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ESSAY

YATES *v.* UNITED STATES: A CASE STUDY IN OVERCRIMINALIZATION

STEPHEN F. SMITH[†]

INTRODUCTION

In *Yates v. United States*,¹ the Supreme Court will decide whether tossing undersized fish overboard can be prosecuted under the Sarbanes–Oxley Act of 2002,² a law aimed at preventing massive frauds of the sort that led to the collapse of Enron and sent shock waves throughout the economy.³ Although the legal issue is narrow, the case has far-reaching significance. The *Yates* prosecution is a case study in the dangers posed by “overcriminalization”: the existence of multitudinous, often overlapping criminal laws that are so poorly defined that they sweep within their ambit conduct far afield from their intended target.

The Supreme Court should set an example in *Yates* of how courts should counteract overcriminalization through nuanced statutory construction. In particular, courts should resist the allure of specious “plain meaning” arguments and, in the many cases of textual ambiguity, exercise informed judicial discretion in light of the myriad potential dangers of expansive interpretations of criminal statutes. Unless the Court leads by example,

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¹ 134 S. Ct. 1935 (2014) (granting certiorari to review *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013)).

² Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

³ See HENRY N. BUTLER & LARRY E. RIBSTEIN, *THE SARBANES-OXLEY DEBACLE: WHAT WE’VE LEARNED; HOW TO FIX IT* 7-22 (2006) (discussing Sarbanes–Oxley as a product of the post-Enron “regulatory panic”).

prosecutors will continue to exploit poorly defined federal crimes to produce miscarriages of justice such as those that occurred in *Yates*.

I. *YATES* AS A TEXTBOOK EXAMPLE OF OVERCRIMINALIZATION

Yates has attracted attention because it involves an obvious misuse of the Sarbanes–Oxley Act to make a serious crime out of a minor regulatory infraction.⁴ The defendant, John Yates, was not a high-ranking corporate officer, nor was he an accountant or other professional charged with aiding corporations with meeting financial reporting requirements.⁵ He did not defraud anyone or assist in the commission of a fraud.⁶ To the contrary, until his conviction rendered him unemployable, Yates hired himself out as the captain of a commercial fishing boat operating in the Gulf of Mexico, and was sufficiently impecunious to qualify for representation by the federal public defender and to proceed in forma pauperis in the Supreme Court.⁷ Nonetheless, he was convicted under Sarbanes–Oxley—and thus faced a maximum punishment of *twenty years* in prison—for throwing back into the ocean some fish that were allegedly too small to be caught under federal regulations.⁸

One of the new offenses created by Sarbanes–Oxley—the one that resulted in Yates’s conviction—authorizes up to twenty years in prison for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with intent to obstruct a federal investigation.⁹ For federal prosecutors, the undersized fish Yates netted were “tangible objects,” and tossing them overboard “destroyed” or “concealed” them.¹⁰ Incredibly, the Eleventh Circuit not

⁴ See, e.g., Adam Liptak, *Justices to Weigh Finance Law as It Was Applied to Little Fish*, N.Y. TIMES (Apr. 28, 2014), http://www.nytimes.com/2014/04/29/us/politics/justices-to-weigh-fishermans-conviction-under-federal-finance-law.html?_r=0, archived at <http://perma.cc/CTV2-RAYG>.

⁵ See Brief for Petitioner at 4, *Yates v. United States*, No. 13-7451 (U.S. June 30, 2014) (explaining how Yates was employed as a commercial fisherman and captain of a fishing vessel).

⁶ See *Yates*, 733 F.3d at 1061-62 (recounting how Yates’s conviction arose solely because Yates allegedly instructed his crew to throw undersized fish overboard).

⁷ See *Yates v. United States*, 134 S. Ct. 1935 (2014) (granting Yates’s motion to proceed in forma pauperis).

⁸ See 18 U.S.C. § 1519 (2012) (imposing a twenty-year maximum prison sentence for “[d]estruction, alteration, or falsification of records in Federal investigations”); see also *Yates*, 733 F.3d at 1062-63 (citing 18 U.S.C. § 1519 as the basis for Yates’s conviction).

⁹ 18 U.S.C. § 1519.

