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# AMERICAN PEANUTS V. UKRAINIAN CIGARETTES: DANGERS OF WHITE-COLLAR OVERCRIMINALIZATION AND UNDERCRIMINALIZATION

*Dmitriy Kamensky\**

## ABSTRACT

Does an optimal model of criminal policy exist? This Article considers this question by comparatively exploring two criminalization phenomena: overcriminalization in the United States and undercriminalization in Ukraine. Both phenomena are capable of ruining major principles of criminal liability while at the same time destroying public confidence in criminal justice. This Article considers the deficiencies of these criminalization policies, specifically in the area of white-collar crime. It analyzes existing definitions of overcriminalization and undercriminalization as they are known in the United States and in Ukraine. This Article then examines the concepts of overcriminalization and undercriminalization from different perspectives (legislation, prosecution, judicial interpretation, academic research, and public calls for action) and critically compares several white-collar-crime cases in two countries from the criminalization standpoint. The final part of the Article theorizes on how best to identify the proper criminalization balance and on how to achieve that balance.

## I. INTRODUCTION

“Just ship it.”<sup>1</sup> For most, this phrase indicates routine, everyday postal mailing. However, when used in an email by the CEO of the Peanut Corporation of America, it was the arrow that landed him the designation of convicted felon.

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1. Press Release, Dep’t of Justice, Office of Pub. Affairs, Former Officials and Broker of Peanut Corporation of America Indicted Related to Salmonella-Tainted Peanut Products (Feb. 21, 2013), <http://www.justice.gov/opa/pr/former-officials-and-broker-peanut-corporation-america-indicted-related-salmonella-tainted> [hereinafter *Salmonella-Tainted Peanut Products*]. One of the overt acts of the conspiracy to introduce and deliver for introduction into interstate commerce with intent to defraud or mislead adulterated and misbranded food, charged against Parnell was as follows: “on or about March 21, 2007, upon being told that salmonella testing results were not yet available and that shipment of a portion of a customer’s product would therefore be delayed, Parnell stated, via email: ‘just ship it. I cannot afford to loose [sic] another customer.’” Indictment at 28, *United States v. Parnell*, No. 1:13-CR-12-001 (M.D. Ga. Feb. 15, 2013), <http://www.justice.gov/iso/opa/resources/61201322111426350488.pdf>.

Mr. Stewart Parnell was sentenced to twenty-eight years in prison after his conviction on sixty-seven counts of mail and wire fraud, introduction of adulterated and misbranded food into interstate commerce, and conspiracy.<sup>2</sup> His company was forced out of business due to a large number of civil tort claims and to the loss of customers.<sup>3</sup> This conviction represents one of the major cases when “a corporate executive has been found guilty on criminal counts under the Federal Food, Drug and Cosmetic Act.”<sup>4</sup>

Parnell’s case opens just one of many doors leading to the issue of overcriminalization. This phenomenon of modern American jurisprudence has been gaining momentum for many decades and has recently come under sharp attack.<sup>5</sup>

In contrast to the extreme of overcriminalization, there is undercriminalization, which is demonstrated by examining modern Ukrainian jurisprudence. The case of attempted introduction of contaminated cigarettes to the Ukrainian market, which has resulted in an astonishingly lenient punishment, serves as just one of several examples of undercriminalization.<sup>6</sup>

Overcriminalization and undercriminalization are both highly negative deviations capable of ruining major principles of criminal liability and destroying public confidence in criminal justice. Using a comparative law approach,<sup>7</sup> this Article will analyze overcriminalization and undercriminalization doctrines and help outline their parameters. By critically comparing connections between crimes committed and legal responses to them in these two countries, one will better understand American and Ukrainian criminalization policies.<sup>8</sup>

2. Press Release, Dep’t of Justice, Office of Pub. Affairs, Former Peanut Company President Receives Largest Criminal Sentence in Food Safety Case; Two Others also Sentenced for Their Roles in Salmonella-Tainted Peanut Product Outbreak (Sept. 21, 2015), <http://www.justice.gov/opa/pr/former-peanut-company-president-receives-largest-criminal-sentence-food-safety-case-two>.

3. See, e.g., Nick Miroff and Lyndsey Layton, *Peanut Company at Center of Salmonella Scare Files for Bankruptcy Protection*, WASH. POST (Feb. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303420.html> (referring to the bankruptcy filings that showed “the company carries debt with between 100 and 199 creditors and faces between \$1 million and \$10 million in liabilities”).

4. Jessie Newman, *Peanut Executive Found Guilty in Salmonella Trial*, WALL ST. J. (Sept. 19, 2014, 6:12 PM ET), <http://www.wsj.com/articles/head-of-company-that-distributed-salmonella-tainted-peanuts-found-guilty-1411149368>.

5. See, e.g., BRIAN W. WALSH & TIFFANY M. JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 5-9 (2010), [http://s3.amazonaws.com/thf\\_media/2010/pdf/WithoutIntent\\_lo-res.pdf#page=21](http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf#page=21) (discussing three major issues of criminal legislative process—erosion of *mens rea* requirements, poor legislative drafting, and regulatory criminalization).

6. See *infra* Part IV.A.

7. Studying foreign law and comparing it with one’s own allows one to identify new ideas, approaches, achievements, deficiencies, and mistakes in both legal systems, which allows for critical analysis and the potential to start improving things. As Edward J. Eberle put it, using strong methodological framework for the purposes of comparative law research “will serve as a way of promoting insight and knowledge, and maybe, some degree of harmonization over critical issues or, at least, a measure of common understanding.” Edward J. Eberle, *The Methodology of Comparative Law*, 16 ROGER WILLIAMS U.L. REV. 51 (2011).

8. But see Fernando Molina, *A Comparison Between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It*, 14 NEW CRIM. L.R. 123 (2011) (considering comparative analyses of both European and Anglo-American criminal law with respect to the issue of overcriminalization). Although this Article references some of Molina’s arguments, it differs from his piece both in research focus, criminalization issues raised, and intensity of reference to the comparative

The examples in this piece reveal some of the issues raised by overcriminalization and undercriminalization: (1) unreasonably broad or narrow textual boundaries of some criminal statutes; (2) application of multiple criminal statutes versus prosecuting only a few crimes; (3) severity of criminal punishment or too much flexibility in applying criminal penalties; and (4) the adequate limits of prosecutorial discretion. And although the application of statutes to criminal conduct is examined, this Article is not focused on the discretionary function of charging conduct. Rather, this Article focuses on the substantive law that provides the basis for criminal charges.

Based on these examples and the statutory law behind them, the Article will argue that overcriminalization is bad while undercriminalization can become even worse. Thus, the main issue yet to be decided is how to achieve the “right” criminalization.<sup>9</sup>

This Article begins in Part II by defining the two approaches of overcriminalization and undercriminalization as they are applied in the respective criminal law contexts in the United States and in Ukraine. Because of the breadth of criminal law, this Article takes a small slice, white-collar criminality, to contrast these two approaches. Part III examines the concepts of overcriminalization and undercriminalization from five different perspectives: legislation, prosecution, judicial interpretation, academic research, and public calls for action. Part IV goes on to expose different practical developments of overcriminalization and undercriminalization in the United States and Ukraine, respectively, based on comparative analyses of several white-collar-crime cases. Finally, Part V theorizes on how best to identify the proper criminalization balance and how to achieve it.

## II. OVERCRIMINALIZATION, UNDERCRIMINALIZATION, AND THEIR CONNECTIONS WITH WHITE-COLLAR CRIME

### *A. Overcriminalization's Roots and Changing Masks*

In the United States, the history of the overcriminalization phenomenon may not have a pronounced longevity of record in contrast to traditional criminal law issues, but it is nonetheless quite eventful and still far from complete. A century-long record of federal criminal justice reform initiatives indicates that issues of too many crimes have been raised for many years,<sup>10</sup> and the concept of

method. See also Kimmo Nuotio, *Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach*, in *THE BOUNDARIES OF THE CRIMINAL LAW* 238, 244 (R.A. Duff et al. eds., 2010) (talking about the important role of the *Rechtsgut*, which literally means ‘legal good’, in the European theory of criminalization). *Rechtsgut* doctrine encompasses a variety of legally protected interests, which are harmed by criminal offenses. *Id.* at 246.

9. See Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 *DUQ. L. REV.* 771, 779 (1980) (presuming that “Congress and the courts are likely to remain forever engaged in seeking the ideal balance between ‘overly broad’ and ‘overly narrow’”).

10. See Roger A. Fairfax, Jr., *From “Overcriminalization” to “Smart on Crime”: American Criminal Justice Reform—Legacy and Prospects*, 7 *J.L. ECON. & POL’Y* 597, 601-602 & n.33 (2011) (referring to President Hoover’s concern over the significant growth of federal criminal statutes in numbers over the twenty-year period).

overcriminalization<sup>11</sup> itself can be traced back almost half a century. It has been presumed that the Model Penal Code's failure predicted the dawn of the overcriminalization movement.<sup>12</sup>

Title 18 of the United States Code can serve as one important evidentiary piece of the overcriminalization record in this country. Codified and enacted into positive law on June 25, 1948, this title, with the official name "Crimes and Criminal Procedure," originally enumerated a significantly small number of criminal offenses that were narrower in reach.<sup>13</sup> A simple, surface-level comparison of the original and current texts of the Federal Criminal Code reveals a major difference. The common, white-collar offense of mail fraud serves as a good example. Upon Title 18's enactment, its Chapter 63, entitled "Mail Fraud," included just two offenses: § 1341, "Frauds and swindles," and § 1343, "Fictitious name and address." Today, this Chapter is entitled "Mail Fraud and Other Fraud Offenses" and includes eleven criminal statutes that encompass various types of fraud—including mail fraud, health care fraud, and fraud in foreign labor contracting.<sup>14</sup> This is notwithstanding the fact that the statutory text in Chapter 63 is written broadly, has been construed loosely by federal courts over the past decades, and is sanctioned more severely today.

Overcriminalization is not an easily defined category. For a number of obvious reasons, there is no official definition of overcriminalization. Discussing the roots of overcriminalization,<sup>15</sup> Professor Stephen Smith stressed shortcomings of the two general understandings of overcriminalization: overcriminalization as simply the issue of Congressional enactment of too many criminal laws that are too broad in scope;<sup>16</sup> and as "serious crime-definition and sentencing problems"<sup>17</sup> that often make practical application of criminal statutes lead to erroneous results. In reality, this phenomenon has a much broader meaning and is much more complicated.

Reference sources do not offer much help in searching for a definition of "overcriminalization." The Oxford English Dictionary only provides explanation of the word "criminalization:" "the fact or process of criminalizing a person or activity."<sup>18</sup> Black's Law Dictionary proposes a twofold definition of "criminalization:" "the act or an instance of making a previously lawful act

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11. To a layperson, overcriminalization might seem like too many crimes committed in society. To a reader with some legal background, the word "overcriminalization" may suggest that a phenomenon where the government establishes too many new crimes, punishes wrongdoing too severely, or generally imposes too much into the common citizens' behavior. This line of reasoning can lead to the question of whether Congress exceeds its granted powers when it relies too much on the enactment of crimes while distinct noncriminal measures are available to improve behavior and further public interests.

12. Fairfax, *supra* note 10 at 603.

13. Act of June 25, 1948, 62 Stat. 683 (1948) (codified as 18 U.S.C. §§ 1-5037).

14. 18 U.S.C. §§ 1341, 1347, 1351 (2012).

15. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2013).

16. *Id.* at 539.

17. *Id.*

18. "Criminalize, v." *OED Online*. Oxford University Press, September 2015. Web. 21 October 2015. This is a derivative from the word "criminalize" meaning "To turn a person into a criminal, especially by making his or her activities illegal." See also Webster's Unabridged Dictionary at 476 (giving two meanings to the word "criminalize": (1) "to make punishable as a crime," and (2) "to make a criminal of").

criminal, usually by passing a statute,” and “the process by which a person develops into a criminal.”<sup>19</sup>

Legal scholarship has interpreted this term of art in various ways.<sup>20</sup> For example, Professor Sanford Kadish defined overcriminalization as:

One kind of systematic nonenforcement by the police is produced by criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern, in order to assure that suitable suspects will be prevented from escaping through legal loopholes as the result of the inability of the prosecution to prove acts which bring the defendants within the scope of the prohibited conduct.<sup>21</sup>

Other scholars view it differently, suggesting that the crux of the “overcriminalization” neologism refers to the application of criminal statutes in a manner that allows prosecuting “conduct that traditionally would not be deemed morally blameworthy.”<sup>22</sup> Still, others understand this phenomenon through the lenses of the perception that “we have too much punishment and too many crimes in the United States”<sup>23</sup> and even through attribution of several defining categories—untenable offenses, superfluous statutes, doctrines that overextend culpability, crimes without jurisdictional authority, grossly disproportionate punishments and excessive or pretextual enforcement of petty violations.<sup>24</sup> The National Association of Criminal Defense Lawyers (NACDL) refers to an even more expansive list of overcriminalization problems.<sup>25</sup>

19. BLACK’S LAW DICTIONARY 431 (9th ed. 2009).

20. 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. Todd Haugh, *Sox on Fish: A New Harm of Overcriminalization*, 109 NW. U. L. REV. 835, 836 & n.3 (2015) (admitting that overcriminalization can be defined differently and the vast majority of definitions rest “on the misuse of the criminal law and the resulting harms”).

21. Sanford H. Kadish, *Legal Norm and Discretion In the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1969).

22. Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 719 & n.13 (2013).

23. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3, 4 (2008) (expressing an ambition to propose a *theory of criminalization* that will enable one to differentiate between justified and unjustified criminal laws).

24. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 717 (2005). There are other definitions of overcriminalization that seem to outline major areas of concern such as criminal law growth, related prosecutorial expansion, as well as broad judicial interpretation. Todd Haugh has illustrated some of the proposed approaches to understanding and defining the phenomenon of overcriminalization, coming to a conclusion that “all have merit, but none are perfect.” Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1197-201 (2015).

25. *Overcriminalization*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <http://www.nacdl.org/overcrim> (last visited Jan. 14, 2016). Overcriminalization impacts include: ambiguous criminalization of conduct without meaningful definition or limitation; enacting criminal statutes lacking meaningful *mens rea* requirements; imposing vicarious liability with insufficient evidence of personal awareness or neglect; expanding criminal law into economic activity and regulatory and civil enforcement areas; creating mandatory minimum sentences unrelated to the wrongfulness or harm of the underlying crime; federalizing crimes traditionally reserved for state jurisdiction; and adopting duplicative and overlapping statutes. *Id.*; see also John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the*

Professor Douglas Husak's proposed apparatus for classifying new types of criminal offenses that contribute to criminal law expansion presents three categories of offenses, which are located, relatively speaking, on the periphery of criminal law: (1) overlapping crimes (encompassing situations when a single criminal conduct violates multiple statutory prohibitions); (2) offenses of risk prevention (inchoate types of offenses that prohibit not harm itself but the possibility of causing harm); and (3) ancillary offenses (backup types of offenses that surround primary offenses and are used when prosecution of the principal crime might be unsuccessful or undesirable).<sup>26</sup>

As one sees from the numerous definitions and classifications, the issue of overcriminalization is akin to the "Lernean Hydra,"<sup>27</sup> which is of many forms and many dangers.<sup>28</sup> And even with a growing debate within the United States that prosecutions of financial wrongs have gone unnoticed, it remains a given that there has been an explosion of criminal statutes.

### B. The Flaws of Undercriminalization

In Ukraine, the issue of undercriminalization is of a more implicit character. Though the definition itself is not within the common judicial or academic vocabulary,<sup>29</sup> unlike the terms "criminalization" or "decriminalization," undercriminalization still often appears when: (1) criminal (in its nature) and harmful (in its results) conduct is not charged, prosecuted, or penalized; and (2) the sentence imposed is clearly inadequate to the harmful nature and consequences of the crime. Sure enough, as is the case with overcriminalization,

*Disappearing Tort/Crime Distinction in American Law*, 71 B.U.L. REV. 193, 193 (1991) (asserting that the bright line division between criminal and civil law regulation has significantly diminished, thus significantly expanding the area of criminal law involvement). Academic explanation of overcriminalization is based "largely on the legislative failure and generally democratic-process dysfunction." See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 232 & n.29 (2007).

26. HUSAK, *supra* note 23 at 36-42 (also saying that these three groups are a rough classification that primarily builds on the traditional distinction between *mala in se* and *mala prohibita* offenses).

27. In Greek mythology, Hydra was a gigantic monster with nine heads, the central of which was immortal. In modern English, the word "Hydra" describes a difficult or manifold issue. See *Hydra*, Encyclopedia Britannica, <http://www.britannica.com/topic/Hydra-Greek-mythology> (last visited Jan. 16, 2016).

28. Indeed, American legal literature discusses many pitfalls of criminal law policy that are directly associated with overcriminalization. See, e.g., HUSAK, *supra* note 23 at 22 (stating that "prosecutors have a variety of means to persuade defendants to plead guilty, and increased overcriminalization provides them with one of their most powerful weapons"); Lucian E. Dervan, *The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 649-52 (2011) (pointing at strong historical connection between the system of plea bargaining and overcriminalization); Sara Sun Beale, *The Many Faces of Overcriminalization: Essays: From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747, 747-65 (2005) (discussing various demonstrations of overcriminalization, including intrusion of criminal laws into the areas of individual morality, the increasing number of federal criminal statutes, expansion of federal criminal laws into the traditional domains of state criminal laws, enormous prosecutorial discretion, while also touching on high incarceration levels); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001) (arguing that the breadth of criminal law can be, at least partially, explained by the mutually reinforcing relationships between prosecutorial and legislative power, while the court power is pushed by the two former ones to the periphery); *Coffee*, *supra* note 25 at 198-99 (discussing previously unavailable areas of criminal law regulation, such as the criminalization of wide spectrum of fiduciary duties, breach of contract obligations under the Hobbs Act, "technicalization" of crime, and the overall shift to "pricing" approach of federal criminal law versus prohibiting unlawful conduct).

29. As a result, the word "overcriminalization" itself can hardly be found in Ukrainian legal literature, unlike its more common counterparts—"groundless criminalization" and "wrongful criminalization."

undercriminalization exists in different legal dimensions and on different levels of criminal law policy. Thus, it becomes even more important to identify the key reasons behind undercriminalization and to target solutions on how to correct—and in some cases to restore—the existing state of criminalization to an enhanced and more effective one.

One of the fundamental principles of criminalization in Ukraine is that in order for an act to be considered a crime, a specific degree of actual or potential public harm has to be established.<sup>30</sup> Thus, if the element is satisfied, the national legislature has the ability to enact a new criminal statute. Of course, over a period of time, relations within societies change—some types of criminal behavior disappear, while others emerge. This is true for any country, so long as there is human and societal evolution. There is nothing wrong with natural criminal law developments such as criminalization or decriminalization. It is ineffective when lawmakers start increasing criminal law on the books (overcriminalization) or start repealing criminal statutes that should stay on the books (undercriminalization).<sup>31</sup> The former remains a hot topic in the United States, and the latter is an emerging issue for Ukraine, primarily in the area of economic criminal activity.

Quite often the issue of undercriminalization (and presumably overcriminalization) is related to the erroneous legislative policy or law enforcement strategies in the criminalization sphere. Criminalization and related phenomena usually create a complex area of connected lawmaking and law enforcement practices. Maintaining consistent implementation of criminal policy requires the presence of several factors: (1) exercise of law-making initiatives in a scientific manner; (2) readily available information for the public about the current state of criminal law and the reasons behind its change; and (3) strict adherence to all provisions of current criminal law by law enforcement agencies in the course of exercising their routine activities.<sup>32</sup>

Indeed, in order to better understand the phenomenon of undercriminalization, one needs to start with comprehending the term criminalization itself—as was mentioned in Part A of this piece. Article 1 of the

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30. The element of public danger, which means causing maximum damage, is implicitly included in every single crime. This element means that any crime must be beyond a specific threshold of harm potentially caused to public. If no such harm was caused, then violation simply does not rise to the level of crime. Instead, it may be recognized as another type of offense—an administrative offense, tort or disciplinary violation. *See, e.g.,* ОЛЕКСАНДР ДУДОРОВ ТА МИКОЛА ХАВРОНЮК, КРИМІНАЛЬНЕ ПРАВО: НАВЧАЛЬНИЙ ПОСІБНИК [CRIMINAL LAW: TUTORIAL] 112 (2014) (Ukr.) (explaining how to differentiate crime and administrative violation). Thus, unlike in the United States, the bright line division between criminal and non-criminal offenses is based on the element of public danger. Criminal statutes are traditionally interpreted as the *ultima ratio* response to major public wrongdoing.

