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Lucian E. Dervan

Belmont University - College of Law

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New Crimes and Punishments:
A Case Study Regarding the Impact of Over-Criminalization on
White Collar Criminal Cases

Asst. Professor Lucian E. Dervan¹
 Southern Illinois University School of Law

Introduction

Over-criminalization takes many forms and impacts the American criminal justice system in varying ways.² This article focuses on a select portion of the over-criminalization phenomenon by examining two types of over-criminalization prevalent in white collar criminal law. The first type of over-criminalization discussed in this article is Congress's propensity for increasing the maximum criminal penalties for white collar offenses in an effort to punish financial criminals more harshly. The second type of over-criminalization addressed in this article is Congress's tendency to create vague and overlapping criminal provisions in areas already criminalized in an effort to expand the tools available to prosecutors and increase the number of financial criminals prosecuted each year. While these types of over-criminalization are not the most egregious examples of the phenomenon, they are important to consider because the statutes being affected by these legislative enactments are far from obscure and, in fact, represent some of the most commonly charged offenses in the federal system.³

¹ Assistant Professor of Law, Southern Illinois University School of Law, and former member of the King & Spalding LLP Special Matters and Government Investigations Team. Special thanks to Professors Ellen Podgor and Roger Fairfax for their kind invitation to participate in this roundtable discussion, and to my research assistants, Elizabeth Boratto and Brian Lee, for their work on this article.

² See *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions*, Written Statement of Jim E. Lavine, President, National Association of Criminal Defense Lawyers, Before the Subcomm. Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (2010), available at http://judiciary.house.gov/hearings/printers/111th/111-151_58476.PDF (last visited June 6, 2011).

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

Id. (emphasis added); see also Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U.L. REV. 703, 704 (2005) (“Over time, however, the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives.”); Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Foundation and National Association of Criminal Defense Lawyers (2010), available at www.nacdl.org/withoutintent (last visited June 6, 2011).

³For examples of some of the more egregious forms of over-criminalization, see Luna, *The Overcriminalization Phenomenon*, *supra* note 2, at 703.

Delaware punishes by up to six months imprisonment the sale of perfume or lotion as a beverage. In Alabama, it is a felony to maim one's self to “excite sympathy” or to train a bear to wrestle, while Nevada criminalizes the disturbance of a congregation at worship by “engaging in any boisterous or noisy amusement.” Tennessee makes it a misdemeanor to hunt wildlife from an aircraft, Indiana bans the coloring of birds and rabbits, Massachusetts punishes those who frighten pigeons from their nests, and Texas declares it a felony to use live animals as lures in dog racing. In turn, spitting in public spaces is a misdemeanor in Virginia, and anonymously sending an

While much has been written about the plethora of negative consequences resulting from over-criminalization generally,⁴ it is worth noting that not everyone believes these negative consequences outweigh the potential benefits that might flow from the two types of over-criminalization discussed in this article. First, some might argue that repeatedly increasing the statutory maximums for white collar offenses is justified because doing so means culpable individuals will receive longer prison sentences reflective of their conduct and, in addition, others will be deterred from committing such crimes.⁵ Second, some might argue that enacting broad new criminal provisions in areas already criminalized is justified because such enactments provide prosecutors with the tools necessary to ensure that creative and sophisticated white collar criminals are brought to justice in larger numbers, thereby deterring others from committing similar offenses.⁶ Unfortunately, an extended discussion regarding the accuracy of the above beliefs regarding the relationships between punishment, enforcement, and deterrence is outside the scope of this article. Instead, this article seeks to examine the accuracy of the underlying premises utilized by both of these “justifications” for the over-criminalization discussed herein – (a) the assumption that increasing statutory maximums results in ever lengthening sentences for individual white collar defendants, and (b) the assumption that enacting additional laws that are vague and overlapping in areas already criminalized results in increased levels of enforcement against white collar criminals.

indecent or “suggestive” message in South Carolina is punishable by up to three years imprisonment. Not to be outdone, the federal government prohibits placing an advertisement on the U.S. flag (or vice versa) within the District of Columbia, as well as the unauthorized use of the “Red Cross” emblem or the characters “Smokey Bear” or “Woodsy Owl.”

Id.

⁴ For a discussion of the negative consequences of over-criminalization, see Ellen S. Podgor, *Overcriminalization: The Politics of Crime: Forward*, 54 AM. U.L. REV. 541 (2005) and accompanying symposium articles. In particular, see Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U.L. REV. 747 (2005).

[T]he common features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).

Id.

⁵ See Kip Schlegel, David Eitle, and 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, 134 (2000-01) (“One could assume that at least one purpose for criminalizing acts and actors is to impose more drastic forms and amounts of punishment. A logical rationale for the extension of the criminal sanction to economic activity is the perceived need for more potent deterrents than those offered through a system of pricing.”).

⁶ See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can be Done About It*, 101 YALE L.J. 1875, 1876 (1992).

The law can deter in different ways and to different degrees. Borrowing terms coined by Professor Robert Cooter, I would suggest that in its characteristic operation, the civil law “prices,” while the criminal law “sanctions.” The difference between a price and a sanction is at bottom the difference between, on one hand, a tax that brings private and public costs into balance by forcing the actor to internalize costs that the actor’s conduct imposes on others and, on the other, a significantly discontinuous increase in the expected cost of the behavior that is intended to dissuade the actor from engaging in the activity at all.

Id.

