

## THE FEDERAL CRIMINAL “CODE”: RETURN OF OVERFEDERALIZATION

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The federal criminal “code”—to the extent one can call the United States’ sprawling and disorganized mass of criminal legislation and regulations a “code”—is a disgrace. In particular, the United States has overcriminalized and overfederalized in the realm of criminal law.<sup>1</sup> A recent article by Susan Klein and Ingrid Grobey in the *Emory Law Journal* argues that overfederalization is not a problem.<sup>2</sup> This Essay attempts first to present the material facts about which both sides of the debate agree. Then, it explains the basis of my fundamental disagreement with those who believe the “overfederalization” claim is overblown.

Fact 1: No definitive count of federal crimes is extant, and such a count is probably not possible without too much work to make the task worthwhile. Even Professors Klein and Grobey deem a definitive count “an impossible task.”<sup>3</sup> The latest count is 4,000 criminal statutes,<sup>4</sup> but no one actually knows how many criminal prohibitions exist, in part because Congress regularly delegates to federal agencies the authority to promulgate regulations implementing legislation.<sup>5</sup> Congress

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1. See generally Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643 (2006).

2. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-federalization of Criminal Law*, 62 EMORY L.J. 1 (2012).

3. *Id.* at 13.

4. See JOHN S. BAKER, JR., THE FEDERALIST SOC’Y FOR LAW & PUB. POLICY STUDIES, MEASURING THE EXPLOSIVE GROWTH OF FEDERAL CRIME LEGISLATION 3 (2004), <http://fedsoc.server326.com/publications/practicegroupnewsletters/criminallaw/crimreportfinal.pdf> [hereinafter FEDERALIST REPORT].

5. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, THE FEDERALIZATION OF CRIMINAL LAW 9–10 & n.11, app. C (1998),

often prospectively provides that when agencies finally issue the regulations, they can be enforced criminally.<sup>6</sup> Some estimate that federal agencies have generated hundreds of thousands of criminally-enforceable regulations.<sup>7</sup>

Fact 2: The undeniable trend is towards even more criminal legislation and criminally-enforceable regulations. Thus, one ABA Task Force determined that “[m]ore than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.”<sup>8</sup> A report published by the Federalist Society noted that the explosive growth in federal crimes has continued unabated since the ABA Report. I concluded that the number of statutory provisions susceptible to criminal enforcement increased by one-third between 1980 and 2004.<sup>9</sup>

Fact 3: Those who argue that overfederalization is not a problem point out that, despite the ever-increasing federal criminal “code,” the allocation of federal and state law enforcement has been stable for quite some time.<sup>10</sup> Between two and five percent of all criminal cases are federal, and between ninety-five and ninety-eight percent are state, a statistic that has been fairly constant.<sup>11</sup> It should be noted, however, that the absolute number of state *and* federal cases has increased. As Professors Klein and Grobey document, “[t]he number of federal criminal prosecutions has grown steadily, with little fluctuation, since 1980, at a rate of about 1,500 additional cases per year.”<sup>12</sup> Thus, the num-

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[http://www.americanbar.org/content/dam/aba/publishing/criminal\\_justice\\_section\\_newsletter/crimjust\\_pubs\\_catalog\\_fedcrimlaw1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_pubs_catalog_fedcrimlaw1.authcheckdam.pdf) [hereinafter ABA TASK FORCE REPORT].

6. See, e.g., Klein & Grobey, *supra* note 2, at 28 (“An enormous number of new regulatory crimes were enacted in the period 1980–2011, so many that we were unable to count even a fraction of them . . .”).

7. See, e.g., Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2441–42 (1995) (estimating that as of the mid-1990’s there were 300,000 criminally enforceable regulations on the books).

8. ABA TASK FORCE REPORT, *supra* note 5, at 7.

9. See FEDERALIST REPORT, *supra* note 4, at 3, 8. Professors Klein and Grobey do not seem to take issue with this, but they note that “the rate of enactment of frequently used statutes has not significantly increased since federalism complaints began.” Klein & Grobey, *supra* note 2, at 13 (emphasis added).

10. See Klein & Grobey, *supra* note 2, at 5, 36–37.

11. *Id.* at 36–37.

12. *Id.* at 16.

ber of federal criminal filings more than doubled from 1964 through 2011 despite a significant overall decline in crime rates.

Fact 4: Resource constraints mean the federal government can only bring a limited number of cases, no matter the breadth of the "code."<sup>13</sup> Professors Klein and Grobey rightly point out that about eighty percent of all federal cases fall into just four offense categories: drugs, immigration, guns, and fraud.<sup>14</sup> Of course, this means that twenty percent of federal resources are being devoted to other areas.

