sensitive to a drop off in the punishment rate.⁵⁹

Given that only an estimated 1.3% of criminal offenses committed each year in the United States result in prosecution and conviction, Robinson and Darley note that “these low rates of conviction and punishment will have a seriously damaging effect on deterrent effect of the threatened punishment.”⁶⁰

The above research indicates that Congress was on both the right and the wrong path when it passed the Sarbanes–Oxley reforms in hopes of deterring future criminality. The increased statutory maximums for mail and wire fraud were intended to dramatically increase sentences for white collar offenders to deter others contemplating similar schemes.⁶¹ While the dramatic increase in sentences sought by President Bush and others did not occur, fraud sentences did increase during the 2000s.⁶² Whether the resulting sentencing increases were small or large, however, appears irrelevant to the deterrence question, because neither would have achieved this goal. As noted above, increasing sentences, particularly where the conduct is already criminalized, does not decrease the occurrence of the offense.⁶³

With regard to white collar offenders, there are several reasons this might be true. First, white collar offenders are unlikely to know that the mail and

⁵⁸ Daniel S. Nagin & Greg Pogarsky, *Integrating Celerity, Impulsivity, and Extralegal Sanction Threats into a Model of General Deterrence: Theory and Evidence*, 39 *CRIMINOLOGY* 865, 865 (2001).

⁵⁹ See Robinson & Darley, *supra* note 54, at 183.

⁶⁰ *Id.* at 184 (noting that the public perceives the prosecution and conviction rate as higher, while certain criminals overestimate their ability to go undetected).

⁶¹ See *supra* note 18 and accompanying text.

⁶² See *supra* Graph A and accompanying text.

⁶³ See *supra* Graph D and accompanying text.

wire fraud statutes exist, let alone the applicable statutory maximum of each.⁶⁴ Second, even if white collar offenders did acquire this legal acumen, they would likely ignore the risks, given the significant financial benefits of economic crime in comparison to the distant and relatively minimal chance of detection.⁶⁵ One might even argue that white collar offenders are particularly susceptible to a belief that they will not be detected because of the often sophisticated nature of their offenses. Finally, even if such a risk–reward analysis did not weigh in favor of criminality, it is likely that those contemplating economic crimes would proceed regardless, either because the offense is easy given their positions of trust or because they cannot control their behavior as a result of addiction or mental illness. In sum, it appears Congress was both misguided and unsuccessful in its attempt to use increased punishments as a means of achieving greater deterrence.

Congress's decision to increase the number of available obstruction of justice offenses may have proven more effective in increasing deterrence. As described in the analysis of the impact of the Sarbanes–Oxley amendments, the number of obstruction of justice prosecutions following passage of the reforms increased by over forty percent.⁶⁶ This significant percentage increase might be perceived as dramatically increasing the likelihood that one will be prosecuted for such conduct.⁶⁷ While increasing sentences does not deter criminality, increasing the likelihood of detection and prosecution measurably impacts offense rates.⁶⁸ While this indicates Congress was on the right path with this particular reform, the execution was likely insufficient to actually result in increased deterrence. When the percentages are stripped away, the reality is that there are very few obstruction of justice prosecutions each year.⁶⁹ Following the passage of Sarbanes–Oxley, there was only an average of 182 prosecutions per year in which obstruction of justice was the most serious offense charged.⁷⁰

64 See John M. Darley et al., *The Ex Ante Function of the Criminal Law*, 35 LAW & SOC'Y REV. 165, 174–81 (2001) (concluding that most people are unaware of the actual content of important state statutes); see also Robinson & Darley, *supra* note 54, at 174.

