

Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes–Oxley Act

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Occasionally the Supreme Court of the United States hears a case, not to resolve a fundamental issue of governance or civil liberties, but simply to correct an injustice. In the criminal law, that can occur if the lower courts have so misread a statute that a person was convicted of conduct no one would have thought it outlawed. That happened in *United States v. Yates*.¹

Yates has attracted attention because of its extremely peculiar facts.² John Yates was convicted of violating the Sarbanes–Oxley Act of 2002,³ a law regulating corporations and accounting firms to prevent the massive frauds that shocked the financial system after the turn of the century. The unanticipated implosion of large, well-known corporations such as Enron robbed thousands of blameless private investors of retirement funds, rocked a financial community that previously had lauded Enron’s management, and shook public confidence in the domestic securities markets. Congress faulted the companies for financial chicanery and the accounting profession for abetting fraud by approving questionable financial statements and shredding relevant documents. Congress imposed new responsibilities on corporate management and made it a crime to destroy, conceal, or falsify an entry in “any record, document, or tangible object” in order to obstruct a federal investigation, a crime punishable by up to twenty years’ imprisonment.⁴

Yates is not a CEO, however, and he does not own or manage a fleet of ships. He also did not cook the books for a fishing enterprise, defraud an investor of savings, or squirrel away financial records. Yates hires himself out as a fishing captain, and he is represented by the federal public defender. Nonetheless, he stands convicted of violating Sarbanes–Oxley for throwing back three fish too small to be caught.⁵ Those facts likely persuaded the Supreme Court that something is amiss.

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¹ 733 F.3d 1059 (11th Cir. 2013), *cert. granted*, 134 S. Ct. 1935 (2014).

² E.g., Jonathan H. Adler, *Does Destroying Fish Violate the ‘Anti-Shredding’ Provision of Sarbanes-Oxley?*, VOLOKH CONSPIRACY (Apr. 28, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/04/28/does-destroying-fish-violate-the-anti-shredding-provision-of-sarbanes-oxley/>; Mark Sherman, *High Court to Hear Fish Tale of 3 Missing Groupers*, ASSOCIATED PRESS (Apr. 29, 2014, 8:28 AM), <http://bigstory.ap.org/article/high-court-hear-fish-tale-3-missing-groupers>.

³ Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

⁴ 18 U.S.C. § 1519 (2012).

⁵ In 2007, Yates was the captain of the *Miss Katie*, a commercial fishing boat working in the Gulf of Mexico. John Jones, a federally deputized Florida Fish and Game Wildlife Commission officer, was patrolling offshore. He saw the *Miss Katie* and conducted a safety inspection. While aboard, Jones saw red grouper that appeared undersized under federal regulations, measured them, and found six dozen too small. 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. Possession of undersized fish is not a criminal offense; it is only a civil violation punishable by a

Yates is just one example of “overcriminalization,” the overuse and abuse of the criminal law. Congress generally is responsible because it enacts needless penal statutes, oftentimes criminalizing morally blameless conduct.⁶ But in *Yates* the federal courts are also guilty because they construe laws broadly, extending criminal laws past any reasonable boundary.⁷ Federal courts cannot create common law crimes,⁸ so refining the proper methodology for statutory analysis has become a critical part of the Supreme Court’s workload.⁹ The purpose of this Article is to persuade the reader—and the Court—to make better use of two remedies for overcriminalization: reading statutes with a healthy dollop of common sense, and applying the rule of lenity when necessary to avoid an unduly severe punishment.

I. COURTS SHOULD EXERCISE COMMON SENSE, NOT SLAVISH ADHERENCE TO THE DICTIONARY, WHEN INTERPRETING A STATUTE

The goal of statutory interpretation is to find “the ‘most sensibl[e] read[ing]’” of its terms.¹⁰ The task begins with the text because discerning the intent of a legislative body, be it Congress or a city council, is difficult (if not impossible), and the text is what the legislature must approve and present to the chief executive for a signature or veto. It makes sense to refer to a dictionary to construe an undefined term because a dictionary supplies the best evidence of how the average person would have understood that term when it became law. The Due Process Clause requires a criminal law to be readily understandable by the average person—not the average lawyer, professor, judge, philologist, or subject-matter specialist¹¹—so that no one is dumbfounded when charged with a crime. Sarbanes–Oxley does not define “tangible object,” so consulting a dictionary is a sensible way to start out.¹²