Fact 5: The number of regulatory violations pursued by the Department of Justice (DOJ) has declined from seven percent of the federal docket in 1980 to two percent in 2011.<sup>15</sup> In real numbers, this was a decrease from 2,925 cases in 1980 to 2,171 in 2011.<sup>16</sup>

In reliance on these facts, those who argue that over-federalization concerns are exaggerated contend first that the overabundance of federal legislation is not a problem because prosecutors ignore the overwhelming majority of these statutes.<sup>17</sup> Federal prosecutors can bring only a small number of cases; by overwhelmingly focusing on four categories of federal charging priorities, they have left the federal-state balance unaltered.<sup>18</sup> Second, where there are concededly problems with

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13. *Id.* at 15 ("The criminal code might be potentially infinite, but a prosecutor's time and resources are both finite.").

14. *Id.* at 6.

15. *Id.* at 28.

16. *Id.*

17. *Id.* at 7 (arguing that the "explosion in federal criminal law" is "largely irrelevant to charging decisions" because many of the crimes are "virtually ignored or overlooked by prosecutors"); *id.* at 36 ("The plethora of federal criminal statutes on the books is largely irrelevant to federal law enforcement activities, prosecutorial charging decisions, and the constituency of the federal prison population.").

18. *Id.* at 5-7. On average, ninety-five percent or more of all federal criminal cases end with a guilty plea. In 2010, the plea rate was a shocking 97.4%. *Id.* at 10. Professors Klein and Grobey argue that the plea rate also indicates that prosecutors are being efficient—that is, they are only bringing "rock-solid" cases, *id.* at 10, so society need not worry about the prosecutorial discretion that such a wide variety of statutes presents the DOJ. Although most guilty pleas are warranted, it is undeniable that sometimes defendants plead out for reasons other than the "rock-solid" nature of the DOJ's case. See, e.g., H. Lee Sarokin, *Why Do Innocent People Plead Guilty?*, HUFFINGTON POST, (May 29, 2012, 4:33 PM) [http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas\\_b\\_1553239.html](http://www.huffingtonpost.com/judge-h-lee-sarokin/innocent-people-guilty-pleas_b_1553239.html). Sometimes, even innocent defendants plead guilty. See *When the Innocent Plead Guilty*, INNOCENCE PROJECT, [http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php) (last

the code—such as the vagueness of many provisions and the disturbingly low mens rea requirements, particularly in the regulatory crimes area—the judiciary can correct them.<sup>19</sup> Thus, Professors Klein and Grobey argue, federal judges can be counted on to fix the drafting issues that prosecutors—invested with too much discretion and a vast and undisciplined code—otherwise might exploit.

So what is the problem, if there is one?

First, there is a cost to a massively overabundant, overlapping federal criminal “code” even if prosecutors are not enforcing it. Aside from the peculiarity of having prosecutors create essentially a code within a code, ignoring the vast majority of what Congress has deemed culpable, this state of affairs carries real and very serious costs.

At the most basic level, having thousands of code sections regularly ignored undermines the credibility of the criminal sanction. A criminal sanction carries moral stigma,<sup>20</sup> but that stigma is lost if the prohibition is perceived as trivial or completely disregarded.

On a more practical level, most agree that the proliferation of statutes results from Congress’ proclivity for responding to events by just passing new statutes—regardless of whether they are redundant or not—or just elevating the penalties for existing crimes. As the ABA Task Force on Federalization of Criminal Law put it:

New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need. Observers have recognized that a crime being considered for federalization is often “regarded as appropriately federal because it is serious and not because of any structural inca-

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visited Dec. 2, 2013). In the area of corporate crime, companies will agree to whatever disposition DOJ offers—regardless of “guilt”—because they feel they have no choice given the overbreadth of the respondeat superior standard of liability, the scope of the criminal code, and the huge penalties that can be assessed. See generally Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. (forthcoming 2013).

19. Klein & Grobey, *supra* note 2, at 9–10, 80.

20. *Mens rea: The Need for a Meaningful Intent Requirement in Federal Criminal Law: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 12 (2013) (statement of Dr. John Baker).

capacity to deal with the problem on the part of state and local government." There is widespread recognition that a major reason for the federalization trend—even when federal prosecution of these crimes may not be necessary or effective—is that federal crime legislation is politically popular.<sup>21</sup>

This knee jerk reaction means that Congress often does not respond with meaningful consideration—that is politically risky—of what other avenues may be appropriate to deal with the underlying problem. Adding to the "code" is an easy, politically expedient out, but it obviates more serious, judicious, and probably more effective, responses to society's ills.