65 See Robert Lenzner, *The Shame Of It All: Bernie Madoff Redistributes \$65 Billion*, FORBES.COM (Mar. 13, 2009, 8:00 PM), <http://www.forbes.com/2009/03/13/bernie-madoff-fraud-personal-finance-financial-advisor-network-ponzi-scheme.html>; Bob Van Voris, *Ex-Tyco CEO Kozlowski Isn't Eligible for Millions in Benefits, Judge Rules*, BLOOMBERG (Dec. 2, 2010, 9:56 AM), <http://www.bloomberg.com/news/2010-12-02/ex-tyco-ceo-kozlowski-isn-t-eligible-for-millions-in-benefits-judge-rules.html>; see also Robinson & Darley, *supra* note 54, at 174 (“[E]ven if [criminals] know the legal rules and perceive a cost–benefit analysis that urges compliance, potential offenders commonly cannot or will not bring such knowledge to bear to guide their conduct in their own best interests, such failure stemming from a variety of social, situational, or chemical influences.”).

66 See *supra* Graph D and accompanying text.

67 See Robinson & Darley, *supra* note 54, at 183.

68 See Nagin & Pogarsky, *supra* note 58, at 865.

69 See *supra* Part II.

70 See *supra* Graph D and accompanying text.

While this was significantly more than during the period before 2002, this is hardly a number that will convince potential offenders that the risk of apprehension outweighs the potential gains from their conduct.⁷¹ While Congress may have intended a much larger increase in focus on obstruction offenses, such focus did not materialize; consequently, these reforms are unlikely to yield substantial results. If Congress truly wanted to deter obstruction of justice offenses, it should have dramatically increased funding for law enforcement focus and casework in this area, rather than turning to overcriminalization once again.⁷²

IV. THE ELUSIVE GAINS AND DEFINITIVE CONSEQUENCES OF OVERCRIMINALIZATION

Analysis of the data flowing from prosecutions after the passage of Sarbanes–Oxley in 2002 demonstrates that few of the intended benefits have materialized. Sentences for wire and mail fraud increased only slightly when compared to the calls for reform by President George H. W. Bush and the fourfold increase in the prescribed statutory maximums enacted.⁷³ Further, on average, only fifty–three more prosecutions in which obstruction of justice is the most serious offense occur each year, despite the creation of two more broadly applicable federal statutes.⁷⁴ Finally, the research regarding deterrence suggests that Sarbanes–Oxley’s focus on increasing sentences and creating new laws was not conducive to its ultimate goal of deterring future criminality. To better understand why Congress failed in achieving its goals, one must consider a mechanism from the trenches of our criminal justice system—plea bargaining.⁷⁵

⁷¹ See Robinson & Darley, *supra* note 54, at 182–84.

⁷² See Doob & Webster, *supra* note 53, at 191 (“Deterrence-based sentencing makes false promises to the community. As long as the public believes that crime can be deterred by legislatures or judges through harsh sentences, there is no need to consider other approaches to crime reduction.”). “Overcriminalization” refers to the claim that governments create too many crimes, including crimes that are duplicative and overlapping, crimes that are vague and overly broad, and crimes that lack sufficient *mens rea* to protect innocent conduct. See *Hearing on Stolen or Counterfeit Goods Legislation Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 3 (2012) [hereinafter *Hearing*] (statement of Lucian E. Dervan, Assistant Professor of Law, Southern Illinois University School of Law).

⁷³ See Sarbanes–Oxley Act of 2002, Pub. L. No. 107–204, § 903, 116 Stat. 745, 805; BLOOMENTAL, *supra* note 11, at § 10:1; *supra* Graph A and accompanying text.

⁷⁴ See 18 U.S.C. §§ 1512(c), 1519 (2012).

⁷⁵ In *Lafley v. Cooper*, the Supreme Court stated:

In the end, petitioner’s three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety–seven percent of federal convictions and ninety–four percent of state convictions are the result of guilty pleas.