To examine the accuracy of these assumptions, this article examines Congress's "get tough on crime" response to white collar offenses following the collapse of Enron in 2001. In particular, this article considers the effect of the two types of over-criminalization discussed above as found within the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley" or "Act").⁷ First, Congress's propensity for increasing the maximum criminal penalties will be examined through analysis of Sarbanes-Oxley's provisions increasing the maximum penalty for mail and wire fraud from five years to twenty years in prison.⁸ This article will examine whether these statutory amendments actually resulted in white collar criminals receiving dramatically longer prison sentences. Second, Congress's tendency to enact vague and overlapping criminal provisions will be considered through analysis of Sarbanes-Oxley's creation of two new obstruction of justice provisions as compliments to those already in existence.⁹ This article explores whether these new statutory offenses resulted in a dramatic increase in the number of obstruction of justice prosecutions. By examining the impact of these reforms, this article seeks to understand whether new crimes and punishments really achieve their intended goals and, if not, what this means for the over-criminalization debate and, in particular, the over-criminalization "justifications" discussed above.

1. *Enron and the Road to Sarbanes-Oxley*

The road to Sarbanes-Oxley and a new round of over-criminalization began with the collapse of Enron in 2001.¹⁰ In October of that year, Enron announced to the world that the company would take charges during the third quarter in excess of one billion dollars due to "soured investments."¹¹ By December 2001, Enron was forced to file bankruptcy, a petition that admitted the existence of \$13.15 billion in company debt, a number that was over-shadowed by another \$27 billion in liabilities that lay off-balance sheet.¹² Far from an innocent corporate failure, evidence quickly mounted that the Enron bankruptcy was the result of systemic corruption and fraud that reached the highest levels of the corporate structure. The complex fraud that saw the demise of one of America's largest and fastest growing corporations led the President to discuss corporate crime in his 2002 State of the Union address to Congress. "Through stricter accounting standards and tougher disclosure requirements," stated President Bush, "corporate America must be made more accountable to employees and shareholders and

⁷ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, July 30, 2002.

⁸ See *infra* Section 1; see also Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent*, xxxi (Encounter Books 2009) (noting that a study by the Federalist society in 2007 concluded there were more than 4,450 criminal offenses in the U.S. Code, an increase of 1,450 since 1980); Luna, *The Overcriminalization Phenomenon*, *supra* note 2, at 712 ("A recent report concluded that the erratic body of federal law has now swelled to more than four thousand offenses that carry criminal punishment, and other works have noted similar upsurges in the number of crimes at the state level.").

⁹ See *infra* Section 1; see also Mahsa Saeidi-Azcue, *Overcriminalized America*, NATIONAL REVIEW ONLINE (MAY 2, 2011), available at www.nationalreview.com/articles/print/266130 (last visited May 6, 2011).

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

¹¹ Harold S. Bloomenthal, *Sarbanes-Oxley in Perspective*, § 1:1 (West 2010) (quoting Emshwiller and Smith, *Enron Posts Surprise 3rd-Quarter Loss After Investment, Asset Write-Downs*, WALL STREET J. (Online ed.) (October 16, 2001)) (noting that the write-downs were mostly connected "with write-downs of soured investments, producing a \$618 million third-quarter loss.").

¹² See Bloomenthal, *Sarbanes-Oxley in Perspective*, *supra* note 11, at § 1:1.

held to the highest standards of conduct.”¹³ Interestingly, both President Bush and Securities and Exchange Commission Chairman Harvey Pitt argued that the road to such reforms be advanced through administrative agencies and not through legislative reform.¹⁴ In testimony before Congress on March 21, 2002, Chairman Pitt discussed the administrative reforms being implemented by the SEC and made clear that legislative action was not necessary.¹⁵

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

¹³ *See id.* at § 1:2.

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

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

Id. Further, on March 7, 2002, SEC Chairman Pitt reported to the President regarding the progress that had been made on each of the ten points. In this letter response, no mention was made of a desire or need for legislative reform in addressing the crisis. *See id.* at § 1:4.

¹⁵ *Id.*

¹⁶ *See id.* at § 1:9; *see also* Beale, *From Morals to Mattress Tags*, *supra* note 4, at 755-56.

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

Id.

¹⁷ *See* Bloomenthal, *Sarbanes-Oxley in Perspective*, *supra* note 11, at § 10:1.

¹⁸ For a discussion of the various statements made by politicians, law enforcement personnel, and scholars regarding the predictive impact of Sarbanes-Oxley in lengthening prison sentences for white collar defendants, *see* Lucian E. Dervan, *Plea Bargaining’s Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron*

On July 20, 2002, President Bush signed Sarbanes-Oxley into law.¹⁹ While the bill contained much more than the President had requested, this article will focus on just two of the legislative enactments contained in the Act: (a) the increase in the maximum prison sentences for financial criminals, and (b) the addition of two new obstruction of justice provisions in Title 18 of the U.S. Code.

First, as referenced above, the President requested that white collar criminals be punished more harshly in response to the corporate frauds of 2001 and 2002. Congress, embracing this position, not only granted the President's request, but went above and beyond his specific proposal with regard to two of the most commonly charged white collar offenses – mail and wire fraud.²⁰ Prior to Sarbanes-Oxley, mail and wire fraud, which were originally enacted in 1948 and 1952, respectively, carried a maximum sentence of five years in prison. Under Section 903 of Sarbanes-Oxley, the maximum punishment for each offense was increased to twenty years in prison.²¹ Echoing the President's and Congress's beliefs that these amendments would significantly impact sentences, Attorney General John Ashcroft proclaimed in July 2002 that “executives and companies face tough penalties including *longer jail sentences for individuals.*”²² Deputy Attorney General Larry Thompson repeated these sentiments several months later.