Our vast and disorganized mass of criminal statutes and regulations by definition means that we cannot claim a rational and efficient criminal code covering that which ought to be criminally culpable and leaving alone that which ought not. For example, it was not until President Kennedy was shot that we realized that the assassination of a President was not a federal offense.<sup>22</sup> In addition, Congress neglected to specify the purposes of punishment—critical for rational sentencing—until 1984.<sup>23</sup>

Such a vast code is also inefficient. The mess that is the obstruction chapter illustrates this well.<sup>24</sup> One must feel for federal prosecutors; only those who spend weeks trying to work through the complexities of the obstruction statutes have a shot at getting it right. Unfortunately, most prosecutors do not have that time. Indeed, one commentator estimated that eliminating the time that criminal justice personnel spend working through, and litigating about, confusions in the criminal code would reduce their workload by ten percent. This, in turn, would allow them to pursue an additional 4000 cases per year.<sup>25</sup>

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21. ABA TASK FORCE REPORT, *supra* note 5, at 14–15 (quoting Franklin E. Zimring & Gordon Hawkins, *Toward a Principled Basis for Federal Criminal Legislation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 20–21 (1996)).

22. See Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 45, 58 (1998) (referring to Pub. L. 89-141, 79 Stat. 580 (1965) (codified as 18 U.S.C. § 1751 (1970))).

23. Sentencing Reform Act of 1984, Pub. L. 98-473, § 212, 98 Stat. 1837, 1989–90 (1984) (codified at 18 U.S.C. § 3553(a) (1988)).

24. See generally O'Sullivan, *supra* note 1.

25. Gainer, *supra* note 22, at 85; see also Robert H. Joost, *Federal Criminal Code Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195, 197 (1997) (quoting Attorney General William French Smith as testifying in 1981 that "[w]e have been laboring for

The sprawling nature of the code also breeds incoherence and normative problems. The statutory maximums for fleeing from enforcement agents at an Immigration and Naturalization Service checkpoint above the speed limit is five years<sup>26</sup>—the same penalty prescribed for female genital mutilation of girls under eighteen.<sup>27</sup> The glaring lack of proportionality is a real problem, but a legislator would never recognize it if he has over 4,000 statutes to review and a desire to enact yet more legislation.

Most importantly, this inflated code gives prosecutors enormous power to pick and choose among defendants. This discretion creates a concern regardless of stated enforcement priorities or federal-state balance. As Professor William Stuntz observed, “Too much law amounts to no law at all: when legal doctrine makes everyone an offender, the relevant offenses have no meaning independent of law enforcers’ will. The formal rule of law yields to the functional rule of official discretion.”<sup>28</sup> Further, the extraordinary discretion that the sheer size and scope of the federal code gives law enforcement is exacerbated by the vagueness and elasticity of many of these prohibitions.<sup>29</sup>

Though federal prosecutors normally and regularly use their discretion appropriately, the breadth of the code gives prosecutors with a political or personal agenda a wealth of choices to make cases against those they do not like.<sup>30</sup> And sometimes prosecutors do abuse their discretion. Again, according to Professor Stuntz, “[D]iscretion and discrimination travel together.”<sup>31</sup> Outsized law enforcement discretion, on the state and

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decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources” (alteration in original)).

26. 18 U.S.C. § 758 (2006).

27. *Id.* § 116.

28. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 3 (2011).

29. I agree with Professors Klein and Grobey that vagueness, overbreadth, and mens rea problems with the “code” are not, strictly speaking, problems of “over-federalization.” Like them, however, I will deal with these issues because they are part of the overall problem. In particular, they relate to the larger issue of over-criminalization, which I believe to be an issue as important as the appropriate federal-state balance in law enforcement. *See, e.g., O’Sullivan, supra* note 1.

30. *See, e.g., id.* at 655–665; FEDERALIST REPORT, *supra* note 4, at 9–10.

31. *See STUNTZ, supra* note 28, at 4, *passim*.

federal levels, has resulted in the alarming and disgraceful overincarceration of African Americans.<sup>32</sup>

Thus, the problem is not only that there are too many statutes, but also that the statutes are poorly crafted. In particular, two deficiencies are present: (1) a lack of mens rea in many "public welfare" criminalized regulations; and (2) the vagueness and overbreadth of many of the statutes on the books. This Essay will address the latter. When a sovereign has vague or overbroad statutes, it has functionally delegated the responsibility to identify or limit their contours to prosecutors and judges. Congress therefore escapes hard and necessary political choices and has more time to pass yet more legislation.