Where the Eleventh Circuit Court of Appeals, which upheld *Yates*’s conviction, went wrong was to *stop* there. A word draws meaning from its context, whether from a statute, a novel, or a manual. The Eleventh Circuit’s perfunctory analysis never asked if treating a fish as a “tangible object” *for purposes of Sarbanes–Oxley* makes sense.¹³ The court’s failure to consider whether a fish is a “tangible object” for purposes of that law is the same as a sportscaster’s failure to consider whether soccer is “football” for purposes of the Super Bowl. Soccer is football for some purposes (the World Cup), and a fish is a tangible object for some purposes (the law of theft), but neither term plays that role for *all* purposes.

fine or fishing license suspension. See 16 U.S.C. §§ 1857(1)(A) & (G), 1858(a) & (g), 1859(a) (2012); *Southeast Region Magnuson–Stevens Act Penalty Schedule*, NOAA, http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (last visited June 21, 2014) (recommending a fine of \$500 to \$50,000 or a 45-day fishing license suspension for first offense). Jones directed *Yates* to preserve the fish, but *Yates* was three grouper shy when he arrived in port. *Yates* denies having thrown any fish overboard, but the jury found otherwise.

⁶ See Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL’Y 715, 719 (2013).

⁷ See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 883–84 (2005).

⁸ *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32, 34 (1812).

⁹ See, e.g., *Bond v. United States*, No. 12-158, slip op. at 2 (June 2, 2014); *Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014); *Sekhar v. United States*, 133 S. Ct. 2720, 2725 (2013).

¹⁰ *Bond*, No. 12-158, slip op. at 14 & n.2 (quoting *Jones v. United States*, 529 U.S. 848, 855 (2000)).

¹¹ A criminal statute must be understandable by “a person of ordinary intelligence.” *United States v. Williams*, 553 U.S. 285, 304 (2008) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

¹² See, e.g., *Bond*, No. 12-158, slip op. at 15.

¹³ *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013), cert. granted, 134 S. Ct. 1935 (2014).

The “tangible object” in this case was not a notepad, a stack of index cards, a file cabinet, a computer, a DVD, a thumb drive, an iPhone, or anything remotely similar. Those items store information. Fish don’t. If Yates had wanted to obstruct an investigation into his finances, he would have concealed whatever documents or electronic devices contained the relevant balance sheets. The average person does not store financial data in a fish. Yates could falsify an entry in any one of the above devices, but not in a fish. Treating a fish as a “tangible object” for purposes of Sarbanes–Oxley therefore makes little sense if the enterprise entails construing a law rather than filling out a thesaurus. No librarian would catalog Yates’s grouper with a document or computer. Why should a federal court?

There will be some measure of ambiguity in almost any statutory term. Sometimes that occurs because a term is susceptible to several interpretations, and the statutory context does not illuminate which one is correct.¹⁴ But some ambiguity naturally arises in connection with almost any term because words have a well-understood core meaning, but an indistinct one at their periphery.¹⁵ The consequence: philosophical problems are not the only ones that arise “when language goes on holiday.”¹⁶

Consider Lon Fuller’s famous hypothetical about a sign warning that “Sleeping in the railway station is prohibited.” The admonition seems quite clear on its face, and for most purposes it is. The directive is designed to keep the homeless from camping out overnight at an unoccupied train depot. No one would find it surprising for a police officer to instruct a camper to leave or face a fine. But it would be unreasonable to apply that prohibition to a commuter who momentarily nods off while waiting for the morning train even though, for a second or two, he fell asleep.¹⁷ That is why the law treats the “plain meaning” rule as a canon of statutory interpretation, rather than as a substantive rule of law.¹⁸ Words are not “crystal[s], transparent and unchanged,” Justice Oliver Wendell Holmes once noted,¹⁹ but they also are not “portmanteaus” into which we can dump any meaning we like.²⁰ Some interpretations of statutes, like some interpretations of literature, go too far. It may be reasonable to describe Captain Ahab as a Biblical figure reborn in the nineteenth century, but no one would treat Ahab as a latter-day Moses.