While plea bargaining dates back to English common law, it was not until the twentieth century that it became a powerful force in the American criminal justice system.⁷⁶ In particular, though appellate courts had rejected the constitutionality of plea bargaining following the American Civil War, bargained justice became an invaluable tool of corruption in the early 1900s, as attorneys and judges exchanged money for sentences.⁷⁷ It was into this environment that overcriminalization began to creep as new and expansive criminal laws were adopted and the Prohibition Era brought increased enforcement activity.⁷⁸ By 1930, the overwhelming size of the criminal dockets left prosecutors with little option other than to utilize plea bargaining to keep the criminal justice system afloat⁷⁹:

[F]ederal prosecutions under the Prohibition Act terminated in 1930 had become nearly eight times as many as the total number of all pending federal prosecutions in 1914. In a number of urban districts the enforcement agencies maintain that the only practicable way of meeting this situation with the existing machinery of the federal courts . . . is for the United States Attorneys to make bargains with defendants or their counsel whereby defendants plead guilty to minor offenses and escape with light penalties.⁸⁰

(2012) (describing the vital role that plea bargaining plays in the criminal justice system). *Frye* also cited to a *Stanford Law Review* article which states, “[defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.” *Id.* (citing Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

⁷⁶ See Dervan, *supra* note 18, at 478 (discussing the rise of plea bargaining in the nineteenth and twentieth centuries); see also Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 58 (2012); Lucian E. Dervan, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL’Y 645, 649 (2011); Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 GA. ST. U. L. REV. 239, 243–44 (2010).

⁷⁷ See Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1, 19–24 (1979) (describing the use of plea bargaining as a tool of corruption).

⁷⁸ *Id.* at 27.

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

⁸⁰ Alschuler, *supra* note 77, at 32 (citing NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 56 (1931)).

As evidence of the staggering growth of plea bargaining as a result of overcriminalization in the early twentieth century, consider that in only fifty percent of criminal cases resulted in a plea of guilty in 1908, but by 1925 this number had risen to ninety percent.⁸¹

The relationship between plea bargaining and overcriminalization continued to develop over the next hundred years; today, almost ninety-seven percent of convictions in the federal system result from a plea of guilty.⁸² The significance of the relationship between plea bargaining and overcriminalization in leading us to the current bargained justice system is demonstrated by consideration of what it would mean for one to exist without the other:

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

Similarly, consider the significant ramifications that would follow should there no longer be over-criminalization. The law would be refined and clear regarding conduct for which criminal liability may attach. Individual benefits, political pressure, and notoriety would not incentivize the invention of novel legal theories upon which to base liability where none otherwise exists, despite the already expansive size of the United States criminal code. Further, novel legal theories and overly-broad statutes would not be used to create staggering sentencing differentials that coerce defendants, even innocent ones, to falsely confess in return for leniency.⁸³

As these comments demonstrate, a symbiotic relationship exists between plea bargaining and overcriminalization, a relationship that perpetuates the growth and survival of each.⁸⁴ It is into this hole that the Sarbanes-Oxley reforms may have been swept.

If plea bargaining explains the failures of Sarbanes-Oxley, it is perhaps because prosecutors did not take the tools this legislation offered to lead a charge to dramatically increase sentences for all fraud convictions and significantly increase the total volume of obstruction of justice prosecutions.

⁸¹ *Id.* at 27.

⁸² Dervan, *Over-Criminalization 2.0*, *supra* note 76, at 645-46 (discussing the symbiotic relationship between plea bargaining and overcriminalization).

⁸³ *Id.*

⁸⁴ *Id.* at 646.

Perhaps, instead, they may have simply added these weapons to their plea bargaining arsenals to create ever growing incentives for defendants to accept plea deals and forgo trials.⁸⁵ For those defendants willing to plead guilty, penalties similar to those faced by defendants during the pre-Enron era may have remained on the table and may explain the minimal overall increase in sentences during the 2000s.⁸⁶ For those who challenged the government at trial, however, the new weaponry remained available to secure significantly higher sentences and reinforce the incentives for others to bargain.⁸⁷ As such, while the supposed gains from the overcriminalization contained in Sarbanes–Oxley are elusive, the many and varied negative consequences flowing from overcriminalization are not.⁸⁸ In particular, the reforms passed by Congress after Enron’s collapse may have served to further perpetuate the symbiotic relationship between overcriminalization and plea bargaining and allowed for the creation of even greater incentives to waive one’s constitutional right to trial and plead guilty.⁸⁹

As Congress continues to focus on legislative enactments to respond to crime, and as overcriminalization continues to strengthen the plea bargaining machine, one must consider whether we have gone too far in

85 Dervan, *supra* note 18, at 477–78.

Why have financial crimes prosecutions not increased dramatically? Why are financial criminals receiving only marginally higher sentences? The answer may be found in the institution some felt was in jeopardy because of post-Enron reforms; plea bargaining. Prosecutors are not using their weapons in the war on financial crimes to increase prosecutions or prison sentences, but instead are using new statutes and the possibility of monumental sentences as tools to encourage defendants to accept plea agreements that include sentences similar to those offered before 2001. For those who refuse the government’s advances, prosecutors are prepared to use all of their new powers to secure significantly higher sentences as both a punishment for removing themselves from the plea bargaining machine and as an example to others who might be considering the same foolish course.

Id. It is impossible to know exactly what happened to the aspirations of Sarbanes–Oxley in the trenches of the criminal justice system. This article, however, proposes one possible explanation for the lack of dramatic and significant change resulting from the discussed amendments to the criminal code.

86 *Id.* at 477.

87 *Id.* at 477–78.

88 See Beale, *supra* note 4, at 749; Podgor, *supra* note 4.

89 See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223–24 (2007).

[Overcriminalization] does more than expose ordinary people to criminal punishment for innocuous behavior. It expands the discretion of prosecutors to the point of lawlessness because, with broad codes, they can effectively pick and choose offenders as well as offenses. It aggravates disparities in punishment because the same conduct is covered by multiple statutes carrying different sentences. It makes the criminal law incomprehensible to ordinary citizens. All these things undermine criminal law’s legitimacy.

Id.; see also Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 461 (2009) (“Clearly prosecutors in many jurisdictions retain the leeway—and sometimes the incentive—to charge and bargain harshly in ways that exploit overexpansive criminal codes and sentencing laws.”).

creating a system of pleas instead of trials.⁹⁰ While the relationship between overcriminalization and plea bargaining drove the rise of bargained justice during the twentieth century, it was not until 1970 that the U.S. Supreme Court specifically ruled on the constitutionality of such bargains in the case of *Brady v. United States*.⁹¹

Brady involved a defendant who was charged under a federal kidnapping statute.⁹² The statute allowed for the death penalty if a defendant was convicted by a jury.⁹³ As a result, a defendant could avoid the possibility of receiving the death penalty simply by pleading guilty and avoiding a jury verdict.⁹⁴ According to the defendant, the powerful statutory incentive to plead guilty led him to involuntarily forgo his right to trial.⁹⁵ Despite the previous aversion of U.S. appellate courts to plea bargaining during the prior century, *Brady* determined that plea agreements in return for reduced punishments are permissible.⁹⁶

Importantly, however, *Brady* inserted a caveat:

For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with

⁹⁰ See *Hearing*, *supra* note 72.

In closing, I would like to address one additional issue. While creating additional overlapping federal criminal statutes and significantly increasing the statutory maximum penalties for offenses related to prescription drug offenses may not result in greater deterrence of potential offenders or significantly increase sentences for those convicted, such legislation will perpetuate the phenomenon of overcriminalization and with it the continued deterioration of our constitutionally protected right to trial by jury.

Id.; see also Neal K. Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389–90 (1997).

A few law and economics scholars, however, noted that Becker missed a crucial variable for optimality: marginal deterrence. The idea is essentially the problem of cliffs—exacting equal penalties for crimes of lesser and greater magnitude leads to crimes of greater magnitude. As its primary exponent, George Stigler, put it, “[i]f the thief has his hand cut off for taking five dollars, he had just as well take \$5,000.” Stigler’s insight tracked that of the eighteenth-century Italian theorist Cesare Beccaria, who argued: “If an equal punishment is laid down for two crimes which damage society unequally, men will not have a stronger deterrent against committing the greater crime if they find it more advantageous to do so.” Jeremy Bentham made a similar move as well, arguing that the goal of a sanction is “to induce a man to choose always the least mischievous of two offences; therefore [w]here two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.”

Id. at 2389–90.

⁹¹ See *Brady v. United States*, 397 U.S. 742 (1970).

⁹² *Id.* at 743.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 744.

⁹⁶ *Id.* at 751.

the avoidance of trial, scarce judicial and prosecutorial resources are *reserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.*⁹⁷

According to the Court, then, plea bargaining was to be reserved for those instances where the defendant sought a small benefit in return for preserving judicial and prosecutorial resources in clear cases of guilt. If plea bargaining became excessively powerful, however, the Court warned that it might exceed the bounds of the Constitution and strip defendants of a meaningful decision regarding whether to waive their right to trial by jury⁹⁸:

This is not to say that guilty plea convictions hold no hazard for the innocent or that the methods of taking guilty pleas presently employed in this country are necessarily valid in all respects. This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have serious doubts about this case if the encouragement increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves.⁹⁹

As overcriminalization by Congress continues to perpetuate the dominance and the persuasive power of plea bargaining, the Supreme Court's concerns may have materialized. While the possibility of plea bargaining's innocence problem has been recognized for decades, new empirical evidence regarding the susceptibility of the innocent to plea bargaining brings this issue once again to the forefront.

A recent study of university students, administered by myself and a colleague, suggests that plea bargaining may have an inherent innocence problem. Our results call into question the *Brady* decision's assumptions regarding the persuasive power of plea bargaining.¹⁰⁰ Subjects in the study

97 *Id.* at 752 (emphasis added).

98 *See id.* at 758.

99 *Id.* at 757–58; *see also* Stephanos Bibas, *Harmonizing Substantive–Criminal–Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1382 (2003) (“Even if innocent defendants want to plead guilty, the law should not go out of its way to promote these unjust results.”); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158 (2005) (supporting Bibas' statements regarding innocent defendants and plea bargaining).

100 *See* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). The study was administered to eighty-two students. Six students were removed from the study because of suspicion as to the study's actual focus, an inability to complete the study, or a refusal to assist the confederate when asked to render assistance in answering the questions. Thus, seventy-six participants remained. Of this number, thirty-one indicated they were female and forty-five indicated they were male. Of the study population, 52.6% identified as Caucasian, 21.1% identified as African-American, 13.2% identified as Hispanic,

agreed to participate in a project they believed was designed to test the differences between individual and group problem solving.¹⁰¹ As such, the subjects were placed in a room with another student, who, unbeknownst to the subject, was a confederate working with the researchers.¹⁰² The subject and the confederate were then instructed that they could not assist each other during the individual problem-solving portion of the project.¹⁰³ Nevertheless, in roughly half of the cases, the confederate asked for and received assistance from the subject.¹⁰⁴ This was considered “cheating” for purposes of the study.¹⁰⁵ After the subject and the confederate completed the problem solving project, they were separated and, regardless of whether the individual had in fact assisted the confederate in cheating, the subject was offered a “plea” in return for “pleading guilty” to the alleged offense.¹⁰⁶

The first offer to the participant was a bargain.¹⁰⁷ If the individual pleaded guilty to the alleged offense, he or she would have to admit the conduct and forego his or her compensation for participating in the experiment.¹⁰⁸ All of the participants were informed that those refusing the “deal” would have the case referred to the school’s Academic Review Board (“ARB”).¹⁰⁹ The ARB was described to the participants as a group of ten to twelve faculty and staff members responsible for hearing such matters and determining whether an accused was guilty.¹¹⁰ Further, the

5.3% identified as Asian, and 7.9% identified as “Other.” Forty-eight students identified themselves as U.S. citizens, while twenty-eight students identified themselves as non-U.S. citizens.

¹⁰¹ *Id.* at 28.

¹⁰² *Id.* at 30 n.169.

¹⁰³ *See id.* The research script required the research assistants to make the following statement during the introduction:

We are studying the performance of individuals versus groups on logic problems. You will be given three logic problems to work through together and then three problems to work through on your own. It is very important that you work on the individual problems alone. You have 15 minutes for each set of problems. Even if you run out of time, you must circle an answer for each question. First, you’ll be working on the group problems. I will leave the room and be back in 15 minutes. If you finish before that time, one of you can duck your head out the door and let me know.

Id.

¹⁰⁴ *Id.* at 29.