"Honest services" fraud is the poster child for the problems that attend vague statutes. No federal statute generally outlaws state and local corruption.<sup>33</sup> Yet prosecutors wanted, understandably, to go after corrupt state officials—especially where the corruption spread to state prosecuting authorities. So, federal prosecutors turned to their old workhorses, the mail<sup>34</sup> and wire fraud statutes,<sup>35</sup> and created a theory of fraud premised not on actual harm to property, but rather on harm to intangible rights.<sup>36</sup> Essentially they told the citizenry, "You have an intangible right to the honest services of your representatives—state, local, and federal. And if somebody bribes your representative, that person has deprived you of that right to honest services. If that person does not tell you, the citizens, about the bribe, then that nondisclosure of this material information is fraud." Federal courts bought this theory, not only when politicians were inarguably corrupt, such as in bribery cases, but also when their activities were, though troubling to federal prosecutors, *not* illegal under state or local law.<sup>37</sup>

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32. See, e.g., *id.* at 4–5.

33. See Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 HASTINGS L.J. 699, 704–05 (2000). Where the bribery concerns programs receiving federal funds, however, prosecutors may proceed under 18 U.S.C. § 666 (2006).

34. 18 U.S.C. § 1341 (2006).

35. *Id.* at § 1343.

36. See Beale, *supra* note 33, at 705; O'Sullivan, *supra* note 1, at 661.

37. O'Sullivan, *supra* note 1, at 661.

In time, this jurisprudence expanded to encompass private persons who defraud their private employers of the employers' right to their honest services.<sup>38</sup> Thus, if an individual works for a private employer, and the private employer tells the individual that she may not use the employer's computer for personal purposes, and the employee buys a pair of shoes on eBay on company time, that could be a violation of the duty to provide honest services. If the employee fails to disclose it, she may have committed a twenty-year federal fraud felony. Obviously, this theory of fraud gives prosecutors a lot of discretion in going after government officials who may be acting legally under local law and private persons who are guilty only of violating their employers' employment manuals. In short, if federal prosecutors identify somebody they do not like, it was pretty easy to make a case against virtually anyone on an honest services theory.

All of this brings us to the second part of Professor Klein's and Grobey's defense of the *status quo*: To the extent that there are problems with the "code"—particularly vagueness and overly low mens rea requirements—judges can and will fix those issues.<sup>39</sup> The first response must be: This is not a job for judges. There are many reasons for this. Judge-made law is by its nature retroactive. Thus, common law adjudication precludes effective notice of that which is criminal—the most fundamental requirement of due process and the principle of legality. Further, separation of powers principles dictate that the peoples' representatives, not unelected, politically unaccountable judges, should make law.

Additionally, judges have a limited ability to second-guess the charging choices of prosecutors.<sup>40</sup> Indeed, unless there is demonstrable evidence that prosecutors are violating defendants' constitutional rights by charging as they have, courts can-

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38. See, e.g., *Skilling v. United States*, 130 S. Ct. 2896 (2010); *Black v. United States*, 130 S. Ct. 2963 (2010) (vacating and remanding in light of *Skilling*).

39. See Klein & Grobey, *supra* note 2, at 80.

40. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) ("In our system, 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 discretion."); see also *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 381–82 (1982).



not even entertain discovery to vindicate equal protection and other fundamental norms.<sup>41</sup> In short, the idea that judges will contain prosecutorial excesses in the exercise of their discretion is a pipe dream.

Moreover, it is, practically speaking, not a good idea to rely on judges even if the only power at issue is to cure ambiguous or vague statutes or mens rea deficiencies in the legal definition of a crime. Judges are like the proverbial blind monks examining an elephant.<sup>42</sup> They only see the cases that prosecutors choose to charge, and they only really opine on the scope of the statute where there is no guilty plea. Thus, their view of the statute is necessarily partial and selective. Moreover, they only hear the arguments that the defense and prosecution raise, and those advocates are not necessarily going to raise all the relevant policy considerations. Most importantly, common law adjudication has a terrible cost in human suffering and loss of liberty. Again, honest services presents an example.