Congress had particular types of villainy in mind when it passed Sarbanes–Oxley. The Senate Judiciary Committee report on the bill that became Section 1519 of Title 18 is brimming with livid criticisms of the shredding of financial documents as part of “the cover up” of Enron’s duplicity.²¹ Now, reliance on the legislative history of a statute is a dicey proposition. It is fiction to believe that every legislator reads every line in every bill, let alone the committee reports accompanying them. Moreover, crediting legislative history encourages legislators to insert their pet opinions into a report, and no one should be required to search the Congressional Record in

¹⁴ See e.g., *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 452 (1989) (“‘Utilize’ is a woolly verb, its contours left undefined by the statute itself.”).

¹⁵ See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶¶ 69–71 (G. E. M. Anscombe trans., 4th ed. 2009) (using the example of the word “game”).

¹⁶ *Id.* ¶ 38.

¹⁷ Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

¹⁸ See, e.g., *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

¹⁹ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

²⁰ Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 866 (1930).

²¹ See S. REP. NO. 107-146, at 2–5 (2002).

order to comply with a criminal law.²² That being said, common sense teaches that legislative history can illuminate the general events and concerns prompting legislation, and neither one would lead a knowledgeable person to conclude that the trouble Enron caused had anything to do with fish.

II. COURTS SHOULD TREAT THE RULE OF LENITY AS A *RULE* OF LENITY, ESPECIALLY WHEN A DEFENDANT OTHERWISE WOULD FACE A SEVERE PENALTY

The rule of lenity is an ancient canon of statutory construction requiring courts to interpret uncertain or ambiguous terms in a defendant's favor.²³ In deciding whether a term is ambiguous, the authorized penalty is a powerful piece of evidence. Perhaps, nodding off during the morning rush hour could be deemed "sleeping" if a commuter faced only a warning not to stretch out on a bench. Perhaps, it might be reasonable to ticket a straphanger for dozing off just as we ticket drivers for stopping on a bridge. But no one would deem it reasonable to treat a sleepy-eyed commuter as a homesteader if the penalty were twenty years' imprisonment.

The rule of lenity was created with unjustly severe penalties in mind. The common law courts adopted it in response to the profligate use of capital punishment. England once had more than two hundred capital crimes, and, unlike today, courts could not mitigate a death sentence.²⁴ The choice was between the rule and the executioner. True, Yates did not face the gallows—few do today—but he did risk becoming a doddering old sea captain before setting sail again, and that prospect is still important. The rule is a practical application of the tenet that "it is better that ten guilty persons escape than that one innocent suffer."²⁵ The rule serves that goal by requiring that a defendant receive the benefit of any reasonable doubt as to the meaning of a criminal statute,²⁶ a standard that embodies as much concern with a morally just result as with the accuracy of the verdict.²⁷ That concern is no less present when the risk is that a defendant will be unjustly punished than that he might be unjustly convicted.²⁸ The courts therefore should apply the reasonable doubt standard not only to the jury's fact-finding responsibilities, but also when deciding what statutory interpretation is most sensible.

Any reluctance to apply the rule in that manner may stem from the fear that, because human ingenuity generates novel ways of committing crimes—such as "interpositioning" securities

²² See *United States v. R.L.C.*, 503 U.S. 291, 308–09 (1992) (Scalia, J., concurring in part and concurring in the judgment).

²³ See *Burrage v. United States*, 134 S. Ct. 881, 891 (2014); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); 1 WILLIAM BLACKSTONE, COMMENTARIES *88.

²⁴ See Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 552 (2008). But see *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982) (holding a sentencing judge may not refuse to consider mitigating evidence in a capital case). The king could commute a sentence, but Henry VIII is reputed to have executed 72,000 subjects, Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749 (1935), so any gathering of his clemency recipients would have fit into a Mini Cooper.

²⁵ See, e.g., *Coffin v. United States*, 156 U.S. 432, 456 (1895) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *358).