¹⁰ See generally Brief for the United States at 14, *Yates v. United States*, No. 13-7451 (U.S. Aug. 19, 2014) (“The text, structure, purpose, and history of [18 U.S.C. § 1519] all confirm that Section 1519 prohibits the destruction of any kind of physical evidence—including fish—so long as the destruction occurs with the requisite obstructive intent.”).

only sustained that curious interpretation, but viewed it as *compelled* by the plain language of the statute.¹¹

For all the effort prosecutors expended to convict him in a four-day jury trial, however, Yates received a jail sentence more typical of those imposed in state traffic and misdemeanor courts. He was sentenced to a mere thirty days of incarceration, plus three years of supervised release.¹² Such a light sentence could have been imposed under 18 U.S.C. § 2232(a),¹³ a statute that, as compared to Sarbanes–Oxley, more readily applied to Yates’s conduct. Nonetheless, prosecutors insisted on a conviction under section 1519 as well.

The Eleventh Circuit could have rejected the Justice Department’s overreach. Unfortunately, however, it endorsed the curious use of Sarbanes–Oxley to regulate the catch-and-release of undersized fish. The court’s analysis of the statute, to put it charitably, was unbelabored, amounting to one short paragraph concluding that “‘tangible object,’ as § 1519 uses that term, unambiguously applies to fish.”¹⁴ This issue, which the panel found capable of such cursory treatment, attracted the Supreme Court’s attention, suggesting that the lower court missed something major—as indeed it did.

It is a gross oversimplification to view the interpretive question in *Yates* as whether a fish is a “tangible object.” It is a commonplace of statutory construction that words draw their meaning from context.¹⁵ The Eleventh Circuit never asked if treating a fish as a “tangible object” *for purposes of section 1519* makes sense.

Putting the phrase “tangible object” back into its statutory context yields a result diametrically opposed to the Eleventh Circuit’s. In keeping with the obvious legislative purpose of cracking down on accounting firms and other outside professionals who aid and abet fraudulent financial reporting by corporations,¹⁶ the law applies to “record[s], document[s], or tangible object[s]” *in which it is possible to “make[] a false entry.”*¹⁷ Because “mak[ing] a

¹¹ See *Yates*, 733 F.3d at 1064 (concluding that “tangible object” “unambiguously” applies to fish).

¹² *Id.* at 1063.

¹³ 18 U.S.C. § 2232(a) (2012) (criminalizing the destruction of property “before, during, or after any search for or seizure of property” for the purpose of preventing the government from taking possession of that property).

¹⁴ *Yates*, 733 F.3d at 1064.

¹⁵ See, e.g., *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) (explaining that “[t]he construction of statutory language often turns on context”).

¹⁶ See generally *supra* note 3 and accompanying text.

¹⁷ 18 U.S.C. § 1519 (2012) (emphasis added). Section 1519 provides, in full:

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

false entry” applies to “records, documents, or tangible objects,” each of the object terms is properly read to apply *only* to items in which making a “false entry” is possible.

There are “tangible objects” in which, like “records” and “documents,” it is possible to make a “false entry.” Computer hard drives and compact discs, for example, come readily to mind. Fish, however, are most certainly not among them.

By ignoring the context in which “tangible object” appears, the Eleventh Circuit disregarded settled principles of statutory construction. As the Supreme Court has admonished, “a word is known by the company it keeps (the doctrine of *noscitur a sociis*).”¹⁸ Strict adherence to this rule is necessary “to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’”¹⁹

Noscitur a sociis called for a narrow interpretation of the statute in *Yates*. Reading “tangible objects” as limited to objects, similar to records and documents, in which data are stored reunifies “tangible objects” with “records” and “documents.” It similarly restores the proper use of section 1519 for preventing the fraudulent accounting practices with which Sarbanes–Oxley was so obviously concerned.²⁰ It is little wonder, then, that the appeals court gave the statutory context the back of the judicial hand.

The context in which “tangible object” appears is relevant in another respect as well. “Under the principle of *eiusdem generis*, when a general term follows a specific one, the general term should be understood as a reference

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.

Id.

¹⁸ *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

¹⁹ *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

²⁰ According to the Senate Report to the bill which became section 1519, “[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.” S. REP. NO. 107-146, at 15 (2002). Thus, section 1519 sought to guarantee that “greed does not succeed” by “ensur[ing] that evidence—both physical and testimonial—is preserved and available in fraud cases,” allowing the courts to hold those responsible for corporate frauds civilly and criminally liable. *Id.* at 2. The use of legislative history is controversial in some quarters, but the Supreme Court has repeatedly endorsed the use of legislative aids to statutory interpretation, especially where, as here, it confirms the meaning of the text. See generally 2A NORMAN J. SINGER & SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:1 (7th ed. 2014) (explaining that the Supreme Court has endorsed legislative history as an extrinsic aid to statutory interpretation).

to subjects akin to the one with specific enumeration.”²¹ This principle fully applies to section 1519.