For forty-six years, all the courts of appeals endorsed the honest services theory.<sup>43</sup> Thus, for forty-six years people went to jail for honest services fraud. Then, in *McNally v. United States*, the Supreme Court said that honest service fraud was not, after all, a crime. It held that mail and wire fraud require that a person be defrauded of *property*, and intangible rights such as honest services cannot suffice.<sup>44</sup> All of those people who had gone to jail were released. But their lives had been irreparably harmed, some destroyed.

Congress attempted to overrule *McNally* in 1988 by passing a statute, 18 United States Code, section 1346, that says, for purposes of the fraud chapter of the code, the term "scheme or artifice to defraud" includes "a scheme or artifice to deprive an-

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41. See, e.g., *United States v. Bass*, 536 U.S. 862, 863–64 (2002); *Armstrong*, 517 U.S. at 468–70.

42. See Julie Rose O'Sullivan, *Skilling: More Blind Monks Examining the Elephant*, 39 *FORDHAM URB. L.J.* 343, 356 (2011).

43. The Supreme Court, in *Skilling v. United States*, 130 S. Ct. at 2926, identified the first intangible rights case as *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941). In *McNally v. United States*, Justice Stevens, in dissent, noted that all the courts of appeals had consistently upheld the honest services theory of mail and wire fraud. 483 U.S. 350, 364 (1987) (Stevens, J., dissenting).

44. See *McNally*, 483 U.S. at 359–60.

other of the intangible right of honest services.”<sup>45</sup> Congress gave no attention to critical definitional issues (e.g., what are “honest services”?), functionally delegating to courts the job of defining the content of the statute.

The courts of appeals struggled with this delegation mightily, generating circuit splits all over the map.<sup>46</sup> They tried to create some rational way to distinguish between something for which one should go to jail for twenty years and non-criminal conduct, even though Congress gave them no help in doing so.<sup>47</sup> The courts of appeals identified conflicting means of restricting the plain language of the statute to ensure, for example, that the aforementioned employee would not end up in prison for buying shoes on eBay. Given the number of disagreements below, the Supreme Court finally, after another twenty-plus years of chaos, agreed to hear three cases that raised discrete issues regarding the permissible scope of honest services fraud.<sup>48</sup>

The Supreme Court concluded that section 1346 was, in fact, unconstitutionally vague. However, instead of striking it, the Court chose to adopt (legislate) a limiting construction. The Court did not resolve the cases on the issues raised, or adopt any of the limiting principles the courts of appeals had formulated in their 20 years of wrestling with the statute. Rather, the Court created its own: It decreed that honest services fraud is confined to cases involving kickbacks and bribes but not to undisclosed conflicts of interest.<sup>49</sup> Once again, those many defendants who had been prosecuted and jailed for honest services fraud based on undisclosed conflicts of interest and other theories of culpability over twenty years of prosecutions were by definition not guilty of honest services fraud, and their convictions had to be overturned.

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45. 18 U.S.C. § 1346 (2006).

46. See Julie R. O’Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 31, 35, 37 (2010).

47. See, e.g., *id.* at 31–41 (collecting cases).

48. See *Skilling*, 130 S. Ct. at 2933; *Black v. United States*, 130 S. Ct. 2963, 2968, 2970 (2010) (vacating and remanding in light of *Skilling*); *Weyhrauch v. United States*, 130 S. Ct. 2971, 2971 (2010) (per curiam) (vacating and remanding in light of *Skilling*).

49. *Skilling*, 130 S. Ct. at 2931.

Professors Klein and Grobey laud the Supreme Court, saying that the court has "curbed rather well" the possible excesses caused by overbroad or vague statutes.<sup>50</sup> Indeed, they state that the "Court's active involvement in these areas has served and continues to serve as a powerful antidote to the perceived ills of congressional overreaching, poor statutory drafting, and regulatory criminalization."<sup>51</sup> The topics discussed in this Essay display the error of that view. Fraud, of course, is one of the four primary areas of federal enforcement, yet the Supreme Court utterly failed to put Congress' feet to the fire by invalidating the concededly vague section 1346 or to timely articulate rules that apply to a healthy number of these enforcement actions.

The honest services story illustrates that the ultimate value sacrificed by our willingness to accept an incomprehensible, random, incoherent, duplicative, ambiguous, and overfederalized "code" is freedom. No one can put a price on that, though it may seem simply an ideal to some. But surely everyone should understand and appreciate the cumulative misery unfairly visited upon suspects and defendants over the last sixty-eight years as courts failed—miserably—in the job of ensuring that the fraud chapter of the "code" works.

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50. Klein & Grobey, *supra* note 2, at 9.

51. *Id.* at 80.