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WHITE COLLAR OVERCRIMINALIZATION IN THE UNITED STATES: WHAT WENT WRONG?

This Article is focused on some of the major issues of the overcriminalization phenomenon in the area of American white collar criminality. The unique issue of overcriminalization is researched in its different forms; its impact on the overbroad and overaggressive prosecutorial approach towards economic crimes is analyzed; main factors behind this legal phenomenon are discussed. The conclusion part of the Article is aimed at the search for adequate mechanisms to balance American criminalization back to normal state.

***Key words**: overcriminalization, white collar crimes, prosecution, regulatory offenses.*

Modern political developments, globalized economy, and further synchronization of legal systems around the world provide a unique forum for expanding existing national-law frameworks, establishing new principles and doctrines of law. Criminal law is everything but an exception here. New international threats, such as terrorism, economic criminality and public corruption, require deep rethinking of national and international criminal law regimes respectively.

This Article is focused on various advantages and flaws economic criminalization models in the United States and to a somewhat lesser degree – in Ukraine. Both jurisdictions will serve to a limited extent their virtual "sparring partner" roles for the purposes of evaluating both progresses and potential pitfalls on their own ways to establish effective legal framework to combat white collar crime.

The Criminal Code of Ukraine ("CCU") has been recently amended by introducing new economic crime provisions as well as quasicriminal liability for organizations in the form of specific criminal law measures. The latter by all means historical legislative step highlights a few significant points. In Ukraine from now on liability may be imposed on an artificial legal entity – not just a natural person.

Also Ukraine is serious about its commitment to becoming a member of the European Union in its efforts to combat many new forms of economic criminality. Finally, at this point of the national criminal law developments in the direction of democracy, rule of law, and free-market economy neither judiciary, law enforcement, nor legal community in general are willing to accept criminal corporate liability and some new white collar statutes, due to their novelty, complexity as well as absence of meaningful and comprehensive doctrinal explanation.

Meanwhile, many leading Ukrainian commentators remain quite skeptical about the current model of economic crime liability and argue that the former more traditional approach to economic criminal liability with its balanced system of white collar norms should remain the only remedy available.

As for the United States, its white collar liability regime is viewed by many lawyers in the world as a solid model of assuring compliance among members of the business community, sometimes becoming a quite aggressive tool of law enforcement in the hands of zealous American prosecutors. Indeed, following both media reports, official statistical data and talking to law enforcement representatives as well as average businesspersons in this country reveals stability of white collar enforcement regime and overall stability of the national framework of white collar criminal statutes. On the other hand, many academic observers today ring the bell on the issues of so-called white collar overcriminalization – a wrong state of federal criminal law, under which an unreasonably high number of economic crimes, including small infractions, are being vigorously prosecuted and severely punished. Many of these prosecutions themselves have quite uncertain foundations, as they enter unstable areas of economic regulations, where many legal issues are still disputed. This piece will address such form of overcriminalization in the U.S. in a greater detail and potentially with some practical advices for new Ukrainian economic liability model.

I will start with the definition of "white collar crime", since this term of art remains crucial for any legal research in the area of American or comparative crim-

inal law. As white collar crime is the focused area of criminal law here, it is necessary to provide its contours. A broad definition of white collar crime is meaningfully interrelated with the concept of overcriminalization. As put by one scholar, "though the task of constructing a more efficient and effective white collar criminalization system will inevitably be complex, it is worth undertaking if we are to resolve our ambivalence and uncertainty over white collar criminalization"[1]. Here, as in the case of general overcriminalization, there is no clear, all-inclusive definition, and such a description is not likely to appear anytime soon due to a variety of reasons. Some of them include: (1) the traditionally broad nature of nonviolent and predominantly for-profit offenses; (2) changes in both related legislation and its interpretation, especially during the last three decades; (3) shifts in research focuses from white collar criminals themselves to the specific nature of crimes committed by them; and (4) absence of any attempts to categorize distinct groups of offenses by either legislators or courts.

The term "white collar crime" is famous for its ambiguity. There is some agreement among scholars on what types of criminal behavior the phrase should include. Among various types of criminal activity, one can name antitrust violations, computer and internet fraud, credit card fraud, phone and telemarketing fraud, bankruptcy fraud, healthcare fraud, environmental law violations, insurance fraud, mail fraud, government fraud, tax evasion, financial fraud, securities fraud, insider trading, bribery, kickbacks, counterfeiting, public corruption, money laundering, embezzlement, economic espionage and trade secret theft[2].