²⁶ See, e.g., *Burrage*, 134 S. Ct. at 892; *Moskal v. United States*, 498 U.S. 103, 107–08 (1990).

²⁷ See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 208–209 (2008).

²⁸ See Smith, *supra* note 7, at 925–30.

orders, “trading ahead,” and the like²⁹—we can avoid gaping holes in the criminal law only by trusting the courts to responsibly apply written laws to unforeseen but analogous shades of wrongdoing. That argument, however, is thrice mistaken.

To begin with, there are few such holes. There are more than 3,300 federal crimes.³⁰ Given that dense thicket, it is unlikely that there is no criminal law dealing with clearly dishonest conduct.³¹ The *Yates* case even proves that point. Yates was also convicted under a different statute for throwing the grouper overboard.³² Charging him with violating Sarbanes–Oxley was overkill. Besides, Congress has shown no reluctance to add to the criminal code whenever it finds a loophole that needs plugging.³³ Finally, the Supreme Court long ago made clear that, unlike the courts in the former Soviet Union,³⁴ federal courts may not create crimes by analogy in order to catch every scallywag. *McBoyle v. United States* illustrates that point well.³⁵

McBoyle stole an aircraft and had it flown out of state. The government charged him with transporting a stolen “vehicle” in interstate commerce, in violation of the National Motor Vehicle Theft Act.³⁶ The question in *McBoyle* was whether an aircraft was a “vehicle” for purposes of that law. In an opinion for a unanimous Court, Justice Holmes emphatically answered that question “No.” As he explained, “The question is the meaning of the word ‘vehicle’ in the phrase ‘any other self-propelled vehicle not designed for running on rails.’”³⁷ Justice Holmes conceded that “[n]o doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air,” but he was unswayed by that consideration because “in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.”³⁸ Even though McBoyle had engaged in obviously immoral conduct that could have been prosecuted under a more clearly written law, the Court unanimously decided that it is inappropriate to stretch a criminal statute to capture unethical conduct notwithstanding the fear that a narrow reading of a law would result in a flood of unjustified acquittals.

When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.³⁹

If an “aircraft” cannot be equated with a “vehicle” despite their common use in transportation, a “fish” cannot be deemed equivalent to a “tangible object” when used as an information-storing

²⁹ Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. (forthcoming 2014) (manuscript at 9–11) (describing “interpositioning” and “trading ahead”).

³⁰ Larkin, *supra* note 6, at 726.

³¹ Smith, *supra* note 7, at 897 (“The usual situation is that a multiplicity of federal statutes will be violated by a single criminal act. As such, it would be a minor miracle for someone to violate just one federal criminal statute.” (footnote omitted)).

³² See 18 U.S.C. § 2232(a) (2012); *United States v. Yates*, 733 F.3d 1059, 1062 (11th Cir. 2013), *cert. granted*, 134 S. Ct. 1935 (2014).

³³ See Larkin, *supra* note 6, at 726–29.

³⁴ JEROME MICHAEL & HERBERT WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 1080 n.1 (1940).

³⁵ 283 U.S. 25 (1931).

³⁶ National Motor Vehicle Theft Act, ch. 89, 41 Stat. 324 (1919).

³⁷ *McBoyle*, 283 U.S. at 26.

³⁸ *Id.*

³⁹ *Id.* at 27 (citing *United States v. Bhagat Singh Thind*, 261 U.S. 204, 209 (1923)).

device. At least, there should be a reasonable doubt that any such construction is the most sensible one available.

CONCLUSION

Justice Holmes once wrote that hard cases can make bad law. Hopefully, uncommonly silly cases can make good law. If so, *Yates* certainly qualifies. Courts should always adopt the most sensible reading of a criminal statute and give a defendant the benefit of any reasonable doubt regarding its meaning. *Yates* gives the Court the opportunity to make clear that the dictionary meaning of a term is not always the most sensible one and that the rule of lenity should receive greater prominence in statutory construction, especially when the consequences of a conviction can be quite severe. It is impossible to apply those tenets to *Yates*'s case and not conclude that, however maverick his "catch-and-release" program may have been, it did not violate Sarbanes–Oxley.