“Tangible object” does not appear in a vacuum but is a catch-all phrase included within an enumeration that includes “documents” and “records.”²² “Documents” and “records” have one common feature: they can contain or be used to store financial data. That is why Congress, concerned with preserving the evidence necessary to hold accountable perpetrators of corporate or financial frauds, made it a crime to destroy or conceal documents and records. Under *ejusdem generis*, “tangible object” should be limited to objects like documents and records (but unlike fish), which can be used to store financial data.

The Eleventh Circuit also violated the “‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”²³ In its view, the phrase “tangible object” includes anything “‘having or possessing physical form.’”²⁴ This broad interpretation renders “records” and “documents” in section 1519 entirely redundant.

After all, any “record” or “document” would be a “tangible object,” as the Eleventh Circuit interprets the latter phrase. In that event, “tangible object” leaves no work for “records” and “documents” to do. Only one interpretation of “tangible object” leaves room for “records” and “documents” to have independent meaning: “tangible object” must encompass only objects, other than records or documents, in which financial data are stored. Unsurprisingly, this interpretation of “tangible object” does not include within its ambit fish (of any size) or any other objects not used to store data.

Finally, the Eleventh Circuit overlooked yet another indication that Congress intended a far narrower scope for “tangible object” in section 1519: the provision’s title. The title, which is properly consulted to shed light on statutory meaning,²⁵ leaves no doubt that section 1519 was intended to prevent accounting firms and other entities involved in corporate financial reporting from aiding corporations in perpetrating or concealing frauds on the public.

²¹ *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991).

²² *See* 18 U.S.C. § 1519.

²³ *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

²⁴ *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013) (quoting BLACK’S LAW DICTIONARY 1592 (9th ed. 2009)), *cert. granted*, 134 S. Ct. 1935 (2014).

²⁵ *See, e.g., Fla. Dep’t of Revenue v. Picadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (holding that “statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute” (internal quotation marks omitted)).

Section 1519 is titled “Destruction, alteration, or falsification of records in Federal investigations and bankruptcy.”²⁶ This title makes it clear that section 1519 was aimed to penalize the falsification and destruction of records like those in “the cover up” of Enron’s duplicity, as the Senate Report described it.²⁷ To say the least, the Eleventh Circuit’s expansive interpretation of “tangible objects” to allow enforcement of federal fishing regulations does not sit comfortably with the more limited purposes indicated by the title and language of section 1519.

The Eleventh Circuit’s interpretive problems do not end with “tangible objects.” The conduct for which Yates was convicted—namely, casting previously caught undersized fish overboard—does not equate with “destroying” the fish. The fish are “destroyed” when they are killed, not when they are thrown back into the sea (which, after all, is their natural habitat). Without proof that Yates actually killed the fish—and did so *after* having been warned that they would be seized by federal authorities in port—Yates could not properly be convicted for “destroying” the released fish.

Also, on the particular facts of *Yates*, throwing the undersized grouper overboard after being ordered to retain them for seizure may not constitute “concealing” the fish from federal investigators. After all, the federal field officer who had boarded Yates’s ship at sea *already* had measured the fish and, rightly or wrongly, determined they were undersized.²⁸ The evidence of undersized fish was obtained out at sea, before the ship returned to port, and the later disposal of the fish did not “conceal” anything from the government, which already had the evidence necessary to charge Yates with a violation of federal fishing regulations.

²⁶ 18 U.S.C. § 1519.

²⁷ S. REP. NO. 107-146, at 4, 8, 11 (2002). The Senate Judiciary Committee found that additional legislation was necessary because, “[i]nstead of preserving records relevant and material to the later investigation of Enron or any private action against Enron,” Enron’s accountant, Arthur Anderson LLP, engaged in “a wholesale destruction of documents,” efforts which “extended beyond paper records and included efforts to purge the computer hard drives and E-mail system of Enron related files.” *Id.* at 2-4 (internal quotation marks omitted).

²⁸ See *Yates*, 733 F.3d at 1061 (recounting how Officer Jones measured the fish before instructing Yates to retain them for seizure in port).