The widely used phrase "white-collar crime" was reportedly introduced in 1939 during a speech given by Edwin Sutherland to the American Sociological Society. Sutherland defined this term as "a crime committed by a person of respectability and high social status in the course of his occupation". Later in his other Ar-

[1] Strader K. White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss / K. Strader // George Mason Law Review. – 2007. – № 15. – P. 105.

[2] White Collar Crime: an Overview. [Електронний ресурс]. – Режим доступу : https://www.law.cornell.edu/wex/white-collar_crime. – Заголовок з екрану.

ticle, Sutherland stated that different forms of illegal white collar conduct "consist principally of violations of delegated or implied trust, and many of them can be reduced to two categories: misrepresentation of asset values and duplicity in the manipulation of power"[3].

Reference sources propose similar definitions of white collar crime, defining it as "a non-violent crime usually involving cheating or dishonesty in commercial matters"[4], as "a non-violent, financial crime, committed by a white-collar worker, typically involving the abuse of his or her professional status or expertise," and also defining the term as: nonviolent crime for financial gain committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation[5].

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

Some scholars have discussed the challenges of coming up with a universal definition of white collar crime. For example, Ellen Podgor and Lucian Dervan write that that with a seventy-five year history of sociological and later legal roots under the belt, white collar crime remains a largely imprecise category[6]. Indeed, there is a large number of distinct views on both the specific legal nature and boundaries of white collar criminality, and scholars traditionally observe the term

[3] Sutherland E. White Collar Criminality / E. Sutherland // American Sociological Review. – 1940. – № 5. – P. 2.
[4] Black's Law Dictionary (9th ed. 2009). – P. 1734.
[5] U.S. Department of Justice, Dictionary of Criminal Justice Data Terminology (2d ed. 1981). – P. 215.
[6] Podgor E. 'White Collar Crime': Still Hazy After All These Years / E. Podgor, L. Dervan // Georgia Law Review. – 2016. – № 50.

from different angles and in various enforcements contexts. One approach even suggests that it is the government, not the businessman, that becomes the "bad guy" for purposes of economic enforcement – thus white collar crime can be associated with the failure of government to effectively regulate competitive capitalists. Katherine Chiste refers to one of the debate realms that proposed to understand white collar crime through the frame of political economy, thus explaining rebellious business behavior against legal restrictions imposed by the government[7].

White collar overcriminalization is a disturbing concurrent component within the general trend of expanding criminal liability on a federal level. The increase of regulatory offenses, for example, makes it hard even for an experienced lawyer to keep an eye on the ever-shifting horizon of illegal business behavior, shaped by both the legislature and numerous federal regulators. Environmental protection may serve as one of many examples, so most would agree that crimes, such as dumping highly toxic waste, illegal hunting, discharging oil into navigable waters, and other offenses along these lines pose a substantial threat to the community and therefore should be punished accordingly[8]. On the other hand, there are many offenses in this area of federal regulation alone that can be hardly be called "blameworthy" in the sense they are very unlikely to harm public moral perceptions or the common perception of justice. Indeed, the breadth of white collar crimes breadth has been the subject of many scholarly works. As professor Podgor mentioned, the focus within white collar crime may change over time from areas of corruption to areas such as mortgage fraud[9]. Professor Strader's proposal for an alternative solution calls for the default use of the arsenal of means, provided by either civil or administrative law, especially in those cases when bringing criminal charges is

[7] Chiste K. Retribution, Restoration, and White-Collar Crime / K. Chiste // Dalhousie Law Journal. – 2008. – № 31. – P. 89.

[8] Press Release, Dep't. of Justice, Office of Pub. Affairs, Mississippi Phosphates CorP. Pleads Guilty to Clean Water Act Violation and Agrees to Transfer 320 Acres to Grand Bay National Estuary (August 19, 2015). [Електронний ресурс]. – Режим доступу : http://www.justice.gov/opa/pr/mississippi-phosphates-corp-pleads-guilty-clean-water-act-violation-and-agrees-transfer-320. – Заголовок з екрану.