¹⁰⁵ *See id.* It is worth noting that all but two study participants approached by the confederate to offer assistance violated the requirement that each student work alone. The two students who refused to offer assistance were removed from the study. *Id.* n.168.

¹⁰⁶ *Id.* at 31–33. Importantly, the individual offering the subjects the “plea” was unaware at the time whether the individual had, in fact, “cheated.” *Id.* at 30.

¹⁰⁷ *Id.* at 32.

¹⁰⁸ *Id.* at 31 (“This particular offer was made to all study participants and was constructed to be akin to an offer of probation or time served in the actual criminal justice system.”).

¹⁰⁹ *Id.* at 32.

¹¹⁰ *Id.*

ARB was described in terms similar to a traditional criminal court, where the participant would have the opportunity to explain his or her version of events, present evidence, and argue for his or her innocence.¹¹¹ Finally, to offer the participant some background information about the fictional ARB similar to that which might be offered by counsel in an actual criminal case, the participant was informed that “the majority of students, like 80–90%, are usually found guilty” before the ARB.¹¹² This statistic was utilized because it represents the percentage of cases that result in verdicts of guilt after trial in the U.S. criminal justice system.¹¹³

The research assistant then offered the accused participant one of two different versions of what would occur if the ARB found him or her guilty.¹¹⁴ In roughly half of the cases, the research assistant informed the participant that, if found guilty after trial before the ARB, he or she would lose his or her compensation, his or her faculty advisor would be notified, and he or she would have to enroll in nine hours of ethics training.¹¹⁵ In roughly the other half of cases, the research assistant informed the participant that, if found guilty after trial before the ARB, he or she would lose his or her compensation, his or her faculty advisor would be notified, and he or she would have to enroll in a three credit-hour seminar that met throughout the semester.¹¹⁶ Both courses were described as free of charge, but each was explained as requiring mandatory attendance and completion of a final examination.¹¹⁷ Placed in a similar position to a criminal defendant weighing his or her options, regardless of guilt or innocence and in the face of a sentencing differential, the study subjects contemplated their choices.¹¹⁸

The results of the study were significant, though perhaps not surprising. Almost nine out of ten “guilty” subjects accepted the “deal” and pleaded guilty.¹¹⁹ Slightly less than six out of ten innocent defendants falsely confessed to something they had not done in return for the same incentives.¹²⁰

111 *Id.*

112 *Id.*

113 *Id.*

114 *Id.* at 32–33.

115 *Id.*

116 *Id.* at 32.

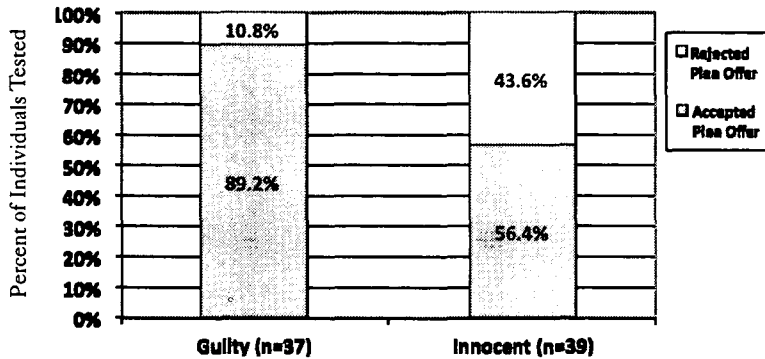
117 *Id.* at 32–33.

118 *See id.* at 33 (“While academic discipline is not precisely equivalent to traditional criminal penalties, the anxiety experienced by students anticipating punishment is similar in form, if not intensity, to the anxiety experienced by an individual charged with a criminal offense.”).

119 *See id.* at 34.

120 *See id.* (“We conducted a three-way log-linear analysis to test the effects of guilt (guilt vs. innocence) and type of sanction (lenient vs. harsh) on the participant’s decision to accept the plea bargain. The highest order interaction (guilt x sanction x plea) was not

Graph F:
Percentage of Students by Condition (Guilty or Innocent)
Accepting the Plea Offer



This evidence of plea bargaining's innocence problem reveals that the Supreme Court was wrong in 1970 when it assumed innocent defendants would not falsely confess in the face of an offered bargain.¹²¹ With this in mind, the symbiotic relationship between overcriminalization and plea bargaining is especially problematic. This is particularly so given that the statutes in question raised statutory maximums and created overlapping, broad federal statutes in already-criminalized areas, yet failed to achieve their intended enforcement objectives.

significant, $\chi^2 (1, N = 76) = 0.26, p = 0.61$. What was significant was the interaction between guilt and plea, $\chi^2 (1, N = 76) = 10.95, p < 0.01$. To break down this effect, a separate chi-square test was performed looking at guilt and plea, collapsed across type of sanction. Applying the continuity correction for a 2 x 2 contingency table, there was a significant effect of guilt, $\chi^2 (1, N = 76) = 8.63, p < 0.01$, with the odds ratio indicating that those who were guilty were 6.38 times more likely to accept a plea than those who were innocent.”).

121 See *Brady v. United States*, 397 U.S. 742, 758 (1970).

CONCLUSION

A preliminary review of data regarding the sentences received by mail and wire fraud defendants and the number of obstruction of justice prosecutions since the passage of Sarbanes–Oxley suggests that little has changed significantly as a result of these legislative enactments.¹²² Defendants convicted of mail and wire fraud offenses are receiving average sentences that are higher than during the pre–Sarbanes–Oxley period, but the observed increases in mean and median prison sentences for fraud are likely attributable to forces other than post–Enron statutory reforms.¹²³ Further, the actual number of individuals charged with obstruction of justice as their most significant offense remains small, despite the creation of two new federal statutes.¹²⁴ In fact, when compared with all federal prosecutions during the same period, the government’s focus on obstruction of justice appears to have diminished since the collapse of Enron.¹²⁵ These failings, and the likely resulting failure to deter future criminality through these reforms, may be due, at least in part, to plea bargaining—a system that uses such legislative enactments for its own ends rather than those of the legislature.

Based on these findings, the “justifications” advanced by some for ignoring the negative consequences that naturally flow from the overcriminalization found in Sarbanes–Oxley and examined in this article are hollow and unconvincing. These justifications rely on false assumptions regarding the relationship between increased statutory maximums, increased punishments for individuals, the relationship between expanding prosecutorial arsenals in areas already criminalized, and increased levels of enforcement.¹²⁶ While the overcriminalization found in Sarbanes–Oxley may not result in significantly longer sentences, dramatically increased enforcement actions, or greater deterrence of potential offenders, such legislation does perpetuate the phenomenon of overcriminalization and with it the continued deterioration of our constitutionally protected right to trial by jury.

Today, almost ninety–seven percent of criminal convictions in the federal system are resolved through a plea of guilty.¹²⁷ As the number, breadth, and sentencing severity of federal criminal statutes continue to increase through overcriminalization, prosecutors gain increased ability to create overwhelming incentives for defendants to waive their constitutional

¹²² See *supra* Graphs A, D and accompanying text.

¹²³ See *supra* Part II.

¹²⁴ See *supra* PART I and Graph D (citing 18 U.S.C. §§ 1512(c), 1519 (2012)).

¹²⁵ See *supra* Graphs C, E and accompanying text.

¹²⁶ See *supra* Part IV.

¹²⁷ See Dervan, *Over–Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, *supra* note 76, at 645.

right to a trial by jury and plead guilty. The symbiotic relationship between overcriminalization and plea bargaining has led us to our current state and created an environment in which we have jeopardized the accuracy of our criminal justice system in favor of speed and convenience. We found that more than half of the innocent participants in our study falsely admitted guilt in return for a perceived benefit.¹²⁸ As overcriminalization continues to create incentives that make plea bargaining so prevalent and powerful, one must ask what constitutional price is being paid when Congress creates yet another law or increases yet another statutory maximum where, despite the intent of Congress in passing them, these reforms appear ineffective at actually achieving their primary goal of deterrence.

¹²⁸ See *supra* Graph F.