[T]hese [financial] crimes are particularly pernicious and appropriately the subject of intense – and that is what they are getting – law enforcement focus and action. . . . Our goal is to separate the offenders from law-abiding companies. *In many cases, that separation will be physical and for an extended term of years.*²³

The question to be addressed herein is whether the changes to the maximum punishments available for mail and wire fraud actually had the desired result of dramatically increasing the average prison sentences of individual white collar defendants.

World, 60 OKLAHOMA L.R. 451, 453-67 (2007) (“By creating new laws and amending old fraud provisions, SOX took aim at all financial crimes in an effort to increase prosecutions and prison sentences for an enormous class of defendants, not just the limited number of officers and directors involved in the major scandals of the day.”).

¹⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, July 30, 2002. For further discussion on the legislative process that accompanied the creation and passage of Sarbanes-Oxley, see Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005); Anne Tracey and Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes-Oxley Act*, 25 N. ILL. UNIV. L.R. 125 (2004).

²⁰ 18 U.S.C. §§ 1341 (Frauds and Swindles) and 1343 (Fraud by Wire, Radio, or Television) (2011).

²¹ Section 903, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, July 30, 2002; see also Linda Thomsen and Donna Norman, *Sarbanes-Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. LAW 393, 399 (2008); Dervan, *Plea Bargaining's Survival*, *supra* note 18, at 455 (“SOX’s first sweeping reform was to impose a fourfold increase in the maximum punishments for mail and wire fraud.”).

²² Press Release, Dep’t of Justice, Attorney General Statement on Corporate Responsibility and the Creation of the Corporate Fraud Task Force (July 9, 2002), available at http://www.justice.gov/opa/pr/2002/July/02_ag_388.htm (last visited June 16, 2011) (emphasis added).

²³ See Dervan, *Plea Bargaining's Survival*, *supra* note 18, at 462 (citing Larry D. Thompson, Deputy Att’y Gen., *A Day with Justice* (Oct. 28, 2002)) (emphasis added).

Second, Congress's response to the scandals in 2001 and 2002 involved not only increasing the available punishments for white collar criminals. As observed by one scholar, "Congress did not simply increase penalties [in Sarbanes-Oxley]. Congress also plugged some gaps in existing laws, made proof requirements easier on prosecutors, and embraced as criminal a wider range of behavior."²⁴ One such example is the expansion of obstruction of justice laws. Prior to the enactment of Sarbanes-Oxley, Title 18 of the U.S. Code contained several obstruction of justice provisions, including 18 U.S.C. sections 1503 (*Influencing or injuring officer or juror generally*), 1505 (*Obstruction of proceedings before departments, agencies, and committees*), and 1512(b) (*Tampering with a witness, victim, or an informant*). Despite the existence of these various obstruction of justice provisions, Congress determined in the aftermath of Enron that additional laws were necessary. According to one Senate Report, statutory changes were necessary in this already criminalized area to ensure that "when a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical distinctions will neither hinder nor prevent prosecution and punishment."²⁵ As such, Congress passed and the President signed Sarbanes-Oxley, which contained two new obstruction of justice statutes.²⁶

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

Whoever corruptly -- (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.²⁷

18 U.S.C. section 1512(c) is similar to 18 U.S.C. section 1512(b), but is broader in scope because it reaches beyond the conduct of managerial agents and applies to anyone who engages in document destruction.²⁸

²⁴ Tracey and Fiorelli, *Nothing Concentrates the Mind like the Prospect of a Hanging*, *supra* note 19, at 135 ("In this regard probably the most sweeping changes pertain to obstructing investigations of fraud.")

²⁵ See Gary G. Gindler and Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 AM. CRIM. L. REV. 67 (2004) (citing S. Rep. No. 107-146, at 7 (2002)).

²⁶ See Grindler and Jones, *Please Step Away from the Shredder*, *supra* note 25, at 77 (citing 148 Cong. Rec. S7418 (2002) (daily ed. July 26, 2002) (statement of Sen. Leahy)) ("With the enactment of Sarbanes-Oxley, Congress created new criminal statutes and modified § 1512, all in an effort to 'clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.'"); *see also* Tracey and Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging*, *supra* note 19, at 133 ("Recent business scandals, such as those referenced herein, did not occur in a legislative environment that condoned such activity. To the contrary, many federal laws addressed and prohibited conduct occurring in these scenarios, such as obstruction of justice, intimidating witnesses, destroying evidence, and various types of fraudulent activity.")

²⁷ 18 U.S.C. § 1512(c) (2011).

²⁸ See Grindler and Jones, *Please Step Away from the Shredder*, *supra* note 25, at 78.

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

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

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.²⁹

18 U.S.C. section 1519 is particularly broad and was created with the hope that it would provide prosecutors with the ability to bring charges against a more expansive group of potential defendants, thereby increasing the number of white collar prosecutions each year.³⁰ As Senator Leahy, one of the architects of the Sarbanes-Oxley criminal provisions, stated, 18 U.S.C. section 1519 "is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct" a matter within the jurisdiction of the United States.³¹ As with the mail and wire fraud amendments in Sarbanes-Oxley, the question to be addressed herein is whether the new and overlapping obstruction of justice provisions in this already criminalized area had the desired result of dramatically increasing the number of white collar defendants prosecuted in subsequent years.

2. *The True Impact of Sarbanes-Oxley Over-Criminalization on White Collar Cases*

The first "justification" advanced by some for ignoring the negative consequences that naturally flow from the over-criminalization contained in Sarbanes-Oxley is that an increase in the statutory maximum sentences for mail and wire fraud will result in dramatically harsher punishments for individual criminals, thus creating a strong deterrent for others.³² One need not wonder whether the intended result became a reality.³³ The Bureau of Justice Statistics maintains records regarding the mean length of sentence for defendants convicted of mail and wire fraud by year.³⁴

Id.

²⁹ 18 U.S.C. § 1519 (2011).

³⁰ See Grindler and Jones, *Please Step Away from the Shredder*, *supra* note 25, at 78 (citing 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002) (statement of Sen. Leahy)) ("Senator Leahy characterized § 1519 as 'a new general anti-shredding provision.'").

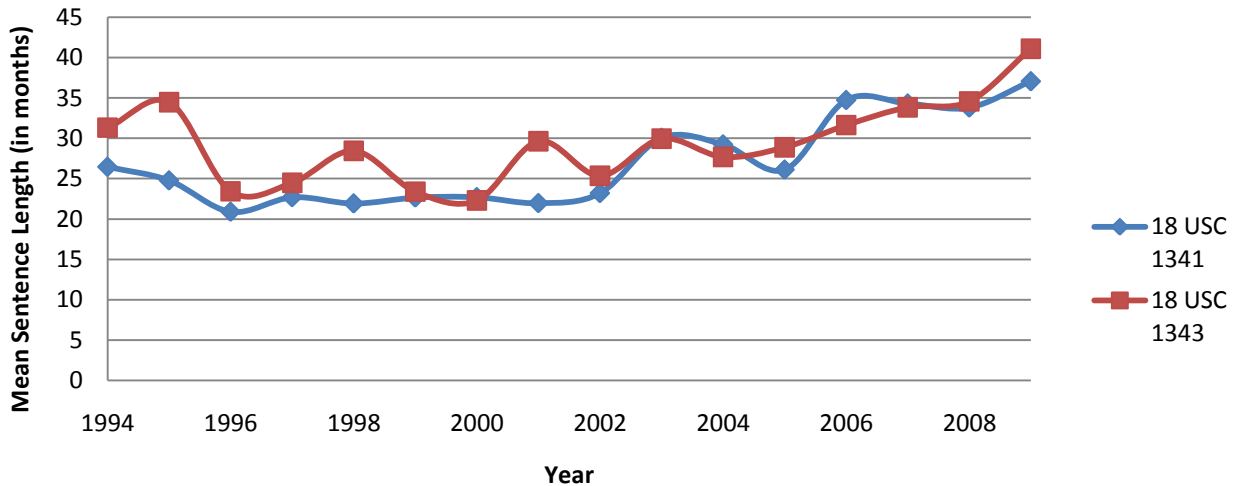
³¹ See Grindler and Jones, *Please Step Away from the Shredder*, *supra* note 25, at 78.

³² See *supra* section *Introduction* and accompanying text.

³³ Schlegel et al., *Are White-Collar Crimes Overcriminalized?*, *supra* note 5, at 119 ("In spite of the attention directed toward overcriminalization, very little empirical evidence has been produced to actually demonstrate that these initiatives and reforms resulted in a toughened posture against business malfeasance.").

³⁴ See Bureau of Justice Statistics, *Federal Justice Statistics Program*, available at <http://bjs.opj.usdoj.gov/fjsrc/> (last visited June 6, 2011).

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



As Graph A indicates, the mean sentences for defendants convicted of mail and wire fraud have risen since 2002, the year in which the Sarbanes-Oxley amendments took effect. In particular, between 2002 and 2009, the mean sentence for mail fraud increased by eleven months, while the mean sentence for wire fraud increased by ten months. Despite this upward shift in sentences, the empirical evidence does not support the general proposition that the increase in statutory maximums had the intended effect.

First, while Sarbanes-Oxley created a 400% increase in the maximum sentence for defendants convicted of mail or wire fraud, the actual resulting increase in defendants' sentences represents a mere 24%-29% increase. Second, this increase is likely not attributable to the increase in the statutory maximums from five years to twenty years in prison because the mean sentences are far from reaching either statutory cap. Further, it is more likely that the small increase in the mean sentence for defendants convicted of mail and wire fraud is the result of a skewing effect resulting from a handful of defendants who engaged in large frauds and who received enormous sentences. For instance, Bernard Madoff, the infamous ponzi-schemer convicted of mail and wire fraud, was sentenced to 150 years in prison in 2009.³⁵ Utilizing available data regarding the number of mail and wire fraud convictions in 2009, Madoff's single sentence increased the mean incarceration period for all defendants that year by almost four months.³⁶ As such, it is likely that three to four defendants a year following the passage of Sarbanes-Oxley could be wholly responsible for the ten to eleven month rise in mean sentences.

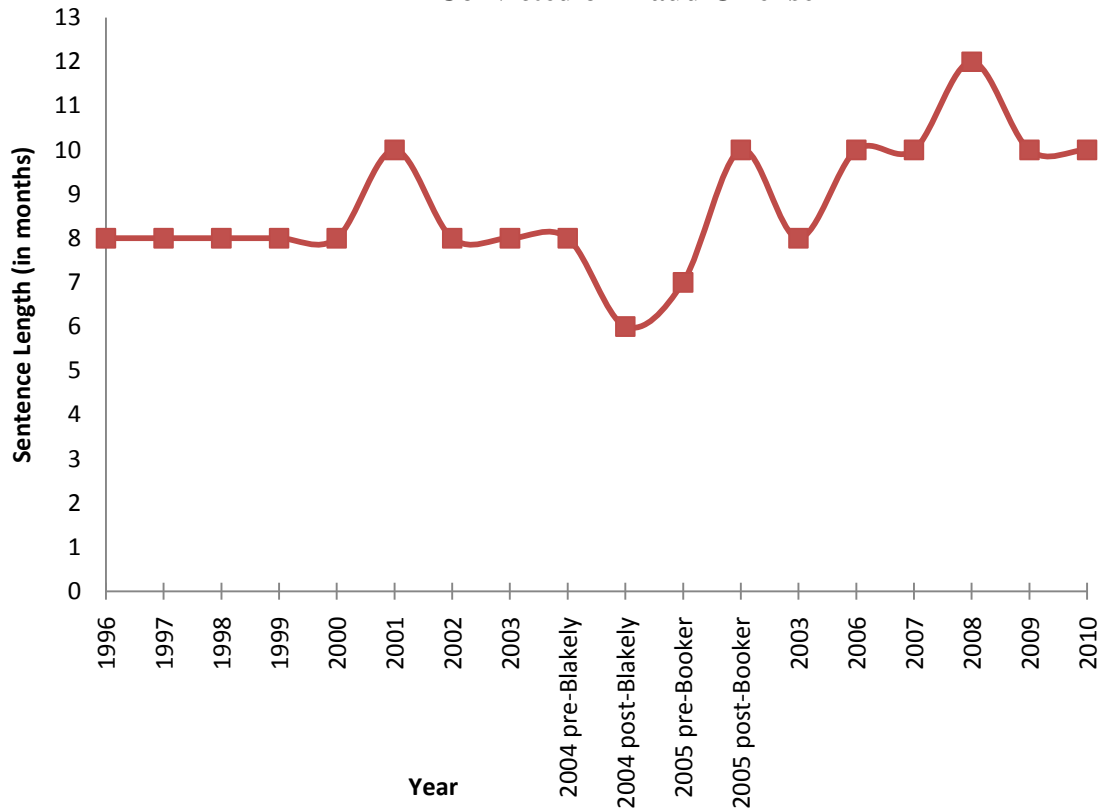
³⁵ See U.S. Department of Justice, Southern District of New York, *United States v. Bernard L. Madoff and Related Cases*, available at <http://www.justice.gov/usao/nys/madoff.html> (last visited June 16, 2011).

³⁶ In 2009 there were 1062 wire or mail fraud cases closed in the federal system (556 mail fraud cases and 506 wire fraud cases). The mean sentence for these defendants was 37.07 months for mail fraud and 41.1 months for wire fraud. If Bernard Madoff were removed from this group of defendants, the mean sentence for the remaining defendants would decrease to 33.89 months for mail fraud and 37.61 months for wire fraud, a drop of 3.17 months and 3.48 months respectively.

While one might argue that raising the statutory maximum for mail and wire fraud was necessary to sentence the most culpable white collar defendants to prison terms in excess of five years, this is not accurate, because it is not necessary to increase the statutory maximums to sentence particularly egregious white collar criminals to staggering terms in prison. As an example, consider the case of Jeffrey Skilling, who was convicted using statutes passed prior to Sarbanes-Oxley. By merely using consecutive rather than concurrent sentencing, the court was able to impose a term of 292 months in prison.³⁷

The hypothesis that Sarbanes-Oxley was not responsible for the slight increase in mean sentences for mail and wire fraud after 2002 seems further supported by examination of the median sentences for fraud defendants in the federal system during the same time period.

**Graph B:
Median Sentence Length (in months) for Federal Defendants
Convicted of Fraud Offense**



As demonstrated in Graph B, the median sentence for federal defendants convicted of fraud increased from eight months in 2002 to ten months in 2009 and 2010. This represents a

³⁷ See Laurel Brubaker Calkins and Thom Weidlich, *Skilling May Stay in Prison Even if He Wins Appeal (Update 3)*, Bloomberg (April 2, 2008), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDf5bJG8hbE0&refer=us> (last visited June 6, 2011) (“U.S. District Judge Sim Lake sentenced Skilling to 10 years on each of two securities-fraud counts, to be served consecutively. He sentenced Skilling to an additional 52 months on each of the remaining 17 counts, to be served simultaneously after both 10-year sentences were completed.”).

mere two month increase and is certainly not what was expected or desired in the wake of the passage of Sarbanes-Oxley. Further, in 2004 and part of 2005 the median sentence for fraud actually dropped to its lowest level in decades. While one can only hypothesize that the increase in mean sentences for mail and wire fraud in the 2000s were not attributable to Sarbanes-Oxley reforms, more concrete evidence exists to demonstrate that the eventual two month increase in median fraud sentences resulted from non-Sarbanes-Oxley events. Specifically, this increase in median sentences is likely the result of the United States Sentencing Commission decision in 2002 to increase the base offense level for many fraud offenses from six to seven points.³⁸ This in itself subjected defendants to a 10% increase in their sentences. Applying this increase to post-2002 sentencing suggest that this reform alone accounts for almost the entire two month increase described above.³⁹

The above data suggest that average sentences have not risen in a dramatic way since 2002 as a result of the increase in statutory maximums found in Sarbanes-Oxley.⁴⁰ As such, the data appear to indicate that the primary “justification” offered in defense of this type of over-criminalization – that it leads to harsher penalties reflective of financial criminals’ culpability and leads to greater deterrence – is based on a false assumption regarding the impact of such legislative actions on the sentences of individual defendants.⁴¹

The second “justification” advanced by some for ignoring the negative consequences that naturally flow from the over-criminalization contained in Sarbanes-Oxley is that expanding prosecutors’ arsenals in already criminalized areas leads to more prosecutions. To begin the analysis of the accuracy of this assumption, Graph C illustrates the percentage of offenders in the

³⁸ See Dervan, *Plea Bargaining’s Survival*, *supra* note 18, at 459-462.

³⁹ *Id.*; see also Frank O. Bowman, III, *Pour Encourager Les Autres?: The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 433.

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

Id.

⁴⁰ While this article concludes that average sentences for fraud defendants have not risen dramatically since 2002, this article concedes that sentences for the most notorious white collar defendants have increased over the years. In fact, as Professor Ellen Podgor notes in her article regarding white collar sentencing after Enron, such defendants face significant prison time today compared to during the pre-Enron period.

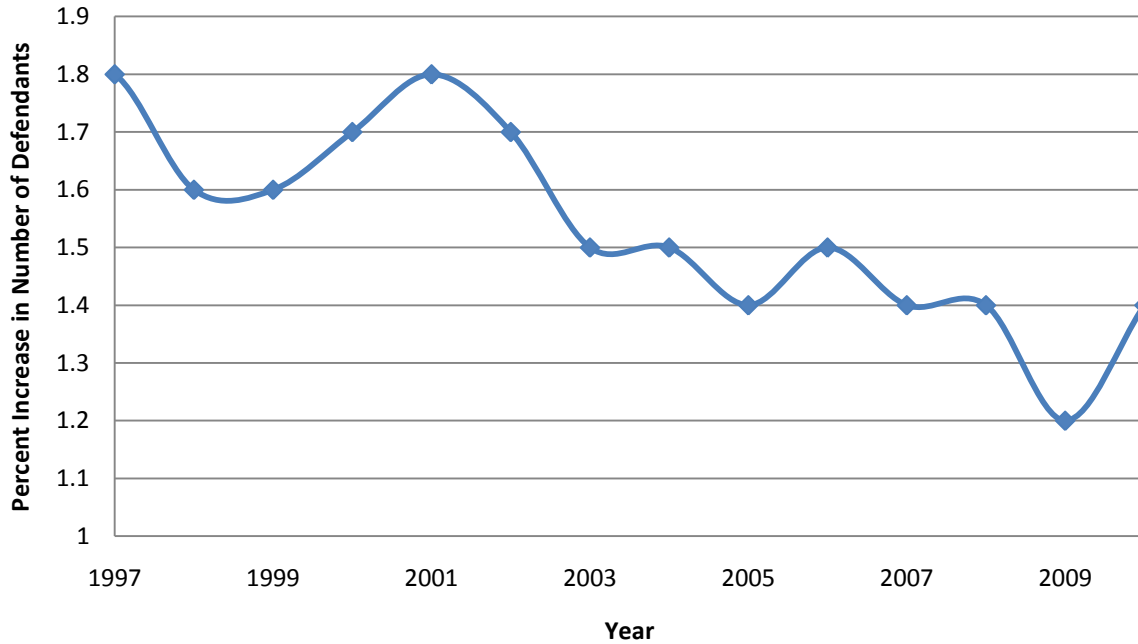
White collar offenders in the United States have faced sentences far beyond those imposed in prior years. For example, Bernard Ebbers, former CEO of WorldCom, was sentenced to twenty-five years; Jeffrey Skilling, former CEO of Enron, was sentenced to twenty-four years and four months; and Adelphia founder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

Ellen S. Podgor, *Criminal Law: The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 731-32 (2007). That the sentences for a few notorious white collar criminals have risen, however, does not change the fact that the average sentences for white collar defendants appear static and that the post-Enron statutory maximum reforms examined herein appear to have been mostly ineffective in achieving their stated goal of increasing sentences for all fraud defendants.

⁴¹ This article does not address the impact of over-criminalization that includes mandatory-minimum sentencing.

federal system for whom the primary offense category was “Administration of Justice,” an offense category which includes obstruction of justice crimes.⁴²

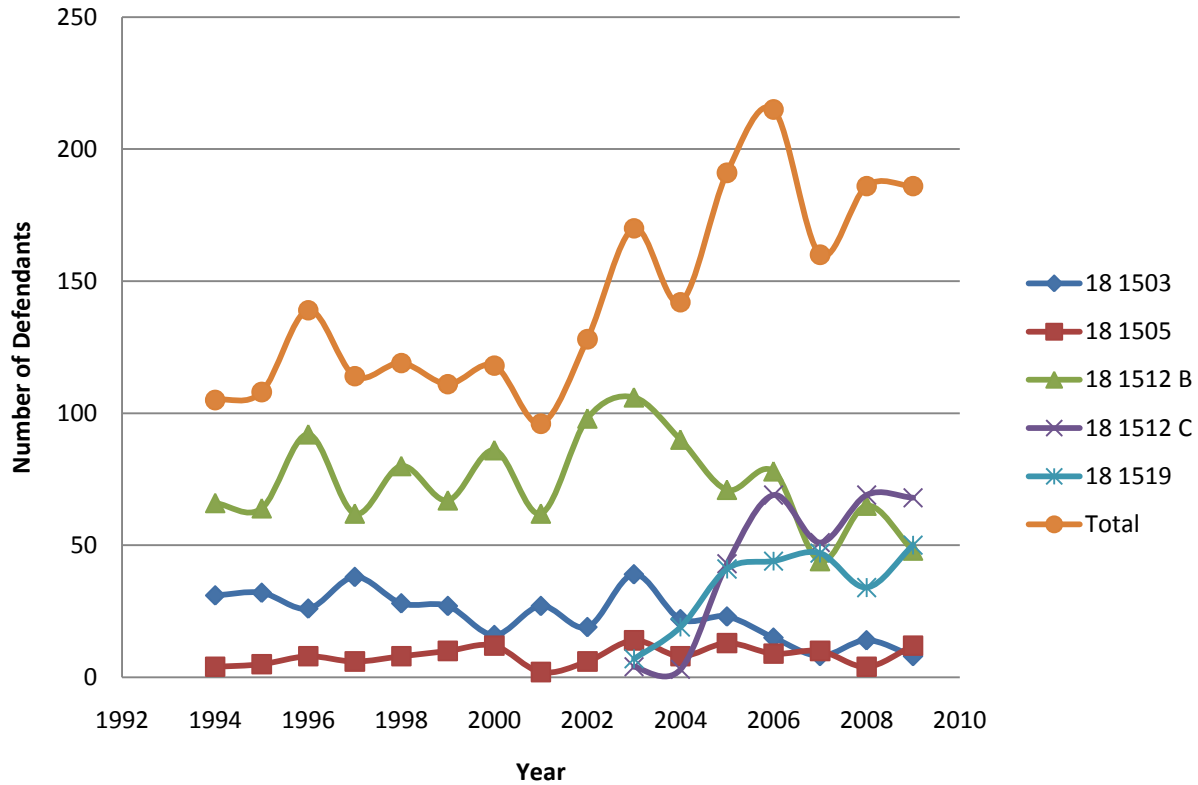
**Graph C:
Percent of Offenders in the Federal System for whom
Adminstration of Justice was the Primary Offense Category**



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

⁴² “Administration of Justice” offenses include “commission of offense while on release, bribery of a witness, failure to appear by defendant, contempt, failure to appear by material witness, *obstruction of justice*, payment of witness, perjury or subornation of perjury, misprision of a felony, and accessory after the fact.” See United States Sentencing Commission, *Soucebook*, Appendix A (2010) (emphasis added).

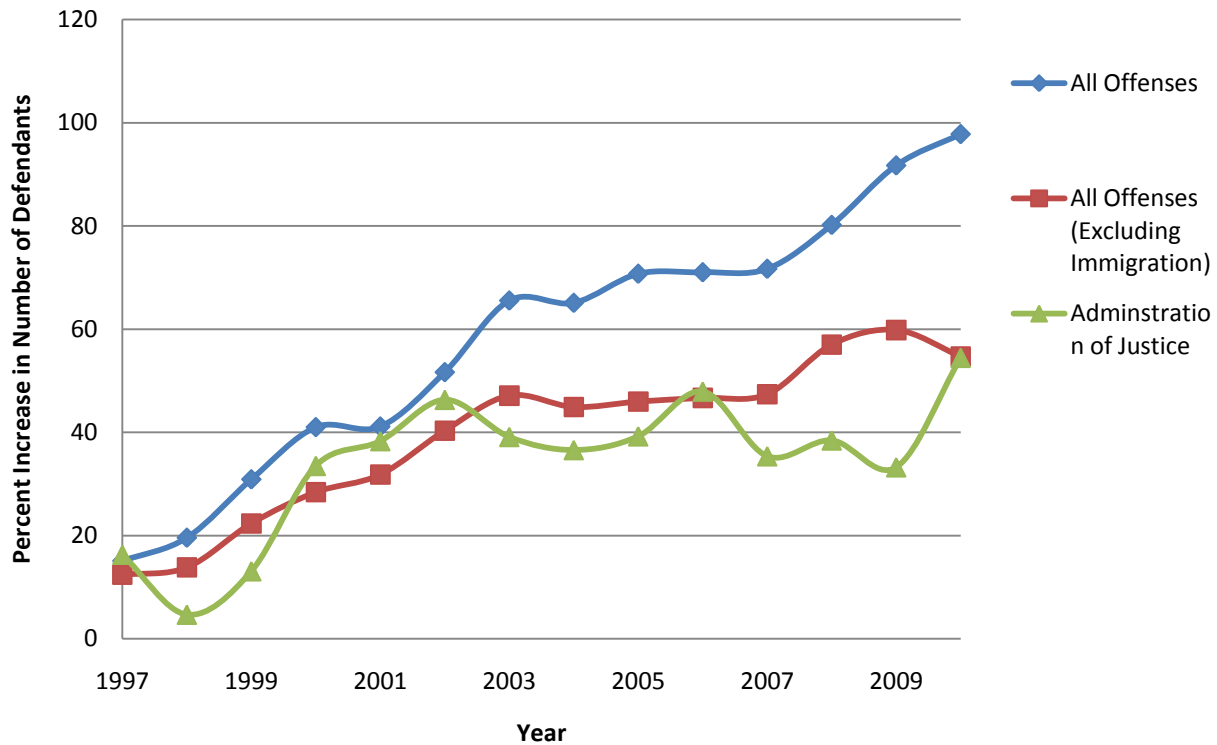
**Graph D:
Total Number of Defendants in Obstruction Cases Filed by
Year and Statutory Provision**



Two interesting observations flow from the statistical information regarding obstruction of justice prosecutions. First, the total number of prosecutions did increase after Sarbanes-Oxley. In 2002, there were 129 obstruction of justice prosecutions using the three pre-existing obstruction statutes – 18 U.S.C. sections 1503, 1505, and 1512(b). This number then increased to an average of 179 prosecutions a year using the three pre-existing obstruction of justice statutes plus the two new provisions – 18 U.S.C. section 1512(c) and 1519. This represents an increase of fifty prosecutions, which is an almost 40% increase. Viewed in isolation, therefore, the addition of two new broad obstruction of justice statutes appears to have succeeded in increasing the number of prosecutions in this area. Second, however, viewed in totality, the addition of fifty prosecutions a year nationwide as a result of the creation of two new statutes appears underwhelming and irreconcilable with the intent of the legislature. Consider, for instance, that in the same time period the total number of federal prosecutions per year grew by over 13,000. Further, note that as the number of prosecutions under 18 U.S.C. sections 1512(c) and 1519 grew, the number of prosecutions applying the older, more burdensome provisions, dropped. This implies that rather than bringing significant additional prosecutions using their new and broader tools, prosecutors simply applied the Sarbanes-Oxley provisions to defendants who would previously have been indicted under the old provisions. This likely occurred because, as compared to the pre-existing obstruction of justice statutes, the new provisions were easier to prove and contained lower burdens of proof.

Returning to the data regarding the number of prosecutions for administration of justice violations, it also appears questionable whether the above described increase in obstruction of justice prosecutions since 2002 was the result of the passage of the new Sarbanes-Oxley obstruction of justice statutes.⁴³

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



Graph E contains data regarding the percent change in the number of cases brought by the federal government each year in comparison to the number of cases brought in 1996. As illustrated by the graph, the total number of prosecutions has grown steadily over the last fifteen years. Interestingly, the growth in the total number of prosecutions by the federal government has accelerated at almost twice the speed of the growth in administration of justice prosecutions. If one removes immigration offenses from the data-set, an area that has seen exponential growth over the last decade and that may skew the data-set, one finds that obstruction of justice prosecutions still grew at a slower rate than prosecutions as a whole. Thus, while broader forces, including growing resources for the Department of Justice, have driven the absolute number of prosecutions in all categories higher over the last decade, obstruction of justice prosecutions appear to be lagging. This lag appears to have persisted despite the fact that Congress created two new obstruction of justice statutes in Sarbanes-Oxley in an effort to increase such prosecutions.

⁴³ Data regarding the percentage change in prosecutions for administration of justice offenses were utilized in Graph E instead of data regarding the percentage change in prosecutions for obstruction of justice. This was done because of the limited number of obstruction of justice cases each year as compared with the number of cases in the other data-sets within this particular graph.

The above data suggest that obstruction of justice offenses did not see a dramatic surge in focus or prosecutions as a result of the passage of Sarbanes-Oxley and the addition of two new obstruction of justice statutes. As a result, the creation of these new vague and overlapping provisions in an area already criminalized has been ineffective in achieving the goal of increasing white collar prosecutions as a deterrent to others. Further, this once again means that the primary “justification” offered in defense of this type of over-criminalization – that it leads to increased prosecutions and more deterrence – is based on a false assumption.⁴⁴

Conclusion

A preliminary review of data regarding the sentences received by mail and wire fraud defendants and the number of obstruction of justice prosecutions since the passage of Sarbanes-Oxley suggests that little has changed as a result of these legislative enactments. Defendants convicted of mail and wire fraud offenses are receiving average sentences that are not dramatically higher than during the pre-Sarbanes-Oxley period, and the slight increase in prison sentences for fraud offenses that has occurred is likely attributable to forces other than post-Enron statutory reforms. Further, the numbers of individuals charged with obstruction of justice has not risen dramatically despite the creation of two new offenses. In fact, when compared with all federal prosecutions during the same period, the government’s focus on obstruction of justice appears to have diminished since the collapse of Enron.

Based on these findings, the “justifications” advanced by some for ignoring the negative consequences that naturally flow from the over-criminalization of mail and wire fraud and obstruction of justice contained in Sarbanes-Oxley are hollow and unconvincing. These justifications rely on false assumptions regarding the relationship between increased statutory maximums and increased punishments for individuals and the relationship between expanding prosecutorial arsenals in areas already criminalized and increased levels of enforcement. Because the data simply do not support the accuracy of these assumptions, one is inevitably left

⁴⁴ This article does not mean to suggest that the proliferation of federal statutes over the last century did not impact the ability of the federal government to bring charges against defendants who would previously be outside the scope of federal jurisdiction or that over-criminalization more broadly does not contribute to the increase in America’s prison population. This article seeks only to address the impact of creating similar and overlapping statutes in an already criminalized area, such as what occurred with regard to obstruction of justice offenses, as opposed to the creation of laws in a previously uncriminalized field.

to grapple with the reality that these forms of over-criminalization, though less egregious at first glance, are just as significant as other more commonly discussed types of over-criminalization.⁴⁵ Further, these forms of over-criminalization serve to perpetuate the larger adverse phenomenon, while simultaneously offering none of their alleged beneficial results.⁴⁶

⁴⁵ See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223-24 (2007).

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

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

⁴⁶ Though outside the scope of this article, one must consider why the specific reforms in Sarbanes-Oxley discussed in this article failed to dramatically increase prison sentences or prosecution rates. In my 2006 article entitled *Plea Bargaining's Survival: Financial Crimes Plea Bargaining, a Continued Triumph in a Post-Enron World*, I examined more broadly the reforms that occurred following the collapse of Enron and, consistent with the findings herein, discovered that little had changed despite all of the law-making and publicity regarding the "war" on financial criminals. In considering why sentences and prosecutions were predominantly stagnant during the period, the article looked to plea bargaining.

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

Dervan, *Plea Bargaining's Continued Survival*, *supra* note 18, at 477; see also Lucian E. Dervan, *Over-Criminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Over-Criminalization*, -- J. OF LAW, ECONOMICS, AND POLICY -- (forthcoming 2011).