[9] Podgor E. 100 Years of White Collar Crime in 'Twitter' / E. Podgor // Review of Litigation. – 2011. – № 30. – P. 557.

going to trigger substantial extension of existing law and when harm caused by the wrongdoing cannot be readily calculated. In my opinion, this proposal, while voiced in a sound manner and backed by facts from some white collar prosecutions, has a big chance of being crushed under the fundamental, judicially supported principle of prosecutorial discretion[10].

In a quite significant contrast, in Ukraine, because of the corruption and the absence of perception of justice, fairness and accountability, both in politics and business, many white collar crimes, such as smuggling, counterfeiting and tax evasion, are viewed as morally neutral, or even as acceptable. Frustration and even hatred against the corrupt government engaged in self-dealing and that does not operate for the benefit of the common folks is one of the major reasons for passive approval of such nonviolent crimes with economic substance. This deviant ideology within economically oppressed society can be formulated this way: "The Government cheats against you, so cheat it back". On the other hand, the vast majority of Ukrainian white collar criminals also believe that cheating or embezzling is insignificant, at least with respect to moral barometers.

Now approaching the main outlined section of the Article, which is white collar overcriminalization in the United States and its major challenges, I would like to firstly explain this phenomenon. Then I will try illustrate the main actors, members of the federal government, who are pretty much responsible for such overcriminalization. And finally, I will try to propose some ideas and potential solutions on how to avoid unnecessary overcriminalization and what should be done to achieve right criminalization balance – both in the United States and in Ukraine with its much younger model of market economy.

In America, the history of the overcriminalization phenomenon may not have a pronounced longevity of record in contrast to traditional criminal law issues, but nonetheless it is quite eventful and still far from complete. A century-long

[10] Strader K. White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss / K. Strader // George Mason Law Review. – 2007. – № 45. – P. 49–50, 102.

record of federal criminal justice reform initiatives indicates that issues of too many crimes have been raised for many years, and the concept of overcriminalization itself can be traced back almost half a century. In his Article "From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform – Legacy and Prospects" Roger Fairfax refers to President Hoover's concern over the significant growth of federal criminal statutes in numbers over the twenty-year period, back at the beginning of the past century[11]. It has been presumed by many criminal law scholars that the Model Penal Code's failure predicted the dawn of overcriminalization movement.

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

Title 18 of the United States Code can serve as one important evidentiary piece of the overcriminalization record in this country. Codified and enacted into positive law on June 25, 1948, this title, with the official name "Crimes and Criminal Procedure", originally enumerated a significantly small number of criminal offenses that were narrower in reach. A simple surface level comparison of the original and current texts of the Federal Criminal Code reveals a major difference. The common white collar offense of mail fraud serves as a good example. Upon Title 18's enactment, its Chapter 63, entitled "Mail Fraud", included just two offenses – § 1341, "Frauds and swindles", and § 1343, "Fictious name and address". Today, this Chapter is entitled "Mail Fraud and Other Fraud Offenses" and in-

[11] Fairfax R. From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform – Legacy and Prospects / R. Fairfax // Journal of Law, Economics and Policy. – 2011. – № 7. – P. 601–602.

cludes eleven criminal statutes that encompass various types of frauds – including mail fraud, health care fraud, and fraud in foreign labor contracting. This is notwithstanding the fact that the statutory text in Chapter 63 is written broadly, has been construed loosely by federal courts over the past decades, and is sanctioned more severely today.

Overcriminalization is not an easily defined category. For a number of obvious reasons, there is no official definition of overcriminalization. Discussing the roots of overcriminalization, Professor Stephen Smith stressed shortcomings of the two general understandings of overcriminalization: overcriminalization as simply the issue of Congressional enactment of too many criminal laws that are too broad in scope; and as "serious crime-definition and sentencing problems" that often make practical application of criminal statutes lead to erroneous results. In reality this phenomenon is has a much broader meaning and is much more complicated[12].

Reference sources do not offer much help in searching for an "overcriminalization" definition. The Oxford English Dictionary only provides explanation of the word "criminalization" – "the fact or process of criminalizing a person or activity"[13]. This is a derivative from the word "criminalize" meaning "To turn a person into a criminal, especially by making his or her activities illegal".