31. Andrew Ashworth & Lucia Zedner, *Preventive Orders: A Problem of Undercriminalization?* in *THE BOUNDARIES OF THE CRIMINAL LAW* 59 (R.A. Duff et al. eds., 2010) (arguing that contemporary focus on the criminal law expansion has distracted attention from some serious undercriminalization in the form of recent growth of civil preventive measures—at least in Great Britain).

32. ВЛАДИМИР КУДРЯВЦЕВ И ДР., ОСНОВАНИЯ УГОЛОВНО-ПРАВОВОГО ЗАПРЕТА (КРИМИНАЛИЗАЦИЯ И ДЕКРИМИНАЛИЗАЦИЯ) [VLADIMIR KUDRYAVTSEV ET AL., GROUNDS OF CRIMINAL PROHIBITION (CRIMINALIZATION AND DECRIMINALIZATION)] 18 (Vladimir Kudryavtsev & Aleksandr Yakovlev eds., 1982) (adding that adequate criminal law policy should be largely based on academic research results and should include: references to other sciences; research of reasons, structure and dynamics of various crimes; results of comparative research of criminal laws and penalties in other countries).



Criminal Code of Ukraine (CCU) explains the objective of national criminalization policy: “to provide legal protection of the rights and liberties of the human being and citizen, property, public order and public safety, the environment, and the constitutional order of Ukraine against criminal offenses, to secure peace and safety of mankind, and also to prevent crime.”<sup>33</sup> Paragraph 2 of the Article continues by stating that to further this aim the CCU defines which socially dangerous acts or omissions count as offenses and which punishments should be imposed upon persons who commit them.<sup>34</sup>

In a recent treatise on contemporary criminal law of Ukraine, Professors Oleksandr Dudorov and Mykola Khavronyuk proposed definitions of both criminalization and penalization. The former is defined as recognition of a specific act as a criminal offense, establishing its elements in the law or, in other words, establishing criminal liability for a new type of conduct.<sup>35</sup> The latter means establishing criminal penalties for specific types of criminal conduct.<sup>36</sup> In most cases, criminalization and penalization take place simultaneously, since penalties also send a message to the public majority to abide by the law.

One Ukrainian commentator has referred to the following principles of criminalization: existence of a new form of socially dangerous behavior that requires intervention by means of criminal law; relative prevalence of such dangerous conduct in society; shift in public morals perceptions toward intolerance to such conduct; and fulfillment of government’s international legal obligations for the protection of human rights.<sup>37</sup> At the same time, he admits that this is an open list of criminalization factors. Such an admission makes sense because a public wrong is a complex concept that involves many variables and reflects different avenues of political, economical, social, and international developments in the country.<sup>38</sup>

Another leading expert on the issues of criminalization and decriminalization in Ukraine defines criminalization as the process of identifying socially dangerous types of human behavior, recognition by the government of necessity and feasibility to combat these acts by means of criminal law, and converting such conduct into criminal offenses via introduction into the Criminal Code.<sup>39</sup> During the period from 1991 (when Ukraine received its independence) until the adoption of the new Criminal Code in 2001, thirty-three articles had

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33. CRIM. CODE OF UKR. art. 1, pt. 1 (2001).

34. *Id.* at pt. 2.

35. ДУДОРОВ ТА ХАВРОНЮК, *supra* note 30 at 65 (also complaining about the absence of official guidelines or rules on the legislative techniques of criminalization and decriminalization that would significantly improve the quality of lawmaking in this area).

36. *Id.*

37. Олександр Готін, *Підстави криміналізації діянь* [*Grounds for Criminalization of Offenses*], 2 ПРАВО УКРАЇНИ 95, 95-98 (2005) (Ukr.).

38. *Id.*

39. Павло Фріс, *Криміналізація і Декриміналізація у Кримінально-правовій політиці* [*Criminalization and Decriminalization in Criminal Law Policy*] 1 ВІСНИК АСОЦІАЦІЇ КРИМІНАЛЬНОГО ПРАВА УКРАЇНИ 19, 19-28 (2014) (also admitting that currently Ukrainian Criminal Code is overbroad and the limits of criminal behavior are often unreasonably stretched; thus urging the national lawmaker to start a critical “decriminalization” review of the Criminal Code).

been excluded from the post-Soviet Criminal Code.<sup>40</sup> This exclusion happened because the statutes' Soviet totalitarian background was in direct conflict with the modern socio-political and economic developments in the emerging democratic environment.<sup>41</sup>

Criminalization of specific conduct is a complicated process of transforming social reality into a legal one using an adopted legal form.<sup>42</sup> Modern practices of criminalization and decriminalization, being parts of the lawmaking policy, reveal multiple retreats by legislators from the scientific-based principles of criminal law and underlying principles of criminalization and decriminalization policies themselves.<sup>43</sup> Such outcome is premised on the absence of coordination between criminal law policy and criminal law science and thus results in a diminished quality of both criminal lawmaking and criminal law enforcement.

“Wrong criminalization,” that is, defective introduction of new criminal statutes or erroneous expansion of existing statutes' scope, and unreasonable decriminalization of specific crimes, can also lead to undercriminalization. One can view undercriminalization in Ukraine as an imperfect operation of a criminal justice system, which does not provide for the proper identification, prosecution, and punishment of criminal offenses under the CCU framework.

The issues of undercriminalization in Ukraine are in practice often connected to the abuse of professional discretion<sup>44</sup> by Ukrainian prosecutors. Unlike their American counterparts, Ukrainian counsel for the government, when dealing with high-profile white-collar-crime cases, will often find a procedural loophole or—in some extreme instances—will commit a violation of rules of criminal procedure in order to refuse bringing criminal charges at all or to drop them later.

One of the primary reasons behind erosion of prosecutorial discretion<sup>45</sup> and

40. KRYMINAL'NO-PROTSESUAL'NYĀ KODEKS URSR [KPK URSR] [CRIMINAL PROCEDURE CODE] (1960) (Ukr.).

41. ПАВЛО ФРІС, КРИМІНАЛЬНО-ПРАВОВА ПОЛІТИКА УКРАЇНИ [CRIMINAL LAW POLICY OF UKRAINE] 155 (2005).

42. ВАЛЕНТИНА БОНДАРЕНКО, ОСНОВАНИЕ УГОЛОВНО-ПРАВОВОЙ ОХРАНЫ И ЕЕ ПРЕКРАЩЕНИЕ [FOUNDATION OF CRIMINAL LAW PROTECTION AND ITS TERMINATION] 57 (2014) (admitting that legal literature proposes various definitions of criminalization and stating that one group of scholars view criminalization as a result—legislative introduction of new criminal statute—while others understand this concept as primarily a process of identifying socially dangerous behavior within myriad of forms of human behavior in society).

43. НАТАЛІЯ РАДОШНОВА, КРИМІНАЛІЗАЦІЯ (ДЕКРИМІНАЛІЗАЦІЯ) В УГОЛОВНОМ ПРАВІ РОСІЇ [CRIMINALIZATION (DECRIMINALIZATION) IN THE CRIMINAL LAW OF RUSSIA] 16 (2015).

44. See, e.g., НАТАЛІЯ ГЛІНСЬКА, КОНЦЕПТУАЛЬНІ ЗАСАДИ ВИЗНАЧЕННЯ ТА ЗАБЕЗПЕЧЕННЯ СТАНДАРТІВ ДОБРОЯКІСНОСТІ КРИМІНАЛЬНИХ ПРОЦЕСУАЛЬНИХ РІШЕНЬ [NATALIA GLINSKA, CONCEPTUAL GROUNDS OF DEFINING AND ENFORCING STANDARDS OF VALID CRIMINAL PROCEDURE DECISIONS] 12, 13 (2015) (arguing that all types of official decision-making during criminal investigations and prosecutions have at least some degree of discretion present—that is the ability of a prosecutor to decide or act based on his or her own free judgment); Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, in DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 28-29 (Michele Caianiello & Jacqueline S. Hodgson eds. 2015) (stating that, while being based on the principles of democracy and deliberate fragmentation, prosecutorial discretion in the United States remains broad within the system of criminal justice, especially when charging crimes and plea bargaining).

45. In contrast, American prosecutors during past century did a great job of aggressively hunting down corruption crimes in the country. In his consistent research of federal anti-bribery laws and their judicial

undercriminalization<sup>46</sup> of unlawful behavior in Ukraine is systemic corruption.<sup>47</sup>

It may seem paradoxical, but criminal proceedings in Ukraine remain fairer with street crimes, where white-collar criminals have nothing to gain or lose, especially in terms of money and power. Thus, while a generally balanced process of criminalization goes on at the level of violent crime (such as homicide, robbery, and rape), justice often remains not served in those cases where significant business interests and fraud are involved. History teaches us that no country has prospered from such a double standard: indeed, what Ukraine and some other countries have witnessed is that lack of wrongful conduct criminalization—not bringing high profile political and business leaders to justice—is a very dangerous practice. It undermines innovations, foreign investments, and qualified labor resources, and it corrodes the competitive market economy in general. It kills stock markets and big infrastructural projects, and it effectively destroys many other positive developments in any given nation.

Take, for example, a clear pattern of undercriminalization in the area of white-collar criminality directly connected with oligarchy.<sup>48</sup> Ukrainian oligarchs<sup>49</sup> are infamous for their questionable activities in Ukrainian economy and politics. The oligarchy phenomenon reflects the rudimentary state of the country's market economy. Most Ukrainian billionaires started building their empires in the last decade of the previous century, or its first decade of the country's independence. Today they control whole segments of the national economy.<sup>50</sup> Because of corruptly obtained political influences,<sup>51</sup> their

clearance, Professor Albert Alschuler underlines zero tolerance of public corruption by American society that ask for a more aggressive approach to fight bribery on all fronts. Albert W. Alschuler, *Criminal Corruption: Why Broad Definitions of Bribery Make Things Worse*, 84 *FORDHAM L. REV.* 463, 491-92 (2015). On the other hand, he contends that “broad definitions of bribery not only sweep into their net common and widely accepted behavior, they also invite unjustified inferences and empower prosecutors to pick their targets.” *Id.* at 492.

46. The concept of undercriminalization is much less familiar in the United States and thus less used in American legal scholarship. Sometimes this term will be used in the recent drug related crimes reform. *But see* Brown, *supra* note 25 at 234-36, 250-53 (providing many historical examples on decriminalization in America and arguing that state legislatures, unlike their federal counterpart, on average do a much better job of constraining criminal law's unreasonable expansion toward punishing trivial or innocent conduct).

47. According to the Transparency International Corruption Perceptions Index of 2014, Ukraine was ranked 142 out of 175 countries compared to the United States rank of 17. *See Corruption Perceptions Index 2014: Results*, TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/cpi2014/results> (last visited Jan. 18, 2016).

48. Merriam-Webster Dictionary defines “oligarch” as “a person who belongs to a small group of people who govern or control a country, business, etc.” *Oligarch*, MERRIAM-WEBSTER, INC., <http://www.merriam-webster.com/dictionary/oligarch> (last visited Jan. 15, 2016).

49. Harriet Salem, *Ukraine's Oligarchs: A Who's Who Guide*, VICE NEWS (Oct. 13, 2014, 11:25 AM), <https://news.vice.com/article/ukraines-oligarchs-a-whos-who-guide> (providing profiles on top Ukrainian oligarchs).

50. Graham Stack, *Twilight of Ukraine's Oligarchs*, BNE INTELLINEWS (Nov. 19, 2015), <http://www.intellinews.com/twilight-of-ukraine-s-oligarchs-84389> (talking about enormous holdings of the richest Ukrainian businessmen and pointing at some illegal practices behind these assets).

51. Larry Elliott & Patrick Wintour, *IMF Warns Ukraine It Will Halt \$40bn Bailout Unless Corruption Stops*, THE GUARDIAN, (Feb. 10, 2016, 07:30 AM) <http://www.theguardian.com/world/2016/feb/10/imf-warns-ukraine-halt-40bn-bailout-corruption-christine-lagarde> (quoting IMF's managing director, Christine Lagarde, in expressing concerns over “Ukraine's slow progress in improving governance and fighting corruption, and reducing the influence of vested interests in policymaking”).

wrongdoings<sup>52</sup> remain beyond the reach of law enforcement; top government officials will protect them from criminal prosecutions. This massive white-collar undercriminalization is a shameful sign of a lack of strong political will and a sign of weakness in law enforcement.<sup>53</sup>

There have been two major economic undercriminalization waves in Ukraine since the country gained independence in 1991. The first wave involved the exclusion of eighteen criminal statutes from the previous “Soviet Era” type of the CCU (adopted in 1960). At that time, such systemic changes were largely anticipated, because the country had just made a transition from a planned, socialist type of economy to a free market based one.<sup>54</sup> Thus, old types of economic crimes, mostly those related to the free exercise of entrepreneurship, no longer had any rational basis for enforcement.

In contrast, the second wave of white-collar criminalization in Ukraine, which took place in 2011 with the adoption of The Law of Ukraine “On Amendments to Some Legislative Acts of Ukraine as to Humanization<sup>55</sup> of Liability for Business Offenses,”<sup>56</sup> had a much less reasonable underlying basis. According to the legislative history of the enactment, authors of the Law were concerned with high levels of criminalization of economic offenses, widespread abuses of criminal law by law enforcement agencies, deterioration of the

52. Andrew Cockburn, *Undelivered Goods: How \$1.8 billion in aid to Ukraine was funneled to the outposts of the international finance galaxy*, HARPER’S MAGAZINE (Aug. 13, 2015, 11:32 AM), <http://harpers.org/blog/2015/08/undelivered-goods/> (discussing questionable business practices by Ukrainian oligarch Igor Kolomoisky and his allegedly fraudulent scheme of misappropriating \$ 1.8 billion of International Monetary Fund financial rescue package for Ukraine).

53. In some cases, the U.S. government targets Ukrainian corrupt moguls. For example, on April 2, 2014, a federal indictment against Ukrainian oligarch Dmytro Firtash and several other foreign individuals was unsealed. Mr. Firtash and others have been charged with participating in an alleged international racketeering conspiracy involving bribes of state and central government officials in India to allow the mining of titanium minerals. The Ukrainian billionaire has also been charged with conspiracy to violate the Foreign Corrupt Practices Act. Indictment at 6, 7, 10-27, *United States v. Dmitry Firtash* (No. 13-CR-515), [http://www.justice.gov/sites/default/files/usao-ndil/legacy/2015/06/11/pr0402\\_01a.pdf](http://www.justice.gov/sites/default/files/usao-ndil/legacy/2015/06/11/pr0402_01a.pdf). On April 30, 2015 the Court in Vienna, Austria, refused to grant extradition of Mr. Firtash to the U.S. on alleged \$ 18.5 million international bribery charges. The case is currently on appeal. See also Jason Meisner, *Ukrainian Industrialist Won’t Be Extradited to Chicago: Judge*, CHICAGO TRIBUNE (Apr. 30, 2015, 5:21 PM), <http://www.chicagotribune.com/news/local/breaking/ct-ukraine-industrialist-extradition-denied-met-20150430-story.html>.

54. Олександр Дудоров, *Злочини у сфері господарської діяльності: особливості кримінальної відповідальності* [*Crimes Related to Business Activity: Specifics of Criminal Liability*], 1 ВІСНИК АСОЦІАЦІЇ КРИМІНАЛЬНОГО ПРАВА УКРАЇНИ 169, 171 (2014), [http://nauka.nlu.edu.ua/wp-content/uploads/2015/07/2\\_12.pdf](http://nauka.nlu.edu.ua/wp-content/uploads/2015/07/2_12.pdf).

55. While discussing the humanism principle in the criminal law of Ukraine, Volodymyr Popovych and Vitaliy Datsyuk refer to its two complementary aspects: (1) humanism as applied to the society in general, that is effective protection of its members from crimes; and (2) humanism as applied to an individual who committed a crime (he is a human being after all, and his basic rights as well as dignity should be protected as well). While trying to wrap the vast economic crimes repeal in the humanization context, the authors conclude that such context simply does not fit. The Ukrainian Parliament’s erroneous approach to restructure the system of economic crimes with the national Criminal Code has in turn led to expanding criminal activity and ultimately fewer protections for legitimate businesses. This is hardly a humanization of criminal law. Володимир Попович та Віталій Дацюк, *Гуманізація кримінального законодавства України: проблеми, виклики і загрози* [*Humanization of Criminal Law of Ukraine: Issues, Challenges and Threats*], 56 ДЕРЖАВА І ПРАВО 405, 406 (2012).

56. *The Law of Ukraine “On Amendments to Some Legislative Acts of Ukraine as to Humanization of Liability for Business Offenses,”* 25 BULLETIN OF VERKHOVNA RADA OF UKRAINE 263 (2012) [hereinafter *Law on Humanization of Economic Crime Liability*].

investment climate, and overall decline of the business activity in the country. As time passed, however, it became evident that the exclusion of sixteen economic statutes was a big mistake. On one hand, this legislative move has not improved the business climate in the country, since the primary reasons for economic failures were largely beyond the reach of the CCU (such as public corruption, bad regulatory and tax policy, ineffective local governance, weak communication with potential investors etc.). On the other hand, criminal activity has significantly expanded since 2001, as the cost/benefit analysis in the economic wrongdoing area was now in favor of criminality.<sup>57</sup> Thus, the hard lesson Ukraine must learn from this erroneous undercriminalization framework is obvious: once the government loosens its grip of criminality control, undercriminalization-related issues will start expanding under favorable conditions.

Another area of research interest in examining the undercriminalization problems was triggered by the adoption of the *Law on Humanization of Economic Crime Liability*.<sup>58</sup> The Law has actually decriminalized sixteen out of thirty-nine existing economic crimes statutes under the Criminal Code and amended some of the remaining provisions, such as smuggling and tax evasion, by significantly narrowing their reach. One of the reasons behind the elimination of previously criminal conduct was the systematic abuse of prosecutorial powers. There would be numerous charges brought under some business crime statutes, while almost no charges under other economic statutes. A piercing look at the challenges against approaching “right” criminalization under the current Ukrainian criminal justice policy might lead to the conclusion that the American overzealous approach to criminalizing conduct is not that bad after all.

### *C. White-Collar Crime and Sutherland’s Legacy: Still Enduring and Still Hard to Define*

As white-collar crime is the focused area of criminal law here, it is necessary to provide its contours. A broad definition of white-collar crime is meaningfully interrelated with the concept of overcriminalization. As put by one scholar, “[t]hrough the task of constructing a more efficient and effective white-collar criminalization system will inevitably be complex, it is worth undertaking if we are to resolve our ambivalence and uncertainty over white-collar criminalization.”<sup>59</sup>

Here, as in the case of general overcriminalization, there is no clear, all-

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57. See, e.g., *Practice Overview of Local and Appellate Courts of Kharkiv Region On Criminal Cases for the Unlawful Manufacturing, Storage, Sale or Transportation With Intent to Sell, of Excisable Merchandise (Article 204 Of The Criminal Code Of Ukraine) for the Period of 2012-2013*, [http://hra.court.gov.ua/sud2090/inf\\_court/generalization/uzag27/](http://hra.court.gov.ua/sud2090/inf_court/generalization/uzag27/) (bringing attention of legal community and the Parliament to the issue of obvious disparity between the harm caused by the economic crime and the monetary penalty for its commission).

58. Adoption of this Law was the biggest reform of the national criminal law since the Criminal Code’s enactment in 2001. See Дудоров, *supra* note 54 at 171.

59. J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 105 (2007) (adding that such ambivalence corrodes the law’s ability to regulate social relations and also damages utilitarian benefits of the law).

inclusive definition, and such a description is not likely to appear anytime soon due to a variety of reasons. Some of them include: (1) the traditionally broad nature of nonviolent and predominantly for-profit offenses; (2) changes in both related legislation and its interpretation, especially during the last three decades; (3) shifts in research focuses from white-collar criminals themselves to the specific nature of crimes committed by them; and (4) absence of any attempts to categorize distinct groups of offenses by either legislators or courts.