II. THE EFFECTS OF CARELESS INTERPRETATION IN AN ERA OF OVERCRIMINALIZATION

It would appear that the Eleventh Circuit fell prey—as federal courts often do²⁹—to the view that they should expand criminal statutes whenever necessary to convict blameworthy offenders. This, however, is not the proper role of federal courts in criminal cases. Their role is to ensure that offenders are *not* convicted in federal court unless their conduct falls squarely within the scope of a criminal law duly passed by Congress, and to resolve any doubts about the meaning or applicability of a criminal statute in favor of individual liberty, as the venerable rule of lenity demands.³⁰

By departing from their proper role, as the Eleventh Circuit did in *Yates*, and by overlooking the virtues of interpreting criminal statutes narrowly, the federal courts have exacerbated the problems associated with overcriminalization. They have done so by “consistently ma[king] federal criminal law broader and more severe . . . than even Congress may have intended.”³¹ The Eleventh Circuit’s approach is no aberration, but rather reflects how federal judges all too often perform their interpretive tasks in criminal cases.³²

Because of the Eleventh Circuit’s misinterpretation of section 1519, the statute now reaches morally blameless conduct. Even though, as the court of appeals no doubt understood, it is blameworthy to discard fish when properly instructed by a federal officer to retain them for seizure, the crime of “destroying” or “concealing” fish as “tangible objects” is no longer limited to blameworthy conduct. Rather, discarding undersized fish is now exposed to prosecution and conviction under section 1519 even when done innocuously.

To see why, it is important to understand that Yates’s actions were blameworthy only because he had been instructed to retain the fish for

²⁹ See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 893-96 (2005) (discussing “the puzzling practice of courts taking ambiguous criminal statutes and interpreting them expansively”).

³⁰ See *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (Ginsburg, J., concurring) (“In the interpretation of a criminal statute subject to the rule of lenity, where there is room for debate, one should not choose the construction that disfavors the defendant.” (internal quotation marks omitted)).

³¹ Smith, *supra* note 29, at 884. Congressman Michael Oxley, co-sponsor of the law at issue in *Yates*, argued in an amicus brief that this phenomenon is precisely what happened in the *Yates* prosecution. See Brief for the Honorable Michael Oxley as *Amicus Curiae* in Support of Petitioner at 1-2, *Yates v. United States*, No. 13-7451 (U.S. July 7, 2014) (opposing “the Government’s attempt to expand [Sarbanes-Oxley’s anti-shredding provision] to reach conduct far beyond anything that Congress ever anticipated or intended”).

³² See generally Smith, *supra* note 29, at 897-925 (citing examples of how courts routinely expand criminal laws, in derogation of the rule of lenity, when blameworthy conduct is involved).

seizure when he arrived back at port. Imagine, however, a more routine catch-and-release operation. Presumably a fisherman would not know that he has caught undersized fish until *after* he has reeled them into his boat. A law-abiding person would then naturally seek to ensure that all his fish were of proper size and otherwise in compliance with applicable legal requirements.

If a hapless fisherman discovers on his own (and not during the type of search by a federal officer that occurred in *Yates*) that he has caught undersized fish, he would quite properly cast the undersized fish back overboard. That innocent act of trying to comply with the law, however, would constitute “destroying” or “concealing” a “tangible object” under the Eleventh Circuit’s interpretation. The federal government would thus be able to charge and convict the law-abiding fisherman for the morally blameless act of releasing undersized fish on his own initiative. This result is one the Supreme Court has wisely strived to avoid in construing criminal statutes.³³ To prevent the blameworthy *Yates* from slipping through the cracks, the government, with the blessing of the court of appeals, turned section 1519 into a trap for the unwary fisherman who returns undersized fish to the sea in a commendable (but now criminal) effort to comply with federal regulations.

Moreover, the Eleventh Circuit’s broad reading of section 1519 dramatically ratchets up the potential punishment for *Yates*’s conduct, in violation of the principle that the punishment should “fit” the offender’s crime. Possession of undersized fish is not itself a crime; it is only a civil violation punishable by a small fine or a brief suspension of the culprit’s fishing license.³⁴ Thanks to the Justice Department’s misuse of section 1519, this regulatory infraction is now a serious felony, on the order of the widespread financial frauds which motivated passage of the Sarbanes–Oxley Act. A wave of the judicial wand has thus transformed a minor regulatory offense into a major felony.

As if that were not bad enough, the Eleventh Circuit’s interpretation overrode Congress’s own grading of an offense which, unlike section 1519, could plausibly apply to *Yates*’s conduct. As federal prosecutors knew (because they charged him under it, in addition to section 1519), there was a

³³ See generally *id.* at 889–90 (noting how the Supreme Court “take[s] moral innocence into account in construing the actus reus of federal crimes”).

³⁴ See *Southeast Region Magnuson–Stevens Act Penalty Schedule*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (last updated June 13, 2003), archived at <http://perma.cc/T73E-7ATC> (recommending fines of \$500–\$50,000 and a maximum forty-five day fishing license suspension for first-time violations regarding the size, condition, or quantity of fish); see also 16 U.S.C. §§ 1857(1)(A), (G), 1858(a), (g) (2012) (punishing violations of fishing laws with civil penalties and permit sanctions).

federal criminal law specifically applicable to Yates's conduct. That law is 18 U.S.C. § 2232(a), which makes it a crime "before, during, or after any [authorized] search for or seizure of property" to "destroy[]" or "dispose[]" of" property "for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody."³⁵

Had the Eleventh Circuit required the government to proceed, in cases such as Yates's, under section 2232(a), a far lower maximum punishment would have applied. The maximum sentence under section 2232(a) is a mere five years,³⁶ one-quarter of the twenty-year maximum that section 1519 allows.³⁷ Expanding the scope of section 1519 serves merely to ratchet up the maximum punishment Congress prescribed for Yates's specific conduct—disposing of property to prevent its seizure by federal enforcement authorities—in favor of a much-higher maximum that Congress enacted to punish frauds on financial markets. With such a powerful club added to its already formidable arsenal—not by Congress, mind you, but rather by the Eleventh Circuit—the Justice Department will have yet another potent weapon with which to extract guilty pleas from the future Yateses of the world.

This, too, is a common, albeit regrettable, consequence of the federal courts' reluctance to interpret criminal statutes narrowly. In a regime of overcriminalization, considerable redundancies exist throughout the criminal code.³⁸ Not surprisingly, expansive interpretations of fraud and other generic statutes often swallow up criminal conduct for which Congress elsewhere provided lesser penalties in more specific statutes or trigger otherwise inapplicable statutory mandatory minimums.³⁹ This serial overriding of legislative grading of offenses translates directly into more prosecutorial power to extract guilty pleas—and into more sentencing power for prosecutors to use to drive up the punishment Congress prescribed for particular offenses. In a regime where more than ninety-five percent of federal defendants plead guilty,⁴⁰ the last thing we need is even more prosecutorial power.

³⁵ 18 U.S.C. § 2232(a) (2012).

³⁶ *Id.*

³⁷ *Id.* § 1519.

³⁸ See, e.g., Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 565 (2012) (describing the "enormous overlap across federal criminal statutes" as one of the "main problem[s] with overcriminalization").

³⁹ See generally Smith, *supra* note 29, at 908-25 (examining prosecutions under the Racketeer Influenced and Corrupt Organizations Act, the Hobbs Act, and mail and wire fraud statutes as examples of prosecutors exploiting statutory redundancies to drive up penalties).

⁴⁰ LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>, archived at <http://perma.cc/7J5E-6GX4>.

CONCLUSION

Yates gives the Supreme Court the opportunity to make clear that courts should take seriously the principle that federal criminal statutes should be construed narrowly, even if the particular offenders before the court are, to some degree, blameworthy. Otherwise, the sky is the limit once prosecutors deem a defendant a bad actor, a regime that results in a presumption that criminal statutes will be broadly construed, in violation of society's "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."⁴¹

Nevertheless, courts need not fully embrace the rule of lenity to start making serious inroads on overcriminalization. Courts may retain the flexibility to expand ambiguous criminal statutes *if* they carefully consider the consequences of expansive interpretations in particular contexts. If, as in *Yates*, a broad reading would expose morally blameless conduct to punishment, a narrow interpretation is appropriate.

Moreover, a narrow interpretation may be warranted even if a criminal statute, as broadly construed, would not reach any morally blameless conduct. *Yates* gives us a stark example: allowing prosecutors to prosecute under 18 U.S.C. § 1519 for casting overboard undersized fish serves no purpose, except to increase the penalty for possession of undersized fish from administrative sanctions to felonies, and to ratchet up the punishment authorized by Congress for disposing of property targeted for government seizure from five years under 18 U.S.C. § 2232(a) to twenty years under 18 U.S.C. § 1519. If legislative supremacy in criminal law is to mean anything, prosecutors cannot be permitted an end-run around legislative grading decisions, one of the most basic policy determinations a legislature makes in creating crimes.⁴²

If courts pursue the interpretive strategies outlined here, they will at last be part of the solution to the problem of overcriminalization. As things now stand, however, courts are part of the problem, and a major one at that. This has to change. *Yates* provides a golden opportunity for the Supreme

⁴¹ United States v. Bass, 404 U.S. 336, 347-48 (1971) (quoting HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 209 (1967)); see also Smith, *supra* note 29, at 925-30 (explaining that the default rule in federal criminal cases is now closer to a "rule of severity" than a rule of lenity).

⁴² For an extensive argument about how and why to restore proportionality to federal criminal law, see generally Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 141-55 (2009), and Smith, *supra* note 29, at 930-49.

Court to chart a path toward overcriminalization reform through more sensible approaches to the interpretation of federal criminal laws.

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