Legal scholarship has interpreted this term of art in various ways. For example, Professor Sanford Kadish defined overcriminalization as: one kind of systematic nonenforcement by the police is produced by criminal statutes which seem deliberately to overcriminalize, in the sense of encompassing conduct not the target of legislative concern, in order to assure that suitable suspects will be prevented from escaping through legal loopholes as the result of the inability of the prosecution to prove acts which bring the defendants within the scope of the prohibited conduct[14].

[12] Smith S. Overcoming Overcriminalization / S. Smith // Journal of Criminal Law. – 2013. – № 102. – P. 538.

[13] "Criminalize, v." OED Online. Oxford University Press, September 2015. Web. 21 October 2015.

[14] Kadish S. Legal Norm and Discretion in the Police and Sentencing Processes / S. Kadish. – 1969. – № 75. – P. 909.

Overcriminalization is the proliferation of criminal statutes and overlapping regulations that impose harsh penalties for unremarkable conduct, i. e., conduct that should be governed by civil statute or no statute at all. Todd Haugh admits that overcriminalization can be defined differently and the vast majority of definitions rest "on the misuse of the criminal law and the resulting harms"[15]. Other scholars view the term in question differently, suggesting that the crux of the "overcriminalization" neologism refers to the application of criminal statutes in a manner that allows prosecuting "conduct that traditionally would not be deemed morally blameworthy"[16]. Still, others understand this phenomenon through the lenses of the perception that "we have too much punishment and too many crimes in the United States"; and even through attribution of several defining categories – untenable offenses, superfluous statutes, doctrines that overextend culpability, crimes without jurisdictional authority, grossly disproportionate punishments and excessive or pretextual enforcement of petty violations[17]. There are other definitions of overcriminalization that seem to outline major areas of concern such as criminal law growth, related prosecutorial expansion, as well as broad judicial interpretation.

The National Association of Criminal Defense Lawyers (NACDL) refers to an even more expansive list of overcriminalization problems. Overcriminalization impacts include: ambiguous criminalization of conduct without meaningful definition or limitation; enacting criminal statutes lacking meaningful *mens rea* requirements; imposing vicarious liability with insufficient evidence of personal awareness or neglect; expanding criminal law into economic activity and regulatory and civil enforcement areas; creating mandatory minimum sentences unrelated to the

[15] Haugh T. Sox on Fish: A New Harm of Overcriminalization / T. Haugh // Northwestern University Law Review. – 2015. – № 109. – P. 836.

[16] Larkin P. Public Choice Theory and Overcriminalization / P. Larkin // Harvard Journal of Law and Public Policy. – 2012. – № 36. – P. 718.

[17] Luna E. The Overcriminalization Phenomenon / E. Luna // American University Law Review. – 2005. – № 54. – P. 717.

wrongfulness or harm of the underlying crime; federalizing crimes traditionally reserved for state jurisdiction; and adopting duplicative and overlapping statutes[18].

Professor Douglas Husak's proposed apparatus for classifying new types of criminal offenses that contribute to criminal law expansion presents three categories of offenses, which are located, relatively speaking, on the periphery of criminal law: (1) overlapping crimes (encompassing situations, when a single criminal conduct violates multiple statutory prohibitions); (2) offenses of risk prevention (inchoate types of offenses that prohibit not harm itself but the possibility of causing harm); and (3) ancillary offenses (backup types of offenses that surround primary offenses and are used when prosecution of the principal crime might be unsuccessful or undesirable)[19].

As one sees from the numerous definitions and classifications, the issue of overcriminalization is akin to the "Lernean Hydra" – which is of many forms and many dangers. Indeed, as I mentioned above, American legal literature discusses many pitfalls of criminal law policy that are directly associated with overcriminalization. And even with a growing debate within the United States that prosecutions of financial wrongs have gone unnoticed, it remains a given that there has been an explosion of criminal statutes.

Now I would like to focus on the main actors, who are responsible to a larger or smaller degree for the overcriminalization phenomenon in the United States. Throughout the past century, the United States has seen many efforts to reform criminal justice or at least some of its components. The legislative process in the criminal law area has become largely deficient. At the same time, movements for "tuning up" criminal law and procedure have sought to make criminal justice more effective, rational, efficient and fair, though often with limited success. As Professor Fairfax put it, such efforts revealed early twentieth century reformers advocat-

[18] Overcriminalization [Електронний ресурс]. – Режим доступу : http://www.nacdl.org/overcrim. – Заголовок з екрану.