The term “white-collar crime” is famous for its ambiguity. There is some agreement among scholars on what types of criminal behavior the phrase should include. Among various types of criminal activity, one can name antitrust violations, computer and internet fraud, credit card fraud, phone and telemarketing fraud, bankruptcy fraud, healthcare fraud, environmental law violations, insurance fraud, mail fraud, government fraud, tax evasion, financial fraud, securities fraud, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage and trade secret theft.<sup>60</sup>

The widely used phrase “white-collar crime” was reportedly introduced in 1939 during a speech given by Edwin Sutherland to the American Sociological Society.<sup>61</sup> Sutherland defined this term as a “crime committed by a person of respectability and high social status in the course of his occupation.”<sup>62</sup> Later in his other article, Sutherland stated that different forms of illegal white-collar conduct “consist principally of violations of delegated or implied trust, and many of them can be reduced to two categories: misrepresentation of asset values and duplicity in the manipulation of power.”<sup>63</sup>

Reference sources propose similar definitions of white-collar crime, defining it as “a non-violent crime usually involving cheating or dishonesty in commercial matters;”<sup>64</sup> as “a non-violent, financial crime, committed by a white-collar worker, typically involving the abuse of his or her professional status or expertise;”<sup>65</sup> and also defining the term as:

Nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the

60. *White Collar Crime: an Overview*, LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/white-collar\\_crime](https://www.law.cornell.edu/wex/white-collar_crime) (last visited Feb. 9, 2016).

61. MIRIAM SAXON, CONG. RESEARCH SERV., H.R. REP. NO. 95-16, WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 2 (1978) <https://www.ncjrs.gov/pdffiles1/digitization/50060ncjrs.pdf>.

62. *Id.*

63. Edwin H. Sutherland, *White Collar Criminality*, 5 AM. SOC. REV. 1, 3 (1940) (“The first is approximately the same as fraud or swindling; the second is similar to the double-cross”).

64. BLACK’S LAW DICTIONARY 1734 (9th ed. 2009) (naming “fraud, embezzlement, bribery and insider trading” as examples of this crime).

65. *White-Collar Crime*, OXFORD DICTIONARIES, [http://www.oxforddictionaries.com/us/definition/american\\_english/white-collar-crime](http://www.oxforddictionaries.com/us/definition/american_english/white-collar-crime) (last visited Jan. 15, 2016).

person's occupation.<sup>66</sup>

The word "fraud" is a term most widely used in the white-collar crime context. This term underlines the "intelligent," nonviolent, and primarily for-profit nature of such offenses that are intended to deceive (an individual, a corporation, or public at large) in order to earn something of value, power, or both.<sup>67</sup> The key message is "that fraud is typically the cornerstone of every white-collar offense, no matter how simple and meager or intricate and grandiose."<sup>68</sup>

Some scholars have discussed the challenges of coming up with a universal definition of white-collar crime.<sup>69</sup> Indeed, there is a large number of distinct views on both the specific legal nature and boundaries of white-collar criminality, and scholars traditionally observe the term from different angles and in various enforcements contexts. One approach even suggests that it is the government, not the businessperson, that becomes the "bad guy" for purposes of economic enforcement—thus, white-collar crime can be associated with the failure of government to effectively regulate competitive capitalists.<sup>70</sup>

White-collar overcriminalization is a disturbing concurrent component within the general trend of expanding criminal liability on a federal level. The increase of regulatory offenses, for example, makes it hard even for an experienced lawyer to keep an eye on the ever-shifting horizon of illegal business behavior, shaped by both the legislature and numerous federal regulators.<sup>71</sup> Environmental protection may serve as one of many examples; most would agree that crimes, such as dumping highly toxic waste,<sup>72</sup> illegal

66. U.S. DEPARTMENT OF JUSTICE, *DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY* 215 (2d ed. 1981).

67. See generally BLACK'S LAW DICTIONARY 731 (9th ed. 2009).

68. F. LEE BAILEY & HENRY B. ROTHBLATT, *DEFENDING BUSINESS AND WHITE COLLAR CRIMES: FEDERAL AND STATE 1* (1984) (also explaining what types of criminal cases are usually encompassed by the term "white collar").

69. Ellen S. Podgor & Lucian E. Dervan, Abstract, '*White Collar Crime*': *Still Hazy After All These Years*, 50 GA. L. REV. (forthcoming 2016) (stating that "[w]ith a seventy-five year history of sociological and later legal roots" under the belt, "white collar crime" remains a largely imprecise category); see generally John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579, 585-86 (2005) (confirming that white-collar crime has historically been defined in many different ways); Donald J. Newman, *White-Collar Crime*, 23 LAW & CONTEMP. PROBS. 735 (1958) (differentiating white-collar crime from more conventional crime on both legal and sociological grounds).

70. Katherine Beaty Chiste, *Retribution, Restoration, and White-Collar Crime*, 31 DALHOUSIE L.J. 85, 89 & n.19-23 (2008) (referring to one of the debate realms that proposed to understand white-collar crime through the frame of political economy, thus explaining rebellious business behavior against legal restrictions imposed by the government).

71. Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 & n.141 (1995) (referring to estimates suggesting that thousands of federal regulations are enforced through the combined efforts of as many as two hundred different federal agencies).

72. See, e.g., Press Release, Dep't. of Justice, Office of Pub. Affairs, Mississippi Phosphates Corp. Pleads Guilty to Clean Water Act Violation and Agrees to Transfer 320 Acres to Grand Bay National Estuary (August 19, 2015), <http://www.justice.gov/opa/pr/mississippi-phosphates-corp-pleads-guilty-clean-water-act-violation-and-agrees-transfer-320>. The DOJ named a Mississippi corporation that plead guilty to a criminal violation of the Clean Water Act for admittedly discharging more than 38 million gallons of acidic wastewater in August 2013. *Id.* The discharge contained pollutants in amounts greatly exceeding company's permit limits, resulting in the death of more than 47,000 fish and the closing of local bayou. *Id.* The company also admitted

hunting, discharging oil into navigable waters, and other offenses along these lines pose a substantial threat to the community and therefore should be punished accordingly. On the other hand, there are many offenses in the area of federal regulation alone that can hardly be called “blameworthy” in the sense that they are very unlikely to harm public moral perceptions or the common perception of justice. Indeed, the breadth of white-collar crimes has been the subject of many scholarly works.<sup>73</sup>

In contrast, in Ukraine, because of the corruption and the absence of perception of justice, fairness and accountability, both in politics and business, many white-collar crimes, such as smuggling, counterfeiting and tax evasion, are viewed as morally neutral, or even as acceptable.<sup>74</sup> On the other hand, the vast majority of Ukrainian white-collar criminals also believe that cheating or embezzling is insignificant, at least with respect to moral barometers.

### III. MAIN ACTORS BEHIND NATIONAL CRIMINALIZATION POLICIES

Major criminalization policy-makers in both Ukraine and the United States are responsible for criminalization-related issues, namely,—the legislature, judiciary, and prosecutors.

#### *A. Legislator: Criminal Lawmaking Policy Fails, Correction is Required*

Throughout the twentieth century, the United States has seen many efforts to reform criminal justice or at least some of its components.<sup>75</sup> The legislative process in the criminal law area has become largely deficient.<sup>76</sup> At the same time, movements for “tuning up” criminal law and procedure “have sought to make criminal justice more effective, rational, efficient and fair,”<sup>77</sup> though often

that, in February 2014, it discharged oily wastewater from an open gate on a storm water culvert into the bayou, creating an oily sheen that extended approximately one mile down the bayou. *Id.*

73. See, e.g., Ellen S. Podgor, *100 Years of White Collar Crime in “Twitter,”* 30 REV. LITIG. 535, 557 (2011) (stating that “the focus within white collar crime may change over time from areas of corruption to areas such as mortgage fraud”); Strader, *supra* note 59 at 49-50 (2007). Professor Strader’s proposal for an alternative solution calls for the default use of the arsenal of means, provided by either civil or administrative law, especially in those cases when bringing criminal charges is going to trigger substantial extension of existing law and when harm caused by the wrongdoing cannot be readily calculated. *Id.* at 102. In my opinion, this proposal, while voiced in a sound manner and backed by facts from some white-collar prosecutions, has a big chance of being crushed under the fundamental, judicially supported principle of prosecutorial discretion.

74. Frustration and even hatred against the corrupt government engaged in self-dealing and that does not operate for the benefit of the common folks is one of the major reasons for passive approval of such nonviolent crimes with economic substance. This deviant ideology within economically oppressed society can be formulated this way: “The Government cheats against you, so cheat it back.”

75. See HUSAK, *supra* note 23 at 4 (stating that the enormous levels of punishment and number of criminal laws should enable readers “to appreciate both the enormity and the urgency of the normative task before” them).

76. Brown, *supra* note 25 at 232 (pointing out that criminal legislation is usually treated differently from other areas of lawmaking—thus bills that introduce new crimes or increase punishments are enacted more easily, while legislative proposals to repeal or reform criminal liability in some areas encounter many obstacles).

77. Fairfax, *supra* note 10 at 597 (referring to such efforts as “early twentieth century reformers advocating for the improvement and normalization of criminal procedural and substantive law, the large-scale criminal law study and reform efforts undertaken in the late 1960s, and the more recent ‘overcriminalization’ movement”).



with limited success.

One of the underlying reasons for overcriminalization in the U.S. is the congressional enactment of too many new laws without keeping a good eye on legislative inventory, thus creating an extremely broad, overlapping, and confusing system of statutory criminal law.<sup>78</sup> Such statutory expansion is one of the primary factors in criminal “law and order” malfunctioning. The wording of many criminal statutes, especially those regulating complex types of modern human misbehavior, can be heavily criticized – and rightfully so.<sup>79</sup> The general public is not able to comprehend the plain meaning of these laws upon a mere reading of the statutes.<sup>80</sup> This is also true with the language of some Ukrainian criminal statutes.<sup>81</sup>

For example, in the early 1980s, the U.S. Department of Justice (DOJ) spent two years in its effort to calculate the total number of criminal offenses within the entire U.S. Code.<sup>82</sup> Although the effort eventually failed, the DOJ provided an approximate estimate of 3,000 offenses.<sup>83</sup> The astonishing number has been often brought up in the context of overcriminalization.<sup>84</sup> As Professor

78. See, e.g., Ellen Podgor, *Laws Have Overcriminalized Business Behavior*, N.Y. TIMES, Nov. 10, 2013, 7:01 PM, <http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior> (stating that Congressional approach to expansive lawmaking by continuously adding numerous statutes and regulations makes it hard to make sure that defendants would be able to understand that they have committed a criminal offense).

79. See, e.g., 21 U.S.C. §§ 331, 333 (2012). Both statutes are extremely complicated in terms of statutory language, scope of regulated activities, and applied penalties. The mail fraud statute is yet another example of cumbersome legislative language. 18 U.S.C. § 1341.

80. See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931), where the Supreme Court articulated on the importance of clear statutory language:

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

See also *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923) (stating that “the words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they taken”); *Maillard v. Lawrence*, 57 U.S. 251, 261 (1854) (explaining that “if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society”).

81. One recent example of criminalizing economic conduct in Ukraine by means of blurred and unclear wording is introducing criminal liability for stock market manipulation under Article 222-1 of the CCU. This provision is just one of many “bridge” type economic regulatory norms, discussed before. In order to establish the act of manipulation, in other words, deception, under the statute, one needs to refer to Article 10-1 of the Law of Ukraine “On State Regulation of Securities Market in Ukraine.” But the wording of the latter provision with its overbroad language to outline potential areas of securities manipulation, as well as using phrases like “can provide insight into,” “that do not possess obvious economic sense,” “disseminating information that a person should know,” “with a price that significantly departs from the market one” makes the criminal statute virtually inapplicable, especially in the country, where, unlike in the United States, case law does not exist.

82. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL ST. J., July 23, 2011, <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.

83. *Id.*

84. According to the Federal Sentencing Statistics for 2014, provided by United States Sentencing Commission, there were 75,836 federal offenses registered in 2014, with the majority of them being drug related (21,323) and immigration related (22,238) crimes. Statistical Information Packet, Fiscal Year 2014, First Circuit, USSC.GOV, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/1c14.pdf> (last visited Dec. 13, 2015).

William Stuntz wrote, “the past century and a quarter has seen even greater increases in the number of crimes listed in the relevant title of the federal code,”<sup>85</sup> starting with just 183 separate offenses in 1873.<sup>86</sup>

Another report on the growth of federal crimes estimates that there were at least 4,450 federal crimes by 2008, a significant increase from 4,000 crimes in the Code at the start of 2000.<sup>87</sup> Later, a Congressional Research Service memorandum, issued on June 23, 2014, provided for an examination of new offenses added to the United States Code from 2008 to 2013, and concluded that 439 offenses have been added to the books.<sup>88</sup> Thus, currently there are approximately 5,000 offenses,<sup>89</sup> excluding regulatory crimes, within the U.S. Code.<sup>90</sup>

With more and more crimes added to the books<sup>91</sup> the number of

According to the 2014 Crime in the United States Report, part of the FBI’s Uniform Crime Reporting Program, the estimated number of violent crime offenses in the nation was 1,165,383 (violent crime rate – 365.5 per 100,000 inhabitants), while estimated number of property crimes in 2014 was 8,277,829 (property crime rate – 2,596.1 per 100,000 inhabitants). 2014 Crime in the United States, FBI.GOV, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2014/crime-in-the-u.s.-2014/tables/table-1> (last visited on Dec. 13, 2015).

85. See Stuntz, *supra* note 28 at 515. Professor Stuntz wrote:

Of course, these numbers do not prove that criminal law is broad. Even if one starts with a given set of behavior that is to be criminalized, there is no obviously right number of criminal offenses: the number depends on the specificity with which crimes are defined and the degree to which they overlap. Still, anyone who studies contemporary state or federal criminal codes is likely to be struck by their scope, by the sheer amount of conduct they render punishable.

86. *Id.* at 514 & n.29.

87. Here is how Professor Baker commented on the significant increase of crimes:

The growth of federal crimes continues unabated. The increase of 452 over the eight-year period between 2000 and 2007 averages 56.5 crimes per year—roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the past twenty-five years, a period over which the growth of the federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade. That pace is not steady from year to year, however; the data indicate that Congress creates more criminal offenses in election years.

John S. Baker, *Revisiting the Explosive Growth of Federal Crimes*, Legal Memorandum No. 26, THE HERITAGE FOUND., (June 16, 2008), <http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes>.

88. *The Crimes on the Books and Committee Jurisdiction: Hearing before the Overcriminalization Task Force of 2014 of the H. Comm. on the Judiciary*, 113th Cong. 30-33 (2014) (statement of John S. Baker, Professor Emeritus, LSU Law School), available at [https://judiciary.house.gov/wp-content/uploads/2016/02/113-102\\_88816.pdf](https://judiciary.house.gov/wp-content/uploads/2016/02/113-102_88816.pdf).

89. Such an astonishing number of crimes (and corresponding statutes) brings one quote by Voltaire to mind: “A multitude of laws in a country is like a great number of physicians, a sign of weakness and malady.” *A quote by Voltaire, 1694-1778*, (last visited Nov. 22, 2015), <http://www.qotd.org/search/single.html?qid=6867>.

90. Todd Haugh has arrived at the same number, by assuming that there were about fifty statutes added annually for the past several years. Haugh, *supra* note 24 at 1191-98.

91. Something that has unfortunately become a practice for the Congress. See, e.g., Sara Sun Beale, *supra* note 28 at 747, 755-56 (2005) (talking about the “crime du jour—legislation drafted in response to whatever crime is the focal point in the media,” even in those cases when state law already addresses such a crime in an adequate manner). Professor Sara Sun Beale provided a relevant example of a high profile carjacking in Washington, D.C. area that has resulted in a swift enactment of a federal carjacking statute, 18 U.S.C. 2119, despite the fact that state criminal law has severally and adequately punished defendants in this criminal case. *Id.* See also Paul H. Robinson & Michael T. Cahill, *Can a Model Penal Code Save the States from Themselves?*, OHIO ST. J. CRIM. L. 169, 172 (discussing irrationality behind *ad hoc* amendments to state criminal codes).

The Sarbanes-Oxley Act of 2002 is another example of fast track legislation, without much focus on thorough

overlapping statutes grows too, expanding the existing criminal justice system. If this practice continues, the whole structure of criminal law may start disintegrating and could potentially result in criminal justice malfunction<sup>92</sup>—virtually an apocalyptic scenario.

In stark comparison, the total number of offenses in Ukraine is only about 340.<sup>93</sup> To some extent, this is due to the mandatory provision contained in paragraph three of article three of the CCU, which proclaims that criminality of any act, as well as imposed penalty and other criminal consequences, should be determined exclusively by the Code provisions.<sup>94</sup> Paragraph two of article three requires that all newly adopted laws on criminal liability be incorporated in the Criminal Code.<sup>95</sup> Virtually all Ukrainian criminal law provisions are located within a single codified framework.

The number of so-called regulatory offenses<sup>96</sup> in the United States also seems to be almost impossible to calculate. Since the mid-1980s, a steady expansion of public welfare offenses has literally infiltrated the modern technological world.<sup>97</sup> Some commentators rely on an incredible figure of up to

drafting work. As Professor Green has commented on passing the Act, this was done “amidst a sense of urgency, one might even say panic, that surrounded a string of spectacular corporate crime scandals that came to light during 2001 and 2002, involving firms such as WorldCom, Adelphia, Tyco, Arthur Andersen, and, most infamously, Enron.” Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. R. 1, 22 (2004).

92. Consider Professor Stuntz’s comment on the unreasonable expansion of American criminal law that could lead to the same negative consequences. He wrote that “the end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys’ offices and police departments.” American substantive criminal law has not ceased to operate yet, but it remains closer to that point than ever before, and it continues to move in the wrong direction. William Stuntz calls such state of play a very unhealthy one. Stuntz, *supra* note 28 at 509.

93. CRIM. CODE OF UKR. (2001). Over the period of time, this number slightly goes up and down because some new types of conduct are criminalized by the national legislator while other are decriminalized. According to official law enforcement statistics in Ukraine, 103,639 criminal cases were heard by Ukrainian courts in 2014 and 102,170 persons have been convicted (convicted persons rate—238.2 per 100,000 inhabitants).

94. CRIM. CODE OF UKR. art.3, pt. 3 (2001).

95. *Id.* at pt. 2.

96. *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 354-55 (1968) (referencing the broad scope of regulatory offenses that refer “to the vast and disorganized set of proscriptions that are used for the job of regulating” business practices of both individuals and corporations across the board of American commerce). It is true that the concept and morally neutral structure of regulatory crimes are often criticized in legal literature. *See also* Edmund W. Kitch, *Economic Crime Theory*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 672-73 (Sanford H. Kadish ed., 1983) (describing regulatory crimes as “actions that violate government regulations” and proposing their main types: illegal “sale of certain kinds of services or commodities;” “violation of regulatory reporting statutes;” “operation of a commercial enterprise in a way that creates unreasonable risks to workers or consumers;” and “creation of private arrangements in violation of legal standards established by statute”).

97. *See Morissette v. United States*, 342 U.S. 246, 254-55 (1952), where the Supreme Court have provided a rationale for criminalizing violations of specific duties by those persons, whose conducts have a negative effect on public health, safety or welfare:

While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called “public welfare offenses.” These cases do not fit neatly into any of such accepted classifications of common law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of

300,000 federal criminal regulations.<sup>98</sup> Today, thousands of various activities routinely undertaken in the course of business or leisure fall into the category of crimes under the broad regulatory offenses framework.<sup>99</sup> Moreover, the same regulatory misconduct often becomes subject to overlapping criminal and civil penalties and there is often little guidance available on which liability to impose and for what reasons. Of course, in the modern technological world, where innovations accelerate industries, improve businesses, change lifestyles, while potentially raising serious regulation concerns and even possibilities of new criminalization (to name just a few such recent and legally novel innovations—self-driving cars from Google<sup>100</sup> and unmanned aircraft systems (drones)),<sup>101</sup> regulatory offenses should justifiably remain in law enforcement’s arsenal. Many will agree, that complicated relations between individual members (or groups) within society require detailed regulations. At the same time, it makes sense to revise the list of regulatory crimes to ensure that: (1) such list is up-to-date with regulated human activities and related laws;<sup>102</sup> and (2) crimes included in the list are themselves not expanding, overlapping, and are not vulnerable to discretionary abuses or overbroad interpretations.

The strict liability character of many regulatory offenses<sup>103</sup> has only added to the totality of overcriminalization arguments against such “statutory schemes.”<sup>104</sup> Paul Larkin referred to the irrational and risky approach of treating “regulatory crimes as if they were no different than ‘street’ crimes.”<sup>105</sup> This is

positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.

98. See, e.g., Coffee, *supra* note 25 at 216 & n.94 (1991); Symposium, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIR. REV. 505, 513 (stating that good face defense is reasonable when dealing with over 300,000 different federal laws).

99. See, e.g., Dick Thornburgh, *The Dangers of Overcriminalization and the Need for Real Reform: the Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279, 1281 (pointing at thousands of discrete rules and regulations that contain criminal sanctions under current law).

100. GOOGLE SELF-DRIVING CAR PROJECT, GOOGLE.COM, <https://www.google.com/selfdrivingcar/> (last visited Jan. 22, 2016) (explaining the goals of the project and some technical innovations behind it).

101. Fed. Aviation Adm’n, *Law Enforcement Resources*, FAA.GOV (Dec. 18, 2015 3:24 PM), [http://www.faa.gov/uas/law\\_enforcement/media/UAS-Enforcement-FAQs.pdf](http://www.faa.gov/uas/law_enforcement/media/UAS-Enforcement-FAQs.pdf) (describing multiple options available for enforcing FAA regulations, including criminal penalties with fines of up to \$250,000 and/or imprisonment for up to three years).

102. In *United States v. Von Barta*, 635 F.2d 999, 1001 (2d Cir. 1980), the Second Circuit admitted that the “centuries-long trend toward greater sophistication in the criminal law has increasingly blurred the line between criminal and noncriminal misbehavior.” The court went on saying:

While defining lawless conduct is primarily a legislative function, courts have mitigated the severity of penal sanctions by construing ambiguous statutes against the Government. This doctrine of strict construction, which grew out of the emerging humanitarianism of seventeenth century England, has long been a tenet of American jurisprudence. But this principle is just the start of the difficult process of statutory interpretation, for in some areas Congress has purposely cast wide the net of the criminal law.

103. See, e.g., HUSAK, *supra* note 23 at 20-21 (considering strict liability offenses among those that “enlarge the scope of criminalization in ways that are not obvious to laypersons”). Ukrainian Criminal Code, on the other hand, emphasizes culpability as one of the mandatory elements of any criminal offense. CRIM. CODE OF UKR. art. 11, pt. 1 (2001).

104. Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L. J. 1533, 1544 & n.21 (1997).

105. Paul J. Larkin, Jr., *Regulation, Prohibition, and Overcriminalization: The Proper and Improper Uses of the Criminal Law*, 42 HOFSTRA L. REV. 745, 746 (2014).

because this approach does not allow for the consideration of the core differences between the two types of wrongdoing, placing persons without knowledge or intent of breaking the law under the risk of criminal prosecution and punishment.<sup>106</sup>

The federal legislature has attempted to address the impacts of overcriminalization. In the last few years, members of Congress have continuously expressed concerns<sup>107</sup> over criminal statutes' growth in numbers, regulatory breadth, and the overzealousness of enforcement. In 2013, the Judiciary Committee of the U.S. House of Representatives unanimously created the "Overcriminalization Task Force of 2013" to study and conduct hearings on the problem of overcriminalization. Several reports issued by the Task Force, demonstrate deep concern and call for action in dealing with overcriminalization, on behalf of at least some members of the federal legislature.

On May 7, 2013, Representative James Sensenbrenner introduced the "Criminal Code Modernization and Simplification Act of 2013."<sup>108</sup> The bill's proposal in the "smart on crime" direction was to set a default *mens rea* requirement for all offenses.<sup>109</sup>

On July 29, 2015, the "Stopping Overcriminalization Act of 2015"<sup>110</sup> was introduced in the House of Representatives and referred to the Committee on the Judiciary. It is designed to: (1) establish a default state of mind of "knowingly" for all Federal criminal offenses;<sup>111</sup> (2) allow a mistake of law defense in cases where the defendant did not know, and a reasonable person would not have known, that action constituted a crime; (3) create a Federal inventory that lists all Federal criminal offenses, including agency rules with criminal penalties;<sup>112</sup> and (4) provide that no newly adopted executive agency rule that defines or establishes a criminal offense shall have force or effect unless approved by joint Congressional resolution. There have been several other legislative proposals to

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106. *Id.* (adding that both criminal and constitutional law should not ignore a number of practical difficulties associated with regulation of modern industrial order by means of criminal law). Mr. Larkin contends that flexibility allowed by both doctrines should enable courts to satisfy governmental and private interests "without damaging the public interest in the process." *Id.*

107. See, e.g., *The Overcriminalization of Conduct: Consequences for an American Inventor, Testimony Before Subcommittee on Crime, Terrorism and Homeland Security, Committee on the Judiciary, House of Representatives* 111th Cong. 1 (2009) (testimony of Krister Evertson).

108. H.R. 1860, 113th Cong. (2013).

109. *Id.* at Sec. 33(a) (states that "unless otherwise provided in the provision defining an offense, the state of mind required to prove the conduct required for the offense is knowingly").

110. H.R. 3401, 114th Cong. (2015). The official Title of the Bill is very long but at the same time rather self-indicting: "To reduce Federal overcriminalization, protect Americans from unjust punishment, and uphold the role of Congress by clarifying mens rea requirements for all Federal criminal offenses, creating an inventory of Federal offenses that carry a criminal penalty, and providing that no rule of the executive branch which may be enforced by criminal penalties can take effect unless a joint resolution of approval is enacted into law."

111. The Bill also proposes to establish a new standard, under which in case of a regulatory offense, where the defendant might be unaware of his conduct's criminality, the Government has the burden to prove that the defendant had reason to know the unlawfulness of his conduct. *Id.* at Sec. 3(a).

112. The Bill establishes a new defense in criminal cases that the offense is not listed in such inventory. It designs two exceptions to such defense: (1) "the Government demonstrates beyond a reasonable doubt that a reasonable person would have known the conduct that person engaged in was criminal in nature;" or (2) "the conduct of the defendant resulted in an imminent and foreseeable risk of death or bodily injury to another." *Id.* at Sec. 4(a).

improve Title 18 of the U.S. Code since then, which were aimed at making the federal criminal code more synchronized, comprehensible for general public, and ultimately more fair.<sup>113</sup>

These significant congressional efforts in the direction of a more rational, common sense approach toward criminal justice policymaking present, as Professor Roger Fairfax put it, “a refreshing break from the existing unproductive ‘soft on crime’ and ‘tough on crime’ binary.”<sup>114</sup> They also seem to outline issues of overcriminalization on the legislative level and reveal promising potential for fixing such issues with a better-designed, “smart on crime” system.

The criminal justice policy in Ukraine also often stumbles over the ineffective, indeed damaging, character of national lawmaking practices. Although the critical issue with the criminal law in Ukraine originates from the opposite end of the criminalization spectrum—from the undercriminalization camp—the resulting impact on criminality structure and levels, law enforcement practices, and public anticipations in general is just as detrimental for the Ukrainian criminal justice system as for the United States.

For example, on December 22, 2010, the Parliament of Ukraine, Verkhovna Rada, adopted the Law “On Amendments to Certain Legislative Acts of Ukraine on Improving Legislation Prohibiting Gambling Business in Ukraine.”<sup>115</sup> Its main purpose was to introduce criminal liability for gambling.<sup>116</sup>

Interestingly enough, despite the existing concerns over illegal gambling,<sup>117</sup> there was no need to introduce a new criminal statute dealing specifically with

113. Two new bills that directly address the issues related to overcriminalization were introduced in November of 2015. The first Bill, introduced on November 16, 2015, is titled “To amend title 18, United States Code, to make various improvements in Federal criminal law, and for other purposes” that also may be cited as the “Criminal Code Improvement Act of 2015,” among other statutory amendments, proposes to establish a default state of mind proof requirement in federal criminal cases, which is “knowing” and also to establish, under certain circumstances, proof by the Government that the defendant knew of the unlawful nature of his conduct. H.R. REP. NO. 4002, 114th Cong. (2015).

This Bill also calls to establish, through the Department of Justice, a complete inventory and index of Federal criminal offenses, including violations of agency rules or regulations that constitute or define Federal criminal offenses, and make them open to public in order to promote general compliance with criminal law provisions.

The second Bill, introduced just a few days later, with the short title name “Mens Rea Reform Act of 2015,” proposes with respect to the statutory element of culpability: to establish “willfully” as a default state of mind, when the statutory text is silent on mens rea requirement; to define terms “willfully,” “knowingly,” and “state of mind” as they are applied in the text of the criminal code; to apply, under specified circumstances, the state of mind to all elements of the criminal offense. S. REP. NO. 2298, 114th Cong. (2015).

114. Fairfax, *supra* note 10 at 598.

115. Zakon Ukraïni pro Vnesennia Zmin do Deiakh Zakonodavchih Aktiv Ukraïni Schodo Udoskonalennia Zakonodavstva pro Zaboronu Hralnogo Biznesu v Ukraïni [The Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on Improving Legislation Prohibiting Gambling Business in Ukraine], VEDOMOSTI VERKHOVNOI RADI UKRAINI [BULLETIN OF THE SUPREME COUNCIL OF UKRAINE] [VVR UKR] 2011, No. 28, Item 253, <http://zakon5.rada.gov.ua/laws/show/2852-17>.

116. KRYMINAL'NIĭ KODEKS UKRAINI [KK UKR] [Criminal Code] art. 203-2 (Ukr.).

117. See Zakon Ukraïni pro Zaboronu Hralnogo Biznesu v Ukraïni [The Law of Ukraine on the Prohibition of Gambling Business in Ukraine], VEDOMOSTI VERKHOVNOI RADI UKRAINI [BULLETIN OF THE SUPREME COUNCIL OF UKRAINE] [VVR UKR] 2009, No. 38, Item 536, <http://zakon5.rada.gov.ua/laws/show/1334-17> (explaining legislatively introduced restrictions on gambling business in Ukraine based on the constitutional principles of priority of rights and freedoms of human and citizen, protection of morality and public health, prohibition of using property to cause harm to a person and society).

illegal gambling. By that time, the general provision of Article 203 of the Criminal Code had been already criminalizing engagement in any types of prohibited business activities. All the legislator had to do was just to include gambling into the regulatory framework that was already dealing with a list of illegal business activities (such as production or firearms, drugs or spirits, conducting unlicensed cash exchange operations etc.). Instead, lawmakers went the “overcriminalization” path, essentially creating a duplicative statute.

Despite the *prima facie* overcriminalization approach to outlawing gambling business in Ukraine, in practical words it has resulted in undercriminalization. After investing millions of dollars and hiring thousands of employees, the industry was facing huge losses overnight because of the newly adopted law.<sup>118</sup> Therefore, the gambling industry entered the underworld market by pouring millions of dollars into black economy. Since the demand was still high, it became “behind the closed doors” type of business, keeping corrupt law enforcement officers on payroll for a variety of protection services.<sup>119</sup>

Legal experts stay on high alert by the intensity of legislative amendments within the Chapter of the CCU on economic crimes.<sup>120</sup> Since the Code’s enactment in 2001, fourteen new business crime statutes have been added and seventeen excluded.<sup>121</sup> Up to this date, virtually all statutes within Chapter VII of the Code have gone through at least some degree of legislative modifications.

Even today, after the broad 2011 white-collar statutes undercriminalization, the CCU contains a significant number of so-called “dead” economic provisions.<sup>122</sup> Among the main reasons for this is the fact that national legislators sometimes copycat foreign or international models of combating crime, without adequate reference to local culture, historical traditions, political

118. The industry was not notified in advance that gambling had been banned. Instead this Law was signed by the President on June 23, 2009. Until this point the gambling industry was heavily regulated by expensive licensing. Money invested by gambling businesses to purchase these licenses, was never returned by the government, thus also adding to casinos going underworld. See, e.g., *Gambling Business has Ran to the Internet*, ТЕМА.IN.UA (October 13, 2009, 5:29 PM), <http://tema.in.ua/article/5069.html> (referring to multiple investigations of internet-based gambling schemes by Ukrainian law enforcement).

119. It makes sense to compare criminalization of gambling in Ukraine with the ban of alcoholic beverages during Prohibition Era in the United States in the past century. Then supporters of the measure claimed public morals and health among the main arguments for banning sale of alcohol—a similar line of arguments was recently behind Ukrainian law on banning gambling. But instead of saving these public values, Prohibition (as well as total gambling criminalization today) has led to more crime, both street and organized, more corruption inside law enforcement and local politics, bigger losses and expenses for the national treasury and arguably even more public tensions. See, e.g., Michael Lerner, *Prohibition: Unintended Consequences*, PBS.ORG, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Jan. 23, 2016) (stating that “growth of the illegal liquor trade under Prohibition made criminals of millions of Americans”).

120. See Олександр Дудоров та Роман Мовчан, *Законодавство України про кримінальну відповідальність за злочини у сфері господарської діяльності—час визначитися зі стратегією розвитку* [*Legislation of Ukraine on Criminal Liability for Business Crimes—Time to Define Development Strategy*], 2 ВІСНИК АСОЦІАЦІЇ КРИМІНАЛЬНОГО ПРАВА УКРАЇНИ 215, 222-24 (2016), [http://nauka.nlu.edu.ua/wp-content/uploads/2016/01/16\\_%D0%94%D1%83%D0%B4%D0%BE%D1%80%D0%BE%D0%B2.pdf](http://nauka.nlu.edu.ua/wp-content/uploads/2016/01/16_%D0%94%D1%83%D0%B4%D0%BE%D1%80%D0%BE%D0%B2.pdf) (stating that since 2008 more and more sporadic, unreasonable amendments have been introduced to the business crime Chapter of the CCU).

121. *Id.* at 216.

122. *Id.* at 226 (stating, for example, that instead of declared improvement of criminal liability for securities fraud, in fact the national legislature has created a new vehicle to avoid such liability).

trends and economic realities. At the beginning of the 2008 global financial crisis, the Parliament of Ukraine adopted three new criminal provisions dealing with various forms of securities fraud, including insider trading and manipulating securities market, in addition to the two already existing provisions.<sup>123</sup> In 2011, these statutes were further amended to include more severe penalties.<sup>124</sup> At the same time, they were formulated in such overcomplicated and broad language that many prosecutions of these crimes have been troubled. The result of the governmental “synthetic”<sup>125</sup> approach to securities fraud criminalization was opposite—it led to significant undercriminalization in the real world of crime.<sup>126</sup>

Politics affect lawmakers in both Ukraine and the United States. If the criminal justice systems are to be improved, then the political “tough on crime” monologue<sup>127</sup> should be transformed into a “smart on crime” dialogue covering various aspects of adequate criminalization policy.

### *B. Judicial Impact on Overcriminalization and Undercriminalization*

Judges are granted a powerful tool of statutory interpretation. Hence, its effective usage for the benefit of criminal law and justice in general is dependent on its precautionous, expeditious usage. While discussing the U.S. Supreme Court’s approach to statutory interpretation in the context of criminal law federalization, Professor Peter Henning made a sound observation: “With the drive in Congress to federalize broader areas of the criminal law, an opinion that seemingly ignores the language chosen by the legislature sends a message that the courts can accord minimal respect to the legislature’s ability to formulate criminal statutes.”<sup>128</sup> Indeed, it seems extremely hard to maintain the fragile balance of lawfulness, reasonableness and specific individual/public/governmental interests furtherance when dealing with complicated, controversial criminal statutes, such as many white-collar provisions.

The risks and significant consequences of broad, sometimes overlapping

123. KRYMINAL'NIĬ KODEKS UKRAĬNI [KK UKR] [Criminal Code] art. 223-1, 223-2, 232-23 (Ukr.).

124. *Id.* at art. 222-1.

125. Here I use the term “synthetic” contextually—to stress the absence of any practical connection between securities violations and criminal statutes designed to deal with them; such Criminal Code provisions were artificial, they were not applicable to real world cases of securities fraud.

126. See Олександр Дудоров та Роман Мовчан, *supra* note 120 at 226 (pointing to the fact that during the last several years there have been no convictions for criminal violations of securities laws).

127. According to Paul Larkin, it looks very unlikely that either major party of the United States wants to reduce overcriminalization. The scholar points out that since 1970 political groups have preferred “buying” public opinion on being tough on criminals, while at the same time ignoring voices of criminologists and other legal minds. Larkin, *supra* note 22 at 760-61.

See also Molina, *supra* note 8 at 126-27 (saying that criminal law scholars have limited influence on the practical application of this area of law and especially so on the policymakers; though some legislators have legal background, they do not necessarily apply their expertise toward comprehensive study of legal questions at hand).

128. Peter J. Henning, *Statutory Interpretation and the Federalization of Criminal Law*, 86 J. CRIM. L. & CRIMINOLOGY 1167, 1177 (1996) (also expressing concerns over the potentially less efficiency and more impreciseness in federal law drafting, if the Congress concludes that the courts are capable of redefining crimes outside the adopted statutory structures).



statutory provisions and the ever-expanding nature of American criminal law has long been a controversial issue before the federal judiciary.<sup>129</sup> As Stanley S. Arkin put it, “Loose and expansive readings of penal statutes, tolerance for speculative and permissive evidentiary theories and harsh sentences of imprisonment is the recent trend of the judiciary in economic crime cases.”<sup>130</sup> Recent white-collar cases have brought the issue of overcriminalization to the surface of decision-making by courts. Federal dockets reveal that sometimes courts are willing to join the “overcriminalization” camp.<sup>131</sup> As pointed by another commentator, “Courts generally accept the white-collar crime rationale . . . that the rules should not hamper the investigation of complex criminal activity, and consequently do not impose broad standards that restrict prosecutors.”<sup>132</sup>

One good example is the recent Supreme Court case of *Yates v. United States*.<sup>133</sup> There, the Court overruled conviction of a commercial fisherman under 18 U.S.C. § 1519 (“Destruction, alteration, or falsification of records in Federal investigations and bankruptcy”) for telling crew members to throw caught undersized fish overboard, instead of complying with the official order to segregate the undersized fish from other fish and return with them to port.<sup>134</sup> The Supreme Court ruled that the term “tangible object,” as it appeared in 18 U.S.C. § 1519, covered only objects that were used to record or preserve

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129. The federal judiciary’s approach to construing criminal statutes has long been failing at the face of objective, consistent critique. State of the art criminal case decisions that are based on dividing philosophies, internal deliberations, and simply different mindsets of Justices make it almost impossible to predict in which direction, overcriminalizing or undercriminalizing, the Supreme Court will proceed in the next case. See generally J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1199-273 (1999) (analyzing some policy implications of white-collar jurisprudence).

130. 1 Stanley S. Arkin, BUSINESS CRIME (Matthew Bender 2015), LexisNexis. At the same time one has to admit that judicial practice has plenty of examples of when statutes have been construed narrowly on purpose, thus trying to mitigate the risks of overcriminalization caused by the Congress. In *Staples v. United States*, 114 S. Ct. 1793 (1994) the Supreme Court construed the federal statute prohibiting possession of an unregistered machinegun to require that a defendant know of the specific characteristics of his gun that make it a machinegun. While admitting that firearms are highly dangerous and regulated, the Court went on reasoning that because gun possession is so wide spread and in most cases innocent, it was necessary to avoid a “construction of the statute [that] potentially would impose criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of weapons in their possession—makes their actions entirely innocent.” *Id.* at 1802.

131. See, e.g., Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 59 (2007) (pointing out that the Supreme Court had many opportunities to curb the expansion of corporate criminal liability or at least control exercise of prosecutorial discretion in this area of criminal law; instead this and other courts preferred to stay aside from regulating the ever growing borders of corporate criminal liability, while relying “on the need to facilitate the identification and punishment of elusive corporate wrongdoers”).

132. Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 412 (1993) (adding that a survey of the imposition of legal standards during white-collar investigations demonstrates a continuing trend in favor of the prosecution).

133. 135 S. Ct. 1074 (2015) (ruling in a split decision that federal statute criminalizing acts of destroying corporate records cannot be used against a commercial fisherman for throwing undersized fish overboard in order to avoid prosecution). As one commentator observed, “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.” Haugh, *supra* note 20 at 836-37.

134. *Yates*, 135 S. Ct. at 1088-89.

information, not all objects in the physical world, such as fish in that case.<sup>135</sup>

While referring in her dissenting opinion to the majority's concern over the harsh twenty-year imprisonment penalties imposed in case of overbroad interpretation of 18 U.S.C. § 1519,<sup>136</sup> Justice Kagan suggested that the case outcome "brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code."<sup>137</sup> Such words might serve as an indicator that members of the Supreme Court are also concerned by overcriminalization. As one commentator observed while analyzing *Yates*, despite "different political ideologies, all nine justices appear to agree that there is an overcriminalization problem within the U.S. Code and/or U.S. attorneys' charging practices."<sup>138</sup> Traditionally American courts have served as an active arbiter of criminal law application.<sup>139</sup> With different tools of statutory interpretation, they can read criminal statutes narrowly or broadly. Some critics, authors of dissenting opinions often among them, argue that when reading statutes broadly, judges might create new crimes—contrary to the constitutional mandate.<sup>140</sup> Though this is a somewhat overstretched argument, extending the reach of criminal statutes can obviously lead to negative consequences.

When thinking about the "right" criminalization balance from the courts' perspective, one should also take into account the implicit presence of liberal/conservative ideology in judicial decision-making. Thus, when courts, particularly on the appellate level, look at the criminal case through multiple lenses of congressional intent, legislative history, prosecutorial approach, and public policy concerns, it becomes extremely hard for them to maintain proper

135. *Id.*

136. Sarbanes-Oxley Act, 18 U.S.C. § 1519 (2002):

"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."

137. *Yates*, 135 S. Ct. at 1100 (Kagan, J., dissenting). Justice Kagan then went on to criticize the often broad and overreaching approach by the Congress when adopting criminal statutes—"I tend to think . . . that § 1519 is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentences too much discretion. And I'd go further: In those ways, § 1519 is unfortunately not an outlier, but an emblem of a *deeper pathology in the federal criminal code*" [emphasis added]). *Id.* at 1101.

138. Adeel Bashir, *Fish Jokes Aside: Yates Hints at the Court's View of Prosecutorial Discretion*, 30 CRIM. JUST. 18, 21 (2015) (speculating that the Supreme Court is going to focus its attention on the issue of overcriminalization in future cases).

139. See, e.g., *United States v. Bass*, 404 U.S. 336, 347-49 (1971), where the Supreme Court adopted a narrow reading of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. § 1202(a), due to its ambiguity. The Court held that the phrase "in commerce or affecting commerce" was part of all three offenses, that is "receives, possesses, or transports" a firearm. *Id.* The Court's analysis was backed by two long established principles: 1) ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity; 2) unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance (thus directly addressing the issue of criminal laws federalization). *Id.*

140. See, e.g., Coffee, *supra* note 25 at 198 (stating that "the federal law of "white collar" crime now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions").

balance of ideological neutrality and objectivity.<sup>141</sup> As Professor Coffee wrote, when discussing interpretations of mail fraud in *McNally v. United States*,<sup>142</sup> and *Carpenter v. United States*,<sup>143</sup> the outcome of the latter case “illustrates the greatest deficiency with judicial legislation of the type that *Carpenter* exemplifies: legislation is never neutral.”<sup>144</sup>

In general, federal criminal jurisprudence, especially at the Supreme Court level, has a somewhat inconsistent record of white-collar-crime interpretation, narrowing statutory scope in some cases and expanding it in others.<sup>145</sup>

Judicial impact of criminalization processes in Ukraine reveals its twofold nature. First, the majority of sentences imposed by courts, and especially in the white-collar area, are too lenient.<sup>146</sup> Second, legal traditions of statutory interpretation by the Ukrainian judiciary directly shape criminal law application in Ukraine.<sup>147</sup> Both avenues of judicial influence on national criminalization policy deserve further explanation.

In 2014, Ukrainian trial courts entered judgments in 1,700 white-collar crime cases, which constituted 1.7% of 103,639 criminal cases decided total.<sup>148</sup> Though there is no statistical data for types and amounts of criminal penalties imposed in white-collar-crimes cases, my analysis of published opinions reveals the fact that such punishments are often within the statutory minimum ranges or sometimes even below them.<sup>149</sup> This is a solid indication of

141. See, e.g., Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 150-54 (discussing the multidimensional nature of judicial ideology); Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U.L. REV. 1757, 1803 (arguing that instead of simply dividing all judges into “activist” or “conservative” categories, “there is a need to recognize that such simple categorizations are woefully inadequate”).

142. 483 U.S. 350 (1987).

143. 484 U.S. 19 (1987).

144. John C. Coffee, Jr., *Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121, 154 (1988) (further adding that “because the legislature is politically accountable, it is entitled to favor one coalition of interests over another, but this is an activity that courts should avoid”). I agree with Professor Coffee in that a checks and balances system should work smoothly, while interpreting federal criminal statutes, so that the balance between unlawful conduct and its legal stigmatization is preserved.

145. In his investigation of the intricacies of judicial politics in the white-collar crime field, Professor Kelly Strader opined that sooner or later, the Supreme Court will face a fundamental question of political nature—how should it react to the Congressional failure to construct relevant criminal statutes both rationally and carefully. Strader, *supra* note 129 at 1269-70 & nn. 388, 389. He added that “indeed, invalidating an overbroad statute, or declining to construe a statute broadly, returns the issue to the political process by leaving it to Congress to redress the problem.”

146. See *infra* Part IV.A.

147. ВАДИМ КЛИМЕНКО, КРИМІНАЛЬНЕ ПРАВО УКРАЇНИ. ЗАГАЛЬНА ЧАСТИНА: ПІДРУЧНИК [CRIMINAL LAW OF UKRAINE. GENERAL PART: TUTORIAL] 27-28 (Ukr.) (Mykola Melnik et al. eds., 2004) (explaining different types of criminal law interpretation by courts and different levels of authority embodied in such interpretations).

148. Analiz Zdiisnennia Pravosuiddia Sudami Zahal'noi Iurisdiksii u 2014 Rotsi [Analysis of the Administration of Justice by the Courts of General Jurisdiction in 2014], [http://court.gov.ua/sudova\\_statystyka/ghjghjfgjhjfgjhj/](http://court.gov.ua/sudova_statystyka/ghjghjfgjhjfgjhj/) (last visited Jan. 26, 2016). In contrast, offenses against property constituted 47.5% of all crimes in the nation over 2014 period, with 49,300 such crimes total. *Id.*

149. My empirical research involved random processing of imposed penalties in thirty criminal judgments between 2012 and 2015 under three “white collar” Articles of the CCU: Article 204 (Unlawful Manufacturing, Storage, Sale or Transportation for Selling Purposes of Excisable Goods), Article 209 (Laundering of Crime Proceeds) and Article 212 (Evasion of Taxes, Fees or Other Compulsory Payments). Criminal cases were retrieved randomly from the online court rulings database. See generally IEdinii

undercriminalization in the country: harm (loss) caused to society by economic crimes significantly exceeds criminal sanctions imposed on wrongdoers.

Some in the legal community view statutory interpretation by the Ukrainian judiciary as an effective tool in furthering legislative goals.<sup>150</sup> On the other hand, judicial silence on important issues of statutory criminal law or the judiciary's unreasonably narrow approaches to construing such statutes sometimes leads to undercriminalization of wrongdoings.

Overall, courts remain in a unique position of correcting some of the "experimental" – and not necessarily fitting – criminalization policy moves by legislatures. Based on granted powers, jurists always face a choice of either adhering to the lawmaking body in its erroneous criminalization policy or being "rebellious" in reshaping the statutes within their routine application to criminal cases at hand. Thus, judges should use interpretation techniques cautiously, in a politically neutral manner and at the same time as consistently as possible. Not paying attention to potential outcomes of judicial decision-making creates serious risks of unreasonable expansion or shrinking of criminal law.

### C. "Smart On Crime" Prosecutor: How Should the Government Maintain Adequate Criminal Policy Balance?

One of the major lines of critique regarding overcriminalization explicitly targets U.S. Attorneys. Federal prosecutors have become widely known for their active employment of broad discretionary powers, granted by law.<sup>151</sup>

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Derzhavnyi Reiestr Sudovikh Rishen' [The United State Register of Court Decisions], <http://www.reyestr.court.gov.ua> (last visited Jan. 26, 2016) (containing court decisions in criminal cases, including white-collar crimes, in electronic format).

My analyses revealed that in 90% of judgments sanctions courts imposed either probation or a modest fine on defendants. Even in money laundering cases, where statute provides for a minimum three year imprisonment, the courts widely exercised their discretion under Article 75 of the CCU, which allows court to impose probation, if the court comes to conclusion that defendant can be corrected without imposition of more severe penalties. Thus in majority of cases money launderers received only one year probation penalty. In cases where remaining two statutes were charged, the analyses revealed that courts imposed mostly fines on defendants, in the lower end of their statutory range. Thus, striking divergence between the loss caused and the criminal fine imposed for the committed offense has emerged in almost every case.

150. Вікторія Яворська, *Поняття змісту актів судового тлумачення, спрямованих на забезпечення єдності у застосуванні судами України кримінального законодавства* [The Definition of Judicial Interpretation Acts Aimed at Providing Uniformity in the Application of Criminal Law by Ukrainian Courts], 4 Scientific Herald of Lviv State University of Internal Affairs 281, 287 (2013) (Ukr.) (stating that one of the major features of judicial interpretation acts remains in providing uniform standards in understanding and applying criminal statutes).

151. See Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569 (2010). Talking about a variety of issues related to the dangers of prosecutorial discretion abuse, Professor Podgor also shifts focus to the breadth of many federal statutory provisions: "Prosecutors' broad discretionary powers are not limited to deciding who will be charged with criminal offenses and what charges will be brought." *Id.* at 1579.

Indeed, legal literature puts quite a bit of blame on federal prosecutors for their active role in expanding, far not as often warranted, full scale criminal prosecutions to conducts that are trivial in their nature, did not cause significant harm in a particular case, or even start deviant prosecutions that contradict the long recognized goals of criminal law and interests of civil society. See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1442-46 & n. 23 (2009) (talking about the nature and obvious downsides of pretextual prosecutions, when prosecutors "target a suspect for one offense but prosecute and secure conviction for another." thus triggering another broad area for prosecutorial discretion); Dervan, *supra* note 28 at 653 (2011) (referring to the problem of expanding criminal justice system due to "increasingly wide

Overzealous prosecution, especially its modern incarnation in white-collar criminality, can cause enormous collateral damage, sometimes without sufficient evidence of wrongdoing.<sup>152</sup> And although the discretionary powers of prosecutors play a significant role in exacerbating the overcriminalization problem, this Article focuses on the substantive, as opposed to procedural law.

Despite wide critique of excessive employment of federal criminal statutes and unwarranted excessive prosecution approaches, the federal prosecution community has been recently demonstrating some aspirations toward a more balanced, efficient and cost effective approach to fighting crime in this country. One of these promising steps, the so-called “Smart on Crime”<sup>153</sup> initiative, was launched in early 2013 by then-Attorney General Eric Holder.<sup>154</sup> This DOJ program, named “Reforming The Criminal Justice System for the 21<sup>st</sup> Century,” pursues five main goals: 1) “to ensure finite resources are devoted to the most important law enforcement priorities;” 2) “to promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system;” 3) “to ensure just punishments for low-level, nonviolent convictions;” 4) “to bolster prevention and reentry efforts to deter crime and reduce recidivism;” and 5) “to strengthen protections for vulnerable populations.”<sup>155</sup> Modern approaches to prosecuting crimes seem to restore the long established *status quo*, with some rare exceptions: prosecute as many wrongdoers as resources allow, get as many convictions or pleas as possible, and push for sentences as severe as possible, all this done without much cost/benefit analysis. Indeed, prosecutorial discretion makes lawyers for the government “the most powerful actors in the criminal justice system.”<sup>156</sup>

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application of novel legal theories and overly-broad statutes;” such theories and statutes are rarely tested in courts since most of indicted Americans accept or are forced to accept plea offers).

152. See, e.g., *USA vs You*, [http://thf\\_media.s3.amazonaws.com/2013/pdf/USAvsYOU.pdf](http://thf_media.s3.amazonaws.com/2013/pdf/USAvsYOU.pdf) (providing mind shocking information on some cases of groundless prosecutions in the United States); Bill Mears, Chris Isidore & Krysten Crawford, *Anderson Conviction Overturned*, CNN MONEY (May 31, 2005, 2:58 PM EDT), [http://money.cnn.com/2005/05/31/news/midcaps/scandal\\_andersen\\_scotus/](http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/) (confirming that the Supreme Court’s reversal of Arthur Andersen LLP’s conviction came too late: the prosecution, trial, and negative publicity had caused the company to lose its client base and shut down its auditing business while firing its 28,000 employees).

153. U.S. Dep’t of Justice, *The Attorney General’s Smart on Crime Initiative*, JUSTICE.GOV (Dec. 1, 2015), <http://www.justice.gov/ag/attorney-generals-smart-crime-initiative>.

154. Unfortunately, not much has been heard from DOJ on “Smart on Crime” agenda since 2013. The lack of continuous record may demonstrate that the former Attorney General designed and promoted this initiative as part of his own professional agenda.

155. U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21<sup>ST</sup> CENTURY (2013), <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> (also “requiring the development of district-specific guidelines for determining when federal prosecutions should be brought”).

156. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795(2013). Professor Luna went on to say:

They decide whether to accept or decline a case, and, on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. As such, the prosecutor is the criminal justice system, in effect making the law, enforcing it against the accused, adjudicating his guilt, and determining the punishment.

In contrast, Ukrainian prosecutors traditionally do not possess significant discretion,<sup>157</sup> especially when compared to their American counterparts. Ukraine belongs to a group of European and Latin American countries, where, quite opposite to American discretionary prosecution model, prosecution is viewed as a mandatory government enforcement process—every single crime has to be prosecuted based on the information gathered by police, provided by crime victims and other citizens, or even identified by prosecutors and judges while working on other criminal cases.

The new Criminal Procedure Code of Ukraine, enacted in 2012,<sup>158</sup> unlike its Soviet Union predecessor,<sup>159</sup> is geared toward balancing the interests of government to prosecute crime versus individual rights<sup>160</sup> of defendants, in addition to equipping defense counsel with more and broader procedural rights.

The principle of legality under Article 9 of the Criminal Procedure Code of Ukraine directly establishes that during a criminal proceeding prosecutor is not only required to comply with the Constitution of Ukraine, the Criminal Code and other applicable laws, but also has to fully and impartially examine all circumstances of the crime.<sup>161</sup> Thus, prosecutorial discretion in Ukraine remains within the Code's oversight and is controlled by the Constitution.

There are two prosecutorial avenues of undercriminalization in Ukraine. They are especially noticeable in economic crimes cases. The first is with regard to guilty pleas, which are becoming more and more popular under the new Criminal Procedure Code framework, particularly in the areas of nonviolent, fraudulent types of crimes.<sup>162</sup> Often prosecutors will promise fines as penalties under proposed plea bargain and courts will go along by approving them in the way most favorable for the defendant.<sup>163</sup> The second avenue is present when a prosecutor asks for less harsh penalties in criminal trials. Indeed, in an

157. As the Supreme Court stated in *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his or her discretion.

158. KRYMINAL'NO-PROTSESUAL'NYI KODEKS UKRAINI [KPK UKR] [Criminal Procedure Code] (Ukr.).

159. KRYMINAL'NO-PROTSESUAL'NYI KODEKS URSR [KPK URSR] [Criminal Procedure Code] (Ukr.).

160. Under Article 8 of the Criminal Procedure Code of Ukraine, criminal proceedings shall be conducted in accordance with the principle of the rule of law, under which a human being, his or her rights and freedoms are recognized as the highest values in the country and for all official activities within it. In addition, the principle of the rule of law in criminal proceedings is applied with due consideration of the practices of the European Court of Human Rights. KRYMINAL'NO-PROTSESUAL'NYI KODEKS UKRAINI [KPK UKR] [Criminal Procedure Code] art. 8 (Ukr.).

161. *Id.* at art. 9 (also explicitly requiring the prosecutor to find circumstances of both incriminating and exculpatory nature in respect to the suspect or the accused, as well as the circumstances mitigating and aggravating their punishment, and also to make adequate legal evaluation of all circumstances and procedural decisions in a given criminal case).

162. *See, e.g.*, Катерина Гупало та Дмитро Трут, *Проблеми тільки починаються* [Problems Only Begin], ЮРИДИЧНА ГАЗЕТА ONLINE (Apr. 21, 2015, 2:44 AM), <http://yur-gazeta.com/publications/practice/podatkova-praktika/problemi-tilki-pochinayutsya.html> (explaining how some businessmen abuse the plea bargaining system in order to minimize their losses in fictitious business cases).

163. *See, e.g.*, Vyroky Babushkins'koho rayonnoho sudu mista Dnipropetrovs'ka vid 3 Lyutoho 2015 r. [Verdict of the Babushkinsky District Court of the City of Dnipropetrovsk of Feb. 3, 2015, REYESTR.COURT.GOV.UA, <http://reyestr.court.gov.ua/Review/42652710>] (as the result of the court's approval of the plea agreement, the defendant was sentenced to pay a criminal fine that was sixty times less than the monetary damage caused by his crime of tax evasion).

environment where statutory criminal penalties are rather low, Ukrainian prosecutors often remain quite modest in their requests for sentencing.<sup>164</sup>

#### *D. Call for the Right Criminalization by Legal Scholarship and Public Interest Groups*

While discussing the old and obvious topic of overcriminalization in legal literature, Professor Stuntz stated that “criminal law’s breadth . . . has long been the starting point for virtually all the scholarship in this field.”<sup>165</sup> Some legal minds seem to understand and promote the idea that a strictly codified and thus internally balanced system of criminal laws possesses a significant potential for the criminal justice system’s improvement and will enable the government to be both “right” and “smart” on crime.<sup>166</sup> Indeed, the amount of published works on overcriminalization and overfederalization, written by both established and emerging names in American criminal law scholarship is significant.<sup>167</sup> Scholars take quite different positions on the criminal law’s multidimensional expansions,<sup>168</sup> but what seems to unite them is the search for solutions on how to narrow down the scope of criminal law in order to make it easily comprehensible and objectively reasonable. Here are a few of the elaborated ideas/solutions to criminalization problems: (1) the careful balancing of all “gains and losses” when adopting new criminal statutes<sup>169</sup> (2) the “recogn[ition] and resist[ance] of

164. See, e.g., Літинський районний суд Вінницької області, *Узагальнення судової практики розгляду кримінальних справ про злочини у сфері господарської діяльності* [*Generalization of Court Practice in Criminal Cases on Crimes against Economic Activity*] (Ukr.) (June 26, 2013, 10:41 AM), <http://lit.vn.court.gov.ua/sud0214/analiz/37404/> (stating that the prevailing punishments imposed on economic offenders in the Litynsky District Court of Vinnitsa during the first six months of 2013 were fines and public works).

165. See Stuntz, *supra* note 28 at 507 (admitting that implications of criminal law’s breadth are still far from being completely comprehended).

166. See, e.g., Edwin Meese III, *Overcriminalization in Practice: Trends and Recent Controversies*, 8 SETON HALL CIR. REV. 505, 512 (2012) (advocating the idea that all federal criminal statutes should “be consolidated into a single title of the United States Code” as part of legislation and legislative process package of correcting overcriminalization).

167. See, e.g., Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 553 & nn. 129, 130 (2011) (stating that “there is a growing body of scholarship on overcriminalization” and common perception between researchers “that the justice system is already severely overcriminalized”); Isaac D. Buck, *Health Care Fraud Regulation In an Era of Overcriminalization and Overtreatment*, 74 MD. L. REV. 259, 264-65 & n.18 (2015) (confirming that “a number of writers have focused their scholarship on overcriminalization in recent years”).

168. It will be fair to mention that the group of scholars lobbying for narrowing down criminal law is not totally monolithic. Some commentators argue that the widely raised issue of overfederalization is largely a myth. In two interconnected pieces on attempts to prove the absence of the overfederalization issue, at least as it is viewed by the majority, Susan R. Klein and Ingrid B. Grobey rely largely on empirical data to demonstrate that despite the significant amount of provisions under the federal criminal code, “the sheer number of criminal statutes in effect at a given time has no demonstrable impact on the balance of power between state and federal law enforcement systems.” Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Overcriminalization of Criminal Law*, 62 EMORY L.J. 1, 79; Susan R. Klein & Ingrid B. Grobey, *Overfederalization of Criminal Law? It’s a Myth*, 28 CRIM. JUST. 23, 32 (arguing that, while the federal criminal justice system is not flawless, “the problem is not overfederalization of criminal law (the number of laws), nor differential in sentences and procedures between state and federal systems. Nor is the problem too many strict liability offenses, nor vague proscriptions.”). While this is a subjective and in my opinion rather controversial analysis of the issues at hand, I will not argue with the authors further.

169. Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 33 (1969) (also expressing hope “that attempts to set out the facts and to particularize the perils of overcriminalization may

problematic amendments” to laws before their codification;<sup>170</sup> (3) the adoption of the “overcriminalization canon (more precisely, an anti-overcriminalization canon),” which will enable the Supreme Court to consider the practicality of prosecution under broad criminal statutes;<sup>171</sup> (4) the abandonment of the practice of rewriting facially inadequate criminal statutes (specifically in the white-collar area) by the courts;<sup>172</sup> (5) the application of the desuetude doctrine in order to address the controversial issues of prosecutions under old and ambiguous criminal statutes;<sup>173</sup> (6) the establishment of an appropriate discretionary balance in prosecutorial decision-making;<sup>174</sup> (7) the allowance of a mistake of law defense, when a *malum prohibitum* crime is charged;<sup>175</sup> and 8) the evoking of merciful discretion mechanisms in criminal justice institutions.<sup>176</sup>

Scholars differ from the main actors in criminalization policy development – including the legislature, courts, and prosecutors. Scholars, unlike these other actors, do not have as much leverage on processes within the criminal justice system. Nevertheless, they remain persistently active and vocal, at least at academic symposiums and on the pages of legal scholarship, on the issues of criminal law policy and its application.<sup>177</sup> It makes good sense for major results of academic research on the issues of overcriminalization and undercriminalization to be thoroughly reviewed and further transformed into the doctrinal platform of adequate principles of criminalization. It will not hurt to, at the very least, think conceptually about what legal scholarship could do to help lawmakers, law adjudicators, and law enforcers improve the crime/punishment balance that is obviously absent today.

Since scholars address issues of overcriminalization in the United States from different angles, a diverse approach to solving such issues is optimal.

ultimately affect the decisions of the legislatures”). See also Luna, *supra* note 24 at 745-46 (stating that “a non-court imposed solution would be more palatable to lawmakers and law enforcers, appealing to their mental faculties rather than judicially curtailing their authority”).

170. C. Jarrett Dieterle, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1306 (referring to the Lacey Act to support his argument).

171. Michael Pierce, *The Court and Overcriminalization*, 68 STAN. L. REV. ONLINE 50-51, 58-59 (2015) (adding that based on the outcomes in two Supreme Court cases, *Bond v. United States* and *Yates v. United States*, “the overcriminalization canon applies when a defendant is charged under multiple criminal statutes, yet each appears to serve the same function as applied to the defendant’s conduct;” thus, there is no reason in prosecuting a person under all such statutes).

172. Strader, *supra* note 129 at 1269-70 (also urging justices to “consistently apply substantive constitutional limitations to white collar criminalization”).

173. Paul J. Larkin, Jr., Finding Room In the Criminal Law for the Desuetude Principle, 65 RUTGERS L. REV. COMMENTARIES 1, 4-5 (2014) (also stating that that application of this doctrine is particularly helpful in those cases “when the government seeks to apply old laws to new scenarios wholly unanticipated when the law went into effect”).

174. Podgor, *supra* note 151 at 1585.

175. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 783-84 (2012) (adding that such acceptance of such defense will effectively balance society’s interests in both enforcement of the law and not criminally punishing morally blameless persons).

176. Carol S. Steiker, *Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration*, in THE BOUNDARIES OF THE CRIMINAL LAW 49-57 (R.A. Duff et al. eds., 2010) (explaining the concept, potential areas of application, and inherent risks of mercy in the criminal justice system).

177. See, e.g., Φpic, *supra* note 41 at 159-62 (discussing the meaning of criminal law policy and its practical implications).



Multiplicity of statutes, broad and overlapping statutes, abuse of professional discretion, politically motivated criminal lawmaking, and inconsistent judicial interpretation should be accordingly addressed on various fronts. Only a comprehensive, multidimensional effort to combat overcriminalization will balance the state of criminal justice system.

Familiarizing oneself with legal comments on the state of criminalization policy in Ukraine reveals a largely different point of view on the effective criminal justice system. Several Ukrainian scholars have recently included criminalization and decriminalization issues into their research agenda.<sup>178</sup>

One of the scholarly proposed recommendations on security and the rule of law in Ukraine stated that the latest achievements of criminal law science, the active cooperation between scholar community, national lawmaker and law enforcement representatives, as well as the quality improvements in the application of criminal law, have to be taken into account.<sup>179</sup>

Turning back to the issues of overcriminalization in the United States, American nongovernmental organizations – think tanks, grass roots organizations, and lobbying, civil rights, and professional groups – exercise a significant influence on addressing such issues, promoting the “smart on crime” concept.<sup>180</sup> Based largely on the foundation laid by previous criminal law

178. See, e.g., Юлія Дорохіна, *Щодо визначення підстав криміналізації і декриміналізації злочинів проти власності* [On Defining Grounds for Criminalization and Decriminalization of Crimes against Property], 6 *ЮРИДИЧНА НАУКА* 76, 81 (2014) (Ukr.) (advocating for the establishment of the criminalization theory within Ukrainian criminal law doctrine that would become a persuasive roadmap for legislators working on bills proposing amendments to the Criminal Code); Наталья Лопашенко, *ОСНОВЫ УГОЛОВНО-ПРАВОВОГО ВОЗДЕЙСТВИЯ: УГОЛОВНОЕ ПРАВО, УГОЛОВНЫЙ ЗАКОН, УГОЛОВНО-ПРАВОВАЯ ПОЛИТИКА* [FUNDAMENTALS OF CRIMINAL LAW IMPACT: CRIMINAL LAW, CRIMINAL LEGISLATION, CRIMINAL POLICY] 288 (2004) (Russ.) (discussing underlying principles of criminalization); Валерій Матвійчук, *Проблема криміналізації та декриміналізації діянь проти навколишнього природного середовища* [The Problem of Criminalization and Undercriminalization of Crimes Against Environment], 4 *ЮРИДИЧНА НАУКА* 67, 67-81 (2013) (Ukr.) (discussing three common approaches to understanding the concept of criminalization that exist in modern jurisprudence).

179. *Рекомендації V Міжнародної науково-практичної конференції “Проблеми науки кримінального права та їх вирішення у законотворчій та правозастосовній діяльності”* [Recommendations of the Fifth International Scientific Conference “Issues of Criminal Law Science and Their Solving in Lawmaking and Law Enforcement Actions”] 2, *IVPZ.ORG* (October 8-9, 2015), [http://ivpz.org/images/pdf/rekomendacii\\_2015.pdf](http://ivpz.org/images/pdf/rekomendacii_2015.pdf). See also, Олена Рябчинська, *Суб’єкти наукового супроводу правотворчої та правозастосовної діяльності в Україні* [Subjects of Scientific Maintenance of Lawmaking and Law Enforcing in Ukraine], in *ISSUES OF CRIMINAL LAW SCIENCE AND THEIR SOLUTION IN LAWMAKING AND LAW ENFORCING* 92 (2015) (stating that today the potential of criminal law science is capable of adequate supporting development of criminal law policy in Ukraine on all of its levels—doctrinal, program, legislative and law enforcement).

180. *Criminal Justice and Law Enforcement*, CATO INSTITUTE, <http://www.cato.org/research/criminal-justice-law-enforcement> (last visited Feb. 3, 2016); *Criminal Law Reform*, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/criminal-law-reform> (last visited Feb. 3, 2016); *Overcriminalization*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <http://www.nacdli.org/overcrim/> (last visited Feb. 3, 2016); *Overcriminalization*, THE HERITAGE FOUNDATION, <http://www.heritage.org/issues/legal/overcriminalization> (last visited Feb. 3, 2016); *Overcriminalization*, RIGHT ON CRIME, <http://rightoncrime.com/category/priority-issues/overcriminalization/> (last visited Feb. 3, 2016); *Overcriminalization*, TEXAS PUBLIC POLICY FOUNDATION, <http://old.texaspolicy.com/issues/overcriminalization> (last visited Feb. 3, 2016); *Task Force on Overcriminalization*, AMERICAN BAR ASSOCIATION, <http://www.americanbar.org/groups/litigation/initiatives/overcriminalization.html> (last visited Feb. 3, 2016); *Texas Smart-On-Crime Coalition Legislative Agenda for the 85th Legislative Session*, TEXAS SMART-ON-CRIME COALITION (Dec. 3, 2015), <http://smartoncrimetexas.com/legislative-agenda/texas-smart-crime-legislative-agenda-85th-legislative-session>; also some of the state budget efficiency promotion groups.

reform efforts, the “overcriminalization” movement, which basically means an initiative to stop criminal law expansion, has existed for at least a couple of decades and has recently gained even more momentum.<sup>181</sup>

For example, the Heritage Foundation, an influential conservative think tank, maintains a large-scale overcriminalization project by addressing a variety of issues that erode federal criminal laws and their application.<sup>182</sup> The conservative “Right on Crime” initiative has, in turn, introduced a Statement of Principles for American criminal justice policy that outlines a major concept of “a cost-effective system that protects citizens, restores victims, and reforms wrongdoers.”<sup>183</sup>

In 2011, the “Smart on Crime Coalition”<sup>184</sup> with its focus on improving American criminal justice, presented a set of recommendations for the federal Legislature and the Administration in 16 major areas of concern. Chapter 1 of the document specifically addressed the issues of overcriminalization of conduct, overfederalization of criminal law, as well as the exercise of enforcement discretion.<sup>185</sup> Elaborated proposals to Congress concerning this specific area of criminal legislation flaws include two major “screening” measures. The first is automatic referral of bills introducing new or modifying existing criminal offenses and penalties to the House or Senate Judiciary Committee, accordingly.<sup>186</sup> Proponents of this approach expect it to bring clarity, some predictability, necessary substantiation and overall higher efficiency of criminal lawmaking, due to the expertise and narrowly applied resources of Judiciary Committees.<sup>187</sup> The second proposal calls for the legislative codification of the common-law rule of lenity,<sup>188</sup> thus attempting to deal with a great number of

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181. See, e.g., Criminal Code Reform, *Testimony Before the Overcriminalization Task Force of the Judiciary Committee, House of Representatives* 113th Cong. 2 (2014) (testimony of Roger A. Fairfax, Jr.) (stating that “in addition to the bipartisan cooperation taking place in government, private entities from across the political spectrum” have joined their efforts to reform the criminal justice system).

182. *Rule of Law. Overcriminalization*, HERITAGE.ORG, <http://www.heritage.org/initiatives/rule-of-law/overcriminalization> (last visited Apr. 13, 2016) (containing legislation database that “provides analysis on all bills in Congress that add or modify federal criminal offenses or penalties”).

183. See *Statement of Principles*, WWW.RIGHTONCRIME.COM, <http://rightoncrime.com/statement-of-principles> (last visited Jan. 29, 2015). The Statement includes seven principles, among which: “the criminal justice system must be transparent and include performance measures that hold it accountable for its results in protecting the public, lowering crime rates, reducing re-offending, collecting victim restitution and conserving taxpayers’ money,” “policies for both offenders and the corrections system must align incentives with our goals of public safety, victim restitution and satisfaction, and cost-effectiveness, thereby moving from a system that grows when it fails to one that rewards results,” “criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom.” *Id.* The last principle addresses the issue of recent expansion of regulatory offenses framework.

184. The Smart on Crime Coalition, involving over 40 organizations and individuals, “was convened to provide the 112th Congress and the executive branch with a comprehensive, systematic analysis of the challenges facing state and federal criminal justice systems and recommendations to address those challenges.” *Smart on Crime: Recommendations for the Administration and Congress*, CONSTITUTIONPROJECT.ORG, [http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime\\_Complete.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf).

185. *Id.* at 1-17.

186. *Id.* at 9-10.

187. *Id.* at 9-10.

188. The rule of lenity, being deeply rooted in Anglo-American common law, comes from the Latin legal maxim “in dubiis, non praesumitur pro potentia” (in cases of doubt, the presumption is not in favor of a power). Together with another maxim, “potestas stricte interpretatur” (a power is strictly interpreted), these dogmas outline the “old as world” requirements that laws have to be construed strictly, clearly and straight to the point.

vague statutes that “violate the principle of due process because they fail to put individuals on notice of what conduct is criminal.”<sup>189</sup>

So far, there was a limited progress with legislative enactment of proposals lobbied by public advocacy groups. At the end of the day, toughness on crime largely prevails in the federal criminal justice system. At the same time, the fact that there have been several “dealing with overcriminalization” bills introduced to the congressional committees recently (discussed in Section A of this Chapter) indicates the pressure that public groups put on the federal legislature.<sup>190</sup> I believe that chances of correcting many overcriminalization issues will be even higher if public activists couple their efforts with legal experts; thus, scientifically sound concepts will get a good chance to evolve into strong policy-changing messages. As Professor Erik Luna observed, the “potent coalition of interests may be forming to apply reasoned arguments and political influence to curb government excesses in criminal justice.”<sup>191</sup>

On the other side of the Atlantic, Ukrainian progress on publicly addressing the issues of white-collar undercriminalization remains quite limited. Among some of the major reasons for this are the underdevelopments in the public sector and inactivity of the civil society. The Ukrainian experience demonstrates that it might take decades to create a strong, effective network of public groups that will address legal issues of national importance, including undercriminalization in a post-totalitarian society.<sup>192</sup>

At the same time, hopes for the exposure of serious undercriminalization in Ukraine are placed on the growing freedom of speech. Freedom of speech has become the potent tool of illuminating corruption, abuse of official power, and corporate wrongdoings (all of them often connected), ultimately for the benefit of society. The Ukrainian public now follows media reports on high-profile cases with much more enthusiasm and concern.<sup>193</sup> Meanwhile, investigative

See generally Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197-229 (1994) (telling about the history of the rule of lenity and explaining its application by the U.S. Supreme Court).

189. *Smart on Crime: Recommendations for the Administration and Congress* 11, CONSTITUTIONPROJECT.ORG, [http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime\\_Complete.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/10/SmartOnCrime_Complete.pdf).

190. See, e.g., Criminal Code Reform, *Testimony Before the Overcriminalization Task Force of The Judiciary Committee, House of Representatives* 113th Cong. 2 (2014) (testimony of Roger A. Fairfax, Jr.) (referring to numerous active public and professional groups—such as Heritage, Cato, Justice Fellowship, ALEC, Right on Crime, ACLU, NAACP, Sentencing Project, NAACP Legal Defense and Educational Fund, NACDL, Leadership Conference on Human and Civil Rights, Justice Roundtable, American Bar Association and American Law Institute—that contribute to the criminal justice reform).

191. Luna, *supra* note 24 at 746.

192. See, e.g., *The Center of Resisting Corruption*, ANTAC.ORG, <http://antac.org.ua/en/> (last visited Apr. 13, 2016). This NGO remains one of the few public interest groups in Ukraine that is actively opposing corruption within the government and some other major economic violations.

At the same time this group has recently itself become a target of persecution by the Prosecutor General's office in Ukraine. Anastasia Ringis, *Антикорупційний спецназ. Чому ГПУ почала боротьбу з командою Шабуніна [Anticorruption SWAT. Why General Prosecutor's Office Started Fight Against Shabunin's Team]*, PRAVDA.COM.UA (March 30, 2016, 12:58 PM) <http://www.pravda.com.ua/articles/2016/03/30/7103823/> (connecting the ongoing criminal investigation of the Center of Resisting Corruption with its public anticorruption efforts).

193. Investigative journalist Sergii Leshchenko is one of such journalists of “new formation.” He extensively covers corruption scandals, as well as white-collar wrongdoings by Ukrainian oligarchs. See, e.g.,

reporting has also been expanding to cover major political and business wrongdoings.<sup>194</sup> With this promising trend, the freedom of speech and free journalism should be able to catalyze public awareness, concern, and finally, action against the major factors of white-collar wrongdoings.

#### IV. CASE EXAMPLES ON WHITE-COLLAR OVERCRIMINALIZATION AND UNDERCRIMINALIZATION: UKRAINIAN AND AMERICAN APPROACHES

This Part compares several white-collar cases in the United States and Ukraine in order to reveal different practical implications of over/undercriminalization phenomena. Learning foreign patterns of criminalizing too much or too little provides a good opportunity to gain some novel insights, observations, and potentially, results for improving one's own system of criminal justice.

##### *A. Severe Versus Soft Criminal Sanctions (Punishment)*

The case of Stewart Parnell,<sup>195</sup> briefly mentioned in the Introduction to this Article, revealed a strong pattern of peanut production safety violations of the Federal Food, Drug, and Cosmetic Act (FD&C Act),<sup>196</sup> and a connected massive fraud scheme.<sup>197</sup>

During the trial, the U.S. government introduced a significant amount of email communications to demonstrate that the Parnell brothers issued dubious orders to the Peanut Corporation of America (PCA) employees to ship contaminated peanut products, and also sent misleading statements to customers and Federal Drug Administration (FDA) while being aware of multiple salmonella contamination cases as well as numerous violations of peanut production sanitary rules.<sup>198</sup>

From the criminal law perspective, it is worth mentioning that Mr. Parnell was found guilty not only of multiple counts of introducing adulterated<sup>199</sup> and

Sergii Leshchenko, *Ukraine's Puppet Masters*, EUROZINE (May 15, 2015), <http://www.eurozine.com/pdf/2014-05-15-leshchenko-en.pdf> (discussing the modern history of Ukrainian oligarchy and its roots); Serhiy Leshchenko, *Sunset and/or Sunrise of the Ukrainian Oligarchs after the Euromaidan Revolution?*, in WHAT DOES UKRAINE THINK?, EUROPEAN COUNCIL ON FOREIGN RELATIONS 99 (Andrew Wilson ed., 2015).

194. For example, Natalka Sedletska is a famous Ukrainian investigative journalist, member of the Organized Crime and Corruption Reporting Project. Her investigative journalism reports target corruption, abuse of power and illegal business schemes in Ukraine. See, e.g., «Схеми» передали результати своїх розслідувань Антикорупційному бюро [*"Schemes" Gave the Results of Their Investigations to Anti-Corruption Bureau*], WWW. RADIOSVOBODA.ORG (Apr. 12, 2015), <http://www.radiosvoboda.org/content/news/27407010.html> (stating that Natalka Sedletska, anchorwoman of the "Schemes" TV-program, has provided materials on the fifteen biggest corruption and abuse of power journalistic investigations to the National Anti-Corruption Bureau of Ukraine).

195. *Salmonella-Tainted Peanut Products*, *supra* note 1 (explaining charges against former officials of the Peanut Corporation of America).

196. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399(f) (2015).

197. *Salmonella-Tainted Peanut Products*, *supra* note 1

198. Moni Basu, *28 Years for Salmonella: Peanut Exec Gets Groundbreaking Sentence*, CNN.COM (Sept. 22, 2015, 5:21 PM), <http://edition.cnn.com/2015/09/21/us/salmonella-peanut-exec-sentenced/index.html> (saying that during the trial "prosecutors presented more than 1,000 documents including months of emails" in order to convince the jury of Mr. Parnell's knowledge about the peanut products' contamination).

199. Prosecution was able to prove Counts 3-22 of the indictment charging that the food was adulterated within the meaning of 21 USC § 342(a)(1) & (4) in that: (1) it contained a poisonous or harmful substance, that

misbranded<sup>200</sup> food into interstate commerce with intent to defraud or mislead in violation of 21 U.S.C. §§ 331(a)<sup>201</sup> and 333(a)(2)<sup>202</sup>—which are federal crimes constituting the core of his criminal liability— but also found guilty on a number of charges of garden-variety types of white-collar crimes, including: conspiracy to introduce adulterated and misbranded food into interstate commerce with intent to defraud or mislead (18 U.S.C. § 317); conspiracy to commit wire fraud (18 U.S.C. 1349 & 18 U.S.C. § 1343); interstate shipments fraud (18 U.S.C. § 1341); wire fraud (18 U.S.C. § 1343); and obstruction of justice (18 U.S.C. § 1505).

On September 21, 2015, just over a year after the jury found him guilty on sixty-seven of sixty-eight charges, the federal Court for the Middle District of Georgia sentenced Stewart Parnell to a long term of imprisonment. According to the Order on Court’s Findings as to Defendants’ Guideline Range Calculations, Stewart Parnell’s offense level was forty-seven.<sup>203</sup> Thus, taking into account the statutory maximum terms for the counts of conviction and the fact that the terms of imprisonment for each count may be ordered to be served consecutively, his sentencing guideline range was 9,636 months imprisonment (or 803 years).<sup>204</sup> Instead, he was sentenced to 336 months (or twenty-eight years) in federal prison, to be followed by three years of supervised release.<sup>205</sup> A prominent food safety advocate characterized this harsh sentence<sup>206</sup> as one that is “going to send

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is salmonella which may have rendered it injurious to health; and (2) it was prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth and thereby rendered injurious to health. Special Verdict at 2-21, *United States v. Parnell*, No. 1:13-CR-12-001, 2014 WL 5106465 (M.D. Ga., Sept. 19, 2014), ECF 285.

200. Prosecution was able to prove Counts 23-35 of the indictment charging that the food was misbranded within the meaning of Title 21 United States Code, Section 343(a)(1) in that it was accompanied by a false and misleading certificate of analyses. *Id.* at 22-28.

201. Under § 331(a) of the Federal Food, Drug, and Cosmetic Act, introduction or delivery “for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded” is prohibited. 21 U.S.C. § 331(a).

202. Under § 333(a)(2) of the Federal Food, Drug, and Cosmetic Act, “if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be imprisoned for not more than three years or fined not more than \$10,000, or both.” *Id.* at § 333(a)(2).

203. Order at 15, *United States v. Parnell*, 2015 WL 5559832 (M.D. Ga., Sept. 18, 2015).

204. *Id.*

205. The District Court also sentenced the former PCA executive’s brother, Michael Parnell, who had been working on behalf of PCA as a food broker and was overseeing negotiation and execution of contracts for the purchase of peanut products from PCA, to a 20-year term of imprisonment. Mary Wilkerson, a former quality assurance manager at PCA Blakely facility, who was responsible for managing and overseeing the quality assurance operations at the processing plant, received a five-year prison term for her conviction of obstruction of the FDA’s investigation of the salmonella outbreak. Judgement in a Criminal Case at 2-5, *United States v. Parnell*, 2015 WL 5559832 (M.D. Ga., Sept. 29, 2015).

206. Indeed, this punishment is one of the most severe ever imposed on white-collar offenders. Although it seems to be justified by the enormous amount of harm caused by Mr. Parnell’s business practices, it still might rise, at least in some legal minds, the question about the disproportional punishment and its consequences. Actually, I would like to put the question this way: What is the proportionality between crime and punishment and how can we achieve it?

*See* Molina, *supra* note 8 at 126-27 (explaining that disproportional punishment reveals itself in two ways: when the punishment imposed significantly exceeds the penalty that the defendant deserves based on his or her culpability and the nature of the conduct itself; and when the offender’s crime constitutes a single act that is covered by two or more statutes and thus two or more imposed punishments run consecutively). Professor Molina further argues that, despite some growing dissonance between crime and punishment in European

a stiff, cold wind through boardrooms across the U.S.”<sup>207</sup>

Interestingly enough, charges against the former PCA CEO never included homicide, but, rather, concentrated on fraud. As Professor Lucian Dervan suggested,<sup>208</sup> such a choice might rely on the prosecutors’ desire for a stronger message to national food production businesses, which is to beware of potential charges related to the introduction of adulterated and misbranded food into interstate commerce. He suggested that federal fraud offenses are, in many cases, more attractive to prosecutors because they are broad enough to apply in all kinds of situations and carry potentially significant sentences.<sup>209</sup> Still, many criminal cases are based on such broad statutes “that do not fit neatly into our traditional definitions of ‘white collar crime.’”<sup>210</sup> Indeed, statutory tools used by the federal prosecutors in this case significantly outweigh potential Georgia state law remedies such as the maximum ten-year sentence for involuntary manslaughter.<sup>211</sup> Under identical circumstances in a state criminal case, the defendant would unlikely be sentenced to anything close to the severe twenty-eight-year penalty imposed by the federal judge.

Long sentences for criminal activity related to introduction of adulterated and misbranded food have presumably become the highest yet for this type of offenses and could come as shocking news for top management of food companies and law enforcement officials in many countries. This is amplified in European countries due to their strictly codified criminal law systems.

A different result is seen in examining the Ukrainian system. In 2014 a Ukrainian executive ordered online a large shipment of cigarettes from the United Arab Emirates (UAE).<sup>212</sup> They were recognized as dangerous products under the meaning of Article 227 of the CCU and thus could not be introduced to the Ukrainian market due to the presence of a potent drug, clonidine, in them.<sup>213</sup> According to the court verdict,<sup>214</sup> several shipments of over 83 million cigarettes of different brands and with an estimated total market value of over \$1,150,000

jurisdictions over the past several years, still Europe is way behind the United States in both experiencing and responding to the challenges of disproportionate punishment. *Id.*

207. Bill Marler, *A Stiff, Cold Wind*, MARLER BLOG (Oct 4, 2015), [http://www.marlerblog.com/lawyer-oped/a-stiff-cold-wind/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+MarlerBlog+%28Marler+Blog%29#VhQClux\\_Oko](http://www.marlerblog.com/lawyer-oped/a-stiff-cold-wind/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+MarlerBlog+%28Marler+Blog%29#VhQClux_Oko).

208. Lucian E. Dervan, *Food for Thought re Last Week’s Peanut Sentencing in Georgia*, WHITE COLLAR CRIME PROFBLOG (Sept. 28, 2015), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2015/09/food-for-thought-re-last-weeks-peanut-sentencing-in-georgia.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2015/09/food-for-thought-re-last-weeks-peanut-sentencing-in-georgia.html).

209. *Id.*

210. *Id.*

211. According to GA. CODE ANN. § 16-5-3 (2015):

(a) A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. A person who commits the offense of involuntary manslaughter in the commission of an unlawful act, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

212. Vyroky Prymorskoho rayonnoho sudu mista Odesy vid 6 Lyutoho 2015 r. [Judgment by the Primorsk District Court of the City of Odessa of Feb. 6, 2015] Feb. 6, 2015, REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/Review/42792165> (Ukr.).

213. *Id.*

214. *Id.*

were delivered from the UAE to Ukraine over a four-month period. Upon delivery to Ukrainian seaports, the shipments were seized by Ukrainian law enforcement agents.<sup>215</sup>

The defendant was charged with an attempted introduction of dangerous products to the Ukrainian market under Article 227 of the CCU. The evidence introduced during trial showed that the defendant, while aware of the potentially dangerous contents of the imported cigarettes, deliberately refused to undergo customs and special quality control clearances as required by the Ukrainian law. Thus, the court concluded that the defendant possessed specific intent to expose a dangerous product, namely, specific types of imported cigarettes containing clonidine, to the Ukrainian market. It is also worth mentioning that both the prosecution and the court have viewed several shipments of illegal cigarettes from UAE to Ukraine as separate episodes of a *single* continuing criminal activity—a practice that, while being standard in Ukraine<sup>216</sup> and some other European jurisdictions, is not permissible under the U.S. law.

The most intriguing and arguably disheartening part of this case was the punishment of the defendant. He entered into a plea agreement with the prosecution and was sentenced to a modest fine of \$700, deprivation of his ability to occupy managerial positions and to engage in import-export activities for a three-year period, and the payment of a \$342 forensic assessment.<sup>217</sup>

Now, if we compare these two cases on the levels of criminalization reflected in them, both in terms of statutory foundations and severity of imposed sanctions, significant differences between them become obvious. On one hand, Parnell's case involved sixty-seven charges, all of which were felonies, under six different federal criminal statutes, twenty-eight years of imprisonment (with potentially eight hundred and three years under the statutory maximum), three years of supervised release, \$6,700 assessment and restitution (in the amount to be determined by the court on a later date).<sup>218</sup> On the other hand, the "cigarettes import" case in Ukraine involved a single episode of continuing criminal activity, one attempted crime charged, a fine of \$700, temporary professional deprivation of any managerial or import-export related positions and a \$342 forensic assessment.<sup>219</sup> As a result, these penalties demonstrate two far-apart extremes of a somewhat similar legal issue: the American approach demonstrates sure signs of "overcriminalization," while the Ukrainian approach patently "undercriminalizes" specific illegal conduct. This leads to the question of criminalization and its right borders. When does it stretch too far eventually

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215. *Id.*

216. CRIM. CODE OF UKR. art. 32, pt. 2 (2001) (providing that a continuing offense is a single offense that is comprised of two or more similar acts connected by one criminal intent).

217. Vyroky Prymors'koho rayonnoho sudu mista Odessa vid 6 Lyutoho 2015 r. [Judgment by the Primorsk District Court of the City of Odessa of Feb. 6, 2015] Feb. 6, 2015, REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/Review/42792165> (Ukr.).

218. The Court also determined that under the federal Sentencing Guidelines Stewart Parnell should be accountable for more than \$100 million but less than \$200 million in losses. *United States v. Parnell*, 2015 WL 5559832, at \*5 (M.D. Ga. Sept. 18, 2015).

219. Vyroky Prymors'koho rayonnoho sudu mista Odessa vid 6 Lyutoho 2015 r. [Judgment by the Primorsk District Court of the City of Odessa of Feb. 6, 2015] Feb. 6, 2015, REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/Review/42792165> (Ukr.).

resulting in overcriminalization? On the other hand, when is it irrationally limited (the case of undercriminalization)?

The comparatively modest approach to sentencing the Ukrainian businessman for attempted introduction of large quantity of adulterated cigarettes in the case above proves the existence of prosecutorial and (to a somewhat lesser degree judicial) undercriminalization in the country. The presumption of Parliament's obligation to write criminal laws in a way that they do not overlap or merge, so that a reasonable person could clearly understand what is criminally wrong and what is lawfully right, is deeply rooted in the Ukrainian legal tradition. Ukrainian criminal law doctrine calls this approach "criminal liability distinction."<sup>220</sup> In practice, however, the national legislature often does a severely inadequate job of differentiating grounds of criminality,<sup>221</sup> so that the task of distinctive interpretation is passed through to prosecutors and, ultimately, to judges. With the existence of corruption risks and various influences from state officials and big businesses, prosecutors might become open to some questionable discussions that have nothing in common with the goals of criminal punishment, spirit of criminal law, or right criminal policy. As a result, a significant number of high-profile white-collar crime cases never make it to the Ukrainian court docket or to the sentencing stage at trial.

Finding the right solution for "overcriminalization v. correct criminalization" is presumably among the most difficult and challenging issue for those involved in the operation of the criminal justice system. While discussing some differences between continental European and Anglo-American approaches to overcriminalization, one commentator wrote that most questions arising in the United States are simply unknown to Europeans.<sup>222</sup> He went on by concluding that European countries "still punish far less than in Anglo-American countries."<sup>223</sup>

### *B. Multiple Statutes Application: Strict Normative Limitations Against Unrestricted Prosecutorial Discretion*

The next set of examples reveals another dimension of the over/undercriminalization issue. On September 23, 2011, Roman Petrenko, a Ukrainian national, was found guilty by the Court in the western region of Zakarpattia for attempted smuggling of cigarettes<sup>224</sup> across the border between

220. Євген Письменський та Геннадій Зеленов, *Правила кваліфікації злочинів у разі конкуренції кримінально-правових норм [Rules of Criminal Statutory Interpretation with the Criminal Statutes Concurrence]* in КВАЛІФІКАЦІЯ ЗЛОЧИНІВ 32-44 (Oleksandr Dudorov & Eugene Pismensky eds., 2010) (Ukr.) (discussing various legislative and judicial interpretative approaches to distinguish meaningfully close criminal statutes).

221. See also Jonathan Marx, *How to Construe a Hybrid Statute*, 93 VA. L. REV. 235, 236 (2007) (talking about statutes that while being enforceable under both criminal and civil law, may raise "uncomfortable questions about the law's commitment to the principle of legality: the notion that criminal conduct should be legislatively defined with the greatest possible specificity").

222. Molina, *supra* note 8 at 124.

223. *Id.* at 126.

224. KRYMINAL'NIЙ KODEKS UKRAЇNI [KK UKR] [Criminal Code] art. 15, pt. 2 & art. 201 (Ukr.).

Before November 2011, when a significant number of white-collar offenses were decriminalized by the Ukrainian Parliament, Article 201 of the CCU criminalized smuggling any merchandise, including cigarettes,



Ukraine and Romania.<sup>225</sup> The evidence showed that Petrenko had purchased a truck and made a hidden storage area in the trailer ceiling so that he could smuggle cigarettes across the border. He then purchased 104 boxes of cigarettes containing a total of 52,000 packs of Chesterfield cigarettes produced in Ukraine. At the border control checkpoint, the hidden cigarettes with an estimated value of \$60,000 were discovered by Ukrainian customs officials and seized.<sup>226</sup>

The court found Petrenko guilty of attempted violation of the anti-smuggling statute and sentenced him to four years in prison, also ordering conditional two-year probation.<sup>227</sup> Thus, the defendant would not be incarcerated as long as he met the two-year probation requirement. The court also imposed a forfeiture sanction, ordering Petrenko to forfeit all cigarettes involved in this activity. From the deterrence perspective, clearly negative impacts on legitimate cigarette businesses and on the public policy of these types of “soft” sentences lead to predictable frustration among Ukrainian law enforcement officials as well as common citizens.

Would such a “soft on crime” approach be possible in the United States? The following Supreme Court case will help answer this question.

In the highly controversial case of *Pasquantino v. United States*<sup>228</sup> the U.S. Supreme Court upheld the lower court’s decision that the conduct of smuggling liquor from the United States into Canada to evade that country’s heavy excise duties on alcohol fell within the literal terms of the wire fraud statute.<sup>229</sup> The Court held that both elements of the wire fraud, (1) defendants’ engagement in a “scheme or artifice to defraud,” and (2) “obtaining money or property” as the object of the fraud, were satisfied by the defendants’ conduct.<sup>230</sup> Being unconvinced neither by the anti-smuggling statute,<sup>231</sup> nor by the U.S. tax treaties

across the Ukrainian border, if the total value of goods was at least \$59,000. KRYMINAL’NII KODEKS UKRAINI [KK UKR] [Criminal Code] art. 201 (2010) (Ukr.). If the shipment value did not meet this monetary threshold, smuggling was recognized as an administrative offense (which is an infraction with fine as the only available penalty).

Cigarettes smuggling is no longer a crime in Ukraine. With the average retail price for a pack of cigarettes at one dollar, compared to five to seven dollars in European Union countries, illegal export of cigarettes has for the past several years become a lucrative business, especially for those living in the areas bordering Poland, Hungary, Romania and Slovakia—all now members of the European Union. Striking undercriminalization in this area has become obvious. See, e.g., Vlad Lavrov, *Ukraine’s ‘Lost’ Cigarettes Flood Europe*, ORGANIZED CRIME AND CORRUPTION REPORTING PROJECT, [https://www.reportingproject.net/underground/index.php?option=com\\_content&view=article&id=8:ukraines-lost-cigarettes-flood-europe&catid=3:stories&Itemid=21](https://www.reportingproject.net/underground/index.php?option=com_content&view=article&id=8:ukraines-lost-cigarettes-flood-europe&catid=3:stories&Itemid=21) (last visited Jan. 29, 2016).

225. Vyroky Vynohradivsky’koho rayonnoho sudu Zakarpats’koyi oblasti vid 23 Veresnya 2011 r. [Verdict of the Vinohradivsky District Court of Zakarpats’koyi oblasti Region of Sept. 23, 2011], REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/Review/18430712>.

226. *Id.*

227. *Id.*

228. 544 U.S. 349, 358 (2005).

229. *Id.* at 352; see also 18 U.S.C. § 1343 (2012).

230. *Pasquantino*, 544 U.S. at 355.

231. 18 U.S.C. § 554. The statute makes it a crime to export or send from the United States, “any merchandise, article, or object contrary to any law or regulation,” that is punishable by a fine or imprisonment for not more than ten years, or both. If the merchandise is illegally imported into the country, then the possible sentence can be doubled, allowing a sentence of up to twenty years pursuant to 18 U.S.C. § 545. And under 18 U.S.C. § 555(b), if a person is simply aware of or disregards “the construction or use of a tunnel” under the

to the contrary, the Court reached a conclusion that the defendants' smuggling scheme was within "the terms of the wire fraud statute."<sup>232</sup> Yet one footnote in the opinion sheds some light on the High Court's concern over the issue of overcriminalization: "Any overlap between the anti-smuggling statute and the wire fraud statute is beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct . . . . The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either."<sup>233</sup>

Put into this context, mail and wire fraud, money laundering, RICO statutes, and the like appear to acquire some "predatory" features, because they consume other, specific federal statutes designed to target specific,<sup>234</sup> rather than broad, types of harmful conduct (like the anti-smuggling statute<sup>235</sup> in *Pasquantino*).

Criticizing the majority decision for its overreaching reasoning, the dissenting opinion, delivered by Justice Ginsburg, stated that, while expansively interpreting 18 U.S.C. § 1343, the Court has sided with the Government in its pursuit of foreign tax law enforcement.<sup>236</sup> The dissent argued that Congress never intended to grant the federal wire fraud statute extraterritorial effect, distinguishing section 1343 that has "no reference to foreign law as an element of the domestic crime of wire fraud" from those criminal sections "that chart the court's course in this regard."<sup>237</sup>

Another portion of Justice Ginsburg's opinion, shared by all four dissenting Justices, referred to the potential applicability of the rule of lenity, which should guard the defendants against the majority's overbroad interpretation of § 1343,

U.S. border with another country he or she could be held criminally liable and severely punished with up to ten years in prison. In many jurisdictions, including Ukraine, this type of conduct is not criminalized at all. Overall, there are 15 statutory offenses that relate to issues of illegal moving merchandise across the U.S. border in both directions with the criminal penalties ranging from two to twenty years in prison (or even up to forty years in prison under 18 U.S.C. § 555(c)).

232. *Pasquantino*, 544 U.S. at 355.

233. *Id.*; see Stuntz, *supra* note 28 at 518, & n.62 (2001) (where Professor Stuntz argues that "[s]eparate criminal offenses are rarely completely separate"). As if excusing itself for the sweeping approach toward wire fraud interpretation, the majority opinion is concluded by the following:

It may seem an odd use of the Federal Government's resources to prosecute a U. S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so, and no canon of statutory construction permits us to read the statute more narrowly.

*Pasquantino*, 544 U.S. at 372.

234. There are some scattered attempts in American jurisprudence to refer to narrowly tailored other than broad statutes. See, e.g., *Dixon v. State*, 596 S.E.2d 147, 149 (Ga. 2004) ("[W]here two statutes overlap, the statute addressing the narrower range of conduct will usually trump the more general statute, and the misdemeanor statutory rape provision is far more specific than the child molestation statute."). But in most cases prosecutors will maintain an aggressive line of relying on broad statutes with more severe penalties. And this also becomes an effective negotiation tool for plea bargaining purposes, discussed above.

235. 18 U.S.C. § 546. Though in this particular case Justice Ginsburg's dissenting opinion mentioned that "Section 546's requirement that a vessel have been used to transport the goods to the foreign country would render § 546 inapplicable to these defendants' conduct in any event." See *Pasquantino*, 544 U.S. at 380.

236. *Pasquantino*, 544 U.S. at 377 (Ginsburg, R., dissenting) (while pointing to the Court's inconsistency, based on the outcome of this case compared to other, namely, *McNally v. United States*, 483 U.S. 350 (1987) and *Cleveland v. United States*, 531 U.S. 12 (2000), in interpreting the limits of federal statutes, by saying that "the Court has also recognized that incautious reading of the statute could dramatically expand the reach of federal criminal law, and we have refused to apply the proscription exorbitantly").

237. *Id.* at 379.

since wire fraud is a predicate offense both under the RICO, 18 U.S.C. § 1961(1), and the money laundering statute, § 1956(c)(7)(A).<sup>238</sup>

Overall, the federal mail and wire fraud statutes might serve as perfect models for overcriminalization, overlapping, sweeping, broadness of statutes. A lot has been written on these statutes' stopgap effect on virtually any new type of fraud, even on public corruption and private dishonesty acts.<sup>239</sup> For, as Judge Rakoff put it in his famous piece, "we may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity."<sup>240</sup> The concurring views on the broad language and even broader prosecutions of these two statutes were expressed by many other commentators, including academics, criminal defense counsel, and judges. When armed with just these two statutory "guns,"<sup>241</sup> federal prosecutors seem to be ready to meet the challenge of virtually any new fraud scheme yet to be born.<sup>242</sup> The federal courts, including the U.S. Supreme Court, have sometimes played along with the novel far-reaching theories of mail fraud prosecutions,<sup>243</sup> while on other occasions supporting a much narrower construction<sup>244</sup> of these statutes. Under

238. *Id.* at 383.

239. *See, e.g.,* Carpenter v. United States, 484 U.S. 19 (1987) (holding that financial columnist's and stockbrokers' prepublication use of newspaper's confidential information in order to trade in stocks held to violate federal mail and wire fraud statutes); C.J. Williams, *What Is the Gist of the Mail Fraud Statute?*, 66 OKLA. L. REV. 287, 288-89 (2014) (stating that the evolution of the mail fraud statute "from a minor, narrowly tailored act to its current broad wording and expansive judicial interpretation has indeed made it the "true love" of federal prosecutors"); Ellen S. Podgor, *Tax Fraud – Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CIN. L. REV. 903, 903 (1989) (admitting that "mail fraud's tentacles have grown and extended to such proportions" that its reach potential to any type of criminal conduct becomes overwhelming).

240. Rakoff, *supra* note 9 at 771 (stating that the mail fraud statute, together with the wire fraud statute, has been long viewed "as the 'first line of defense' against virtually every new area of fraud to develop in the United States").

241. In reality the number of broad statutory "guns" in the hands of federal prosecutors far exceeds two. *See, e.g.,* Podgor and Dervan, *supra* note 69 (reminding that initially the federal false statements statute under 18 U.S.C. § 1001 tended to be focused on providing false information under white-collar types of circumstances; however, with time its scope of application has expanded significantly).

242. *See, e.g.,* Larkin, *supra* note 22 at 727 (coming to the conclusion that these two fraud statutes basically make it unnecessary to create and use any additional provisions "to enable the federal government to prosecute swindling in its myriad forms"); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 559 (pointing out that judicial interpretation has significantly contributed to the shaping of the mail fraud crime, with some court opinions expanding the scope of 18 U.S.C § 1341 and others directly rejecting zealous prosecutorial approaches toward sweeping mail fraud statutory applications).

243. *See Pasquantino*, 544 U.S. at 377 (with Justice Ginsburg saying in dissent opinion that "expansively interpreting the text of the wire fraud statute, which prohibits 'any scheme or artifice to defraud, or for obtaining money or property by means of . . . fraudulent pretenses,' the Court today upholds the Government's deployment of § 1343 essentially to enforce foreign tax law.").

244. *See McNally v. United States*, 483 U.S. 350, 360 (1987), where the Supreme Court has famously said:

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

Providing its analyses of mail fraud statute in one of the early mail fraud cases in *Durland v. United States*, 161 U.S. 306, 313 (1896), the Supreme Court stated that "beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning," thus seemingly allowing for the statutory expansion beyond its plain wording. *Id.*

the circumstances, the judicial debates over these fraud provisions are far from being settled yet.

*C. Multiplicity of Charges Against Restrictive Charging Approach: Which is Better?*

The following white-collar cases, which were based on charges of drug money laundering, reveal some particularities of charging several counts of illegal conduct as well as application of the conspiracy doctrine under Ukrainian and American criminal law.

On March 4, 2015 a district court in Kiev, the capital of Ukraine, found a defendant guilty on multiple charges, including smuggling drugs (Article 305 of the CCU), using proceeds from trafficking in drugs (Article 306), sale and transportation of drugs (Article 307), illegal storage of drugs for personal consumption (Article 309) and illegal possession of firearms (Article 263 of the Code).<sup>245</sup> According to the evidence introduced at trial, the person, who had a prior conviction record for dealing with drugs, had established an organized criminal group of four individuals, in order to import large quantities of heroin into Ukraine and then distribute it in Kyiv—the nation’s capital.<sup>246</sup> The smuggling scheme involved a Pakistani citizen who had sold four kilograms of heroin, worth of almost \$450,000 in black market prices, during several meetings with one of the group members in Azerbaijan.<sup>247</sup> The concealed drugs were then smuggled to Ukraine by train or ferry.<sup>248</sup> In Ukraine small quantities of heroin were further distributed in Kiev and Kiev Region with an average price of \$100 per one gram.<sup>249</sup> Packages with drugs were left in secret spots after cash payments were processed to randomly opened accounts in a major Ukrainian bank.<sup>250</sup> The proceeds from drug sales were kept in bank accounts and were used to purchase shipments of heroin.<sup>251</sup> At the end, approximately three and half kilograms of heroin intended for distribution were seized by law enforcement.<sup>252</sup> The evidence established four documented episodes of selling small quantities of heroin for cash.<sup>253</sup>

The leader of the drug-dealing group was sentenced to eight years and three months in prison with the sentences for all five crimes applied concurrently.<sup>254</sup> Additionally, the government forfeited financial proceeds from his drug operation together with his personal assets.<sup>255</sup>

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245. Vyroky Kolehivsi Suddiv Holosiyivskoho Rayonnoho Sudu m. Kyieva vid 4 Bereznya 2015 r. [Verdict by the Panel of Judges of Golosiyivsky District Court in the city of Kyiv of Mar. 4, 2015], REYESTR.COURT.GOV.UA, <http://www.reyestr.court.gov.ua/Review/43080115>.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

It is worth mentioning that despite multiple episodes of smuggling, selling heroin and laundering sale proceeds through a bank, these episodes did not build up into separate counts in the indictment, thus not triggering additional charges against the defendants.<sup>256</sup> Separate episodes were also not considered at the sentencing.

Now, here is a comparable American case. In *United States v. Monea*,<sup>257</sup> the defendant, Paul Monea, was found guilty on four counts: one count of conspiracy to launder monetary instruments in violation of 18 U.S.C. § 1956 (h), and three substantive counts of laundering monetary instruments in violation of 18 U.S.C. § 1956 (a)(3)(B). Monea entered into an agreement with an undercover FBI agent, who had been posing himself as a drug-deal broker with significant amounts of cash to legitimize.<sup>258</sup> Monea made a decision to trade his estate, formerly owned by boxer Mike Tyson, and a large 43.5-carat diamond, known as the “Golden Eye” for \$19.5 million in cash and a boat, all presumably coming from a South American drug dealer.<sup>259</sup> Monea conspired with Michael D. Miller, a co-defendant in this case and a long time target of FBI money laundering investigation, to further the transaction.<sup>260</sup> The conspiracy involved, among other acts, wiring of \$100,000 of “good faith money” to Monea’s escrow account in three transfers of \$50,000, \$45,000 and \$5,000 respectively.<sup>261</sup> At trial, Monea was found guilty on all four counts and sentenced to 150 months in prison.<sup>262</sup>

Comparison of the facts and types of criminal behavior in both cases leads to the conclusion that the Ukrainian crime was a more serious one. At the same time, the Ukrainian case was closed with a lesser punishment.

From the distinguishing perspective, the *Monea* case analysis shows several charges of money laundering—common prosecutorial practice of charging several counts for essentially the same ongoing criminal activity. Such approach, called “charge redundancy,” has often been criticized for its unwarranted overreach and collateral damage consequences.<sup>263</sup> Indeed, there is little indication in the case of why the anticipated \$100,000 was split into several transfers that were wired on three different days. By splitting the wire, the Government actually seemed to secure itself with triple charges, since every wire constituted a separate offense of conducting “financial transaction involving property represented to be the proceeds of specified unlawful activity.”<sup>264</sup> So

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256. *Id.*

257. WL 731100 (N.D. Ohio Mar. 17, 2008), *aff’d* 376 F. App’x 531 (6th Cir. 2010).

258. *Id.* at 1.

259. *Id.* at 9.

260. *Id.* at 1.

261. *Id.* at 3.

262. *Id.* It is worth mentioning that the Presentence Report filed in this case calculated the guideline sentence in the range between 235 and 293 months, which was apparently too severe for this type of criminal activity.

263. See generally Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1117-30 (discussing the roles of the federal criminal code, Constitution and the Federal Sentencing Guidelines in addressing the issue of “piling up” criminal charges).

264. See Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. 1956 and Related Federal*

presuming the FBI undercover agent convinced the defendant to accept ten wires worth of \$10,000 each, could this lead to ten counts in indictment and even more severe penalties?<sup>265</sup> *Monea* is just one of many white-collar cases that explicitly raise the issue of charge redundancy.

In contrast to prosecution practices in the United States, multiple charges are extremely rare under the Ukrainian criminal law framework. For example, economic crime indictments will on average include just two to five criminal statutes. In the drug money laundering case above, every episode under the same statute, which was mentioned in the indictment, did not constitute a separate crime and did not trigger a separate penalty, as would be the case in the United States. Thus, despite four separate episodes of illegal drug sales in the Ukrainian drug case, only one charge of illegal sale under Article 307 of the Criminal Code has been applied.<sup>266</sup>

All of the provided sets of examples reveal a drastic contrast in both numbers of criminal statutes being used, charging policies involved and criminal punishments imposed. When compared to the Ukrainian approach, the American approach appears to be more severe, as indicated by: (1) charging simultaneously a complete offense and an attempted offense; (2) bringing charges under the elements of overlapping offenses; (3) multiplicity of charges<sup>267</sup> brought for the same continuing criminal conduct; and (4) much more severe punishments. Without necessarily saying that one approach is better than the other, one can believe that both prosecution models have a strong potential for further exploration. One should welcome new angles of research, critical analyses of both achievements and failures in two distinct systems of criminal justice while pursuing the ultimate goal of improving national criminal policy agendas.

#### V. MOVING TOWARD RIGHT CRIMINALIZATION: WHERE TO START AND WHERE TO HEAD

So how do we reach adequate criminalization? This Section will concentrate on summarizing some key reasons for overcriminalization in the United States and undercriminalization in Ukraine, and then will outline potential directions for each country to find its own unique scenarios for criminalization improvements. Since the United States and Ukraine have different legal systems, distinctive economic, social and political landscapes,

*Criminal Law*, CONGRESSIONAL RESEARCH SERVICE 15-16, <https://www.fas.org/sgp/crs/misc/RL33315.pdf> (Feb. 8, 2012) (citing 18 U.S.C. § 1956(a)(3)(B) and explaining the sting concealment offense).

265. See Kip Schlegel, David Eitle & Steven Gunkel, *Are White-Collar Crimes Overcriminalized? Some Evidence on the Use of Criminal Sanctions against Securities Violators*, 28 W. ST. U. L. REV. 117, 140 (referring to the long going debates on the impact of criminal sanction in enforcing economic regulations).

266. See CRIM. CODE OF UKR. art. 32, pt. 1 & art. 35 (2001) (providing definition of the repetition of criminal offenses as the commission of two or more offenses, prescribed by the same article or the same paragraph of an article of the Special Part of the Criminal Code; also explaining the features of criminal punishment under the repetition doctrine).

267. With respect to American prosecutors' charging policy, Professor Stuntz referred to the term "charge-stacking"—the process of bringing charges against the defendant for committing several crimes, when in reality there was just one criminal episode. Such approach pushes defendants to enter guilty pleas and thus contributes to saving costs on full trials. See Stuntz, *supra* note 28 at 520.

diverse histories and cultures, their criminalization “treatment prescriptions” will significantly vary as well. At the same time, criminality poses an imminent threat for both jurisdictions. Thus, being able to learn from each other’s experience on how to get to that golden middle of criminal policy seems to become a promising vehicle for future research. Openly addressing one’s own mistakes while learning how not to repeat other’s should be able to contribute to both countries’ improvements in criminal policymaking, and catalyze both solution search and action.

To briefly summarize the overcriminalization issues in the United States, they can be broken into three main areas: 1) lack of legislative consistency and required level of expertise in adopting new criminal laws on the federal level; 2) absence of any significant cooperation between lawmakers and legal scholars with their unique research resources, sufficient empirical data and expertise to reform criminal law, but with no constitutional authority and political means to actually do that; and 3) absence of any consistent and integrated body of criminal law, such as criminal or quasi-criminal code.<sup>268</sup>

“The core of criminal law should remain fairly static”<sup>269</sup>—it is as simple as that. While being old fashioned and oddly formulated, definitions of common law crimes have proved their viability over several centuries of successful adjudication. There is nothing wrong with preserving the key message behind this tradition—criminal law is traditionally a more conservative area of law, thus most of popular criminal law should remain stable. Having its strong crystallized core focus, criminal law arguably becomes much more resistant to the everyday shifts in political agenda and in law enforcement priorities.

There have been quite a few complaints on the existing criminal justice systems in Ukraine and in the United States, though the reasons for them are different in two countries.<sup>270</sup> Looking at the roots of overcriminalization in America shows that federal criminal law needs more cemented, internally connected, and overall balanced statutory crimes framework, as well as related general criminal liability provisions (such as crime definition, elements of crimes, forms of culpability, classification of crimes, defenses etc.).<sup>271</sup>

In Ukrainian criminal policy, the issues related to undercriminalization derive from the opposite side of the criminalization policy spectrum. Massive decriminalization of economic offenses by the national Parliament in 2011 has

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268. An article by Paul Robinson and Markus Dubber provides analyses of the Model Penal Code’s virtues both in terms of influencing positive changes in state criminal policies, in outlying prospective avenues for reforming federal criminal laws, and in more comprehensive and coordinated legal definitions of crimes. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319 (2007).

269. Brown, *supra* note 25 at 233-34 (adding that nobody wants to freeze criminal law, thus we should be able to adapt to changes in technological world and on social horizons).

270. See, e.g., Markus Dirk Dubber, *Reforming American Penal Law*, 90 J. CRIM. L. & CRIMINOLOGY 49, 50, 69 (1999) (predicting that the era of common penal law is coming to an end, with penal law now being primarily developed by lawmakers and not by judges in their opinions).

271. Again, the Model Penal Code had a similar interconnected structure, where key rules under Part I “General Provisions” could be applied to a given offense under Part II “Definition of Specific Crimes.” MODEL PENAL CODE §§ 1.04, 1.13, 2.02, 3.01-3.11 (Proposed Official Draft 1962). Such “General & Special Part” type of code construction is widely recognized in European criminal codes (including the CCU).

resulted in a serious gap in criminal law and its enforcement. A broad area of illegal, primarily fraudulent behavior has been left unaddressed. Experts have constantly criticized this legislative action, taken without any coordination with the Ukrainian legal scholarship community.<sup>272</sup>

Despite its seemingly more comprehensive and closely integrated Criminal Code, criminal law enforcement in Ukraine remains largely ineffective due to extremely high levels of public corruption.<sup>273</sup> The Ukrainian model demonstrates that even a presumably better interconnected and smaller body of statutory criminal law tending to address criminality in a more direct fashion might still malfunction, if other checks and balances—such as political will for unbiased criminal policy, adequate punishment and absence of influence on criminal adjudication from anybody—are not in place. Any society is doomed to become corroded in its views on criminal conduct, if it has no trust in government and accordingly in law and order. On the other hand, deeply rooted and constantly promoted respect to strong democratic law, as one may see such model in the United States, is able to achieve many goals in its movement toward the right criminalization balance.

So, does such a thing as optimal model of criminalization even exist?<sup>274</sup> There is no doubt it does, though it has not yet been discovered and therefore implemented. Being a part of the sovereign's strong "law and order" arm, criminal law, as the ultimate resource of enforcing public order, is often dependent on the political environment in the nation. For example, as it was discussed above, the Soviet-era CCU was primarily based on a socialist ideology, reflecting key elements of Marxism-Leninism.<sup>275</sup> In contrast, the current Criminal Code is based on a democratic platform—it respects human rights and freedoms, recognizes the rule of law principle and promotes the idea of market economy for a free society. American criminal law has been fortunate to not experience such "polarity reversion." At the same time, its growth pattern over the last century and even today reveals strong dependence on the political climate in the country, that, in turn, is largely tailored by public opinion in general and various interest groups in particular. So long as politics continues to play leading role in establishing and/or enforcing criminal law, the optimal criminalization balance will be stunted. Thus, grander involvement should be

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272. See, e.g., Попович та Дацюк, *supra* note 55 at 405-09 (talking about such flaws of economic crimes decriminalization as unreasonable exclusion of crimes that have been constantly committed in the business world, transfer of certain economic crimes into the category of administrative infractions, substitution of imprisonment with fines in some economic statutes (such as tax evasion and bankruptcy fraud) and overall causing serious violation of social justice principle in the white-collar crime area—when criminal sanctions become unreasonably high or low, and also when some statutes are formulated in a clear way, while others are worded in a fashion that makes their prosecution virtually impossible).

273. Laura Mills, *Ukraine Struggles to Battle Corruption*, WALL ST. J., Jan. 2-3, 2016, at A6 (stating that only 7% of Ukrainians see any improvements in the fight against corruption today, while 53% think that corruption remains among the most serious issues in the country).

274. I am not talking about *ideal* criminalization here, since we might never reach one. That is why I compared overcriminalization with Hydra at the beginning of this piece—this phenomenon, as well as undercriminalization, always exists to some degree in any criminal law system. So, just as the crime itself, while overcriminalization cannot be eliminated, it should be cut as much as possible.

275. JAN PALMOWSKI, A DICTIONARY OF CONTEMPORARY WORLD HISTORY (3d ed. 2008) <http://www.oxfordreference.com/view/10.1093/acref/9780199295678.001.0001/acref-9780199295678-e-1487>.



given to experts—lawyers, criminal law scholars, sociologists, psychologists and other academic intellectuals, whose combined efforts can help create a more balanced and effective model of criminalization. After all, American Law Institute’s Model Penal Code, developed by leading experts in the field, is widely recognized as a progressive document, at least for its era.<sup>276</sup>

This Article does not propose specific recommendations for correcting overcriminalization or undercriminalization. This is an extremely complicated task and one that is better suited for a group of experts, rather than a single researcher. Nevertheless, based on the material used and discussed in this Article, here is a potential set of questions that might encompass possible directions for criminal policy reforms: What criminal policy issues (challenges) are directly related to criminalization and can be identified? How is the term “overcriminalization” (“undercriminalization”) defined by the majority of experts, and what are its key elements? Is this phenomenon dependent on the political/social context in the country or is such environment irrelevant? Have similar criminalization-related issues existed before and why? Are there any criminal policy coordination efforts between lawmakers, prosecutors, judges, legal scholars, and public interest groups? What can we learn from foreign jurisdictions while addressing our own concerns about a better criminalization policy? Once major criminalization-related flaws are identified, how shall we proceed with reforms addressing those flaws? How will we be able to measure progress in restoring criminalization balance? These questions may not be exhaustive, but they provide a starting point for examining the important issue.<sup>277</sup>

## VI. CONCLUSION

This Article has analyzed some of the overcriminalization and undercriminalization-related issues in two distinct jurisdictions—the United States and Ukraine. It is impossible within one piece to identify and discuss all forms of over/undercriminalization. For example, sentencing policies are among some of the major areas of concern in criminal law jurisprudence, yet it is only touched upon in this Article. But even with these limitations, this Article provides an outline of the enormous potential for future research of

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276. MODEL PENAL CODE (Proposed Official Draft 1962). The fact that many states have adopted the MPC as the basis for their own criminal codes and also that the MPC provisions remain widely cited by American scholars and judges (in both praising and criticizing contexts), serves as a good example of unbiased, politically neutral and more pragmatic approach to tailoring a system of statutory criminal law.

The Federal Rules of Criminal Procedure and United States Sentencing Guidelines, in both of which Congressional involvement was minimal, also turned out to become viable and consistent documents that, despite some accusations (which is probably always the case with laws), bring rationality, predictability, and order to the application of criminal law. See, e.g., Fairfax, *supra* note 10 at 602 (stating that the Federal Rules of Criminal Procedure “transformed federal criminal practice and influenced state adjudicatory criminal procedure as well”).

277. After all, criminal law in its *ultima ratio* form of official addressing public wrongdoing, will always remain controversial, because stakes are high (personal rights, liberty and even life versus collective safety and well-being) and different parts of civil society will always view it differently, sometimes narrowly or even radically. See, e.g., Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 OHIO ST. J. CRIM. L. 521, 521-34 (2005) (discussing the various connections between the *ultima ratio* principle and the criminalization policy).

over/undercriminalization, with the ultimate goal of achieving a better-balanced criminalization policy. After all, it is important to remember that any criminal law, just as any national legal system, is based on its unique pillars, employs its own enforcement tools and sets the ultimate goal of serving people's needs for justice, order and security.

A more consistent approach in designing the construct of criminal law is needed. That structure should be one that is capable of diminishing or even eliminating broadness of, gaps in and overlapping of criminal statutes, combined with permanent partnership between legislature and the criminal scholarship community, and the obligation on federal prosecutors to exercise their discretion narrowly, with specific targeting of exact crimes committed instead of an "all and now" approach. It should be a design that will push the scales of criminalization to a balanced position.

The act of moving gradually toward the point of right criminalization, even without necessarily reaching it, will teach us a great deal along the way and might help us improve many law-related matters.