[19] Husak D. Overcriminalization: The Limits of the Criminal Law / D. Husak. – Oxford : Oxford University Press, 2008. – P. 36–42.

ing for the improvement and normalization of criminal procedural and substantive law, the large-scale criminal law study and reform efforts undertaken in the late 1960s, and the more recent "overcriminalization" movement[20].

One of the underlying reasons for overcriminalization in the U.S. is the Congressional enactment of too many new laws without keeping a good eye on legislative inventory, thus creating an extremely broad, overlapping, and confusing system of statutory criminal law. For example, Ellen Podgor stated that Congressional approach to expansive lawmaking by continuously adding numerous statutes and regulations makes it hard to make sure that defendants would be able to understand that they have committed a criminal offense[21]. Such statutory expansion is one of the primary factors in criminal "law and order" malfunctioning. The wording of many criminal statutes, especially those regulating complex types of modern human behavior, cannot stand criticism that the public is not able to comprehend the plain meaning of the law. The mail fraud statute, 18 U.S.C. § 1341, is a solid example of cumbersome legislative language in white collar crime provisions.

This is also true with the language of some Ukrainian criminal statutes. One recent example of criminalizing economic conduct in Ukraine by means of blurred and unclear wording is introducing criminal liability for stock market manipulation under Article 222-1 of the CCU. This provision is just one of many "bridge" type economic regulatory norms, discussed before. In order to establish the act of manipulation, in other words, deception, under the statute, one needs to refer to Article 10-1 of the Law of Ukraine "On State Regulation of Securities Market in Ukraine". But the wording of the latter provision with its overbroad language to outline potential areas of securities manipulation, as well as using phrases like "can provide insight into", "that do not possess obvious economic sense", "disseminat-

[20] Fairfax R. From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform – Legacy and Prospects / R. Fairfax // Journal of Law, Economics and Policy. – 2011. – № 7. – P. 597.

[21] Podgor E. Laws Have Overcriminalized Business Behavior / E. Podgor / New York Times. – November 10, 2013. [Електронний ресурс]. – Режим доступу : http://www.nytimes.com/roomfordebate/2013/11/10/prosecuting-executives-not-companies-for-wall-street-crime/laws-have-overcriminalized-business-behavior. – Заголовок з екрану.

ing information that a person should know", "with a price that significantly departs from the market one" makes the criminal statute virtually inapplicable, especially in the country, where, unlike in the United States, case law does not exist.

In the early 1980s, the U.S. Department of Justice (DOJ) spent two years in its effort to calculate the total number of criminal offenses within the entire U.S. Code. Although the effort eventually failed, the DOJ provided an approximate estimate of 3,000 offenses[22]. The astonishing number has been often brought up in the context of ovecriminalization.

According to the Federal Sentencing Statistics for 2014, provided by United States Sentencing Commission, there were 75,836 federal offenses registered in 2014, with the majority of them being drug related (21,323) and immigration related (22,238) crimes[23]. According to the 2014 Crime in the United States Report, part of the FBI's Uniform Crime Reporting Program, the estimated number of violent crime offenses in the nation was 1,165,383 (violent crime rate – 365.5 per 100,000 inhabitants), while estimated number of property crimes in 2014 was 8,277,829 (property crime rate – 2,596.1 per 100,000 inhabitants)[24].

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

[22] Fields G. Many Failed Efforts to Count Nation's Federal Criminal Laws / G. Fields, J. Emshwiller // Wall Street Journal. – July 23, 2011. [Електронний ресурс]. – Режим доступу : http://www.wsj.com/articles/SB10001424052702304319804576389601079728920. – Заголовок з екрану.

[23] Statistical Information Packet, Fiscal Year 2014, First Circuit. [Електронний ресурс]. – Режим доступу : http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2014/1c14.pdf. – Заголовок з екрану.

[24] 2014 Crime in the United States. [Електронний ресурс]. – Режим доступу : https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1. – Заголовок з екрану.

In stark comparison, the total number of offenses in Ukraine is only 340. To some extent, this is due to the mandatory provision contained in paragraph 3 of Article 3 of the CCU, which proclaims that criminality of any act as well as imposed penalty and other criminal consequences should be determined exclusively by the Code provisions. It is noted that paragraph 2 of Article 3 requires that all newly adopted laws on criminal liability be incorporated in the Criminal Code. Virtually all Ukrainian criminal law provisions are located within a single codified framework.

The number of so-called regulatory offenses in the United States also seems to be almost impossible to calculate. Since the mid-1980s, a steady expansion of public welfare offenses have literally infiltrated the modern technological world. In *Morissette v. United States* the Supreme Court has provided a rationale for criminalizing violations of specific duties by those persons, whose conducts have a negative effect on public health, safety or welfare.

"While many of these duties are sanctioned by a more strict civil liability, lawmakers, whether wisely or not, have sought to make such regulations more effective by invoking criminal sanctions to be applied by the familiar technique of criminal prosecutions and convictions. This has confronted the courts with a multitude of prosecutions, based on statutes or administrative regulations, for what have been aptly called "public welfare offenses". These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty"[25].

Some commentators rely on an incredible figure of up to 300,000 federal criminal regulations[26]. Today, thousands of various activities routinely undertaken in the course of business or leisure fall into the category of crimes under the broad

[25] Morissette v. United States, 342 U.S. 246, 254–55 (1952).

[26] Thornburgh D. The Dangers of Over-Criminalization and the Need for Real Reform: the Dilemma of Artificial Entities and Artificial Crimes / D. Thornburgh // American Criminal Law Review. – 2007. –№ 44. – P. 1281.

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

In *United States v. Von Barta*, the Second Circuit admitted that the "centuries-long trend toward greater sophistication in the criminal law has increasingly blurred the line between criminal and noncriminal misbehavior." The court went on saying: "While defining lawless conduct is primarily a legislative function, courts have mitigated the severity of penal sanctions by construing ambiguous statutes against the Government. This doctrine of strict construction, which grew out of the emerging humanitarianism of seventeenth century England, has long been a tenet of American jurisprudence. But this principle is just the start of the difficult process of statutory interpretation, for in some areas Congress has purposely cast wide the net of the criminal law"[27].

To be honest, the federal legislature has attempted to address the impacts of overcriminalization. In the last few years, members of Congress have continuously expressed concerns over criminal statutes' growth in numbers, regulatory breadth,

[27] United States v. Von Barta, 635 F.2d 999, 1001 (2d Cir. 1980).

and the overzealousness of enforcement[28]. In 2013, the Judiciary Committee of the U.S. House of Representatives unanimously created the "Overcriminalization Task Force of 2013" to study and conduct hearings on the problem of overcriminalization. Several reports issued by the Task Force, demonstrate deep concern and call for action in dealing with overcriminalization, on behalf of at least some members of the federal legislature.

Now let us turn to the American judiciary and its powerful interpretation tools that can affect the national criminalization policy a big deal. Hence, its effective usage for the benefit of criminal law and justice in general is dependent on its precautious, expeditious usage. While discussing the U.S. Supreme Court's approach to statutory interpretation in the context of criminal law federalization, Professor Peter Henning made a sound observation: "with the drive in Congress to federalize broader areas of the criminal law, an opinion that seemingly ignores the language chosen by the legislature sends a message that the courts can accord minimal respect to the legislature's ability to formulate criminal statutes"[29]. Indeed, it seems extremely hard to maintain the fragile balance of lawfulness, reasonableness and specific individual/public/governmental interests' furtherance when dealing with complicated, controversial criminal statutes, such as many white collar provisions.

The risks and significant consequences of broad, sometimes overlapping statutory provisions and the ever-expanding nature of American criminal law has long been a controversial issue before the federal judiciary.

The federal judiciary's approach to construing criminal statutes has long been failing at the face of objective, consistent critique. State of the art criminal case decisions that are based on dividing philosophies, internal deliberations and simply different mindsets of Justices make it almost impossible to predict in which direction, overcriminalizing or undercriminalizing, the Supreme Court will proceed

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

[29] Henning P. Statutory Interpretation and the Federalization of Criminal Law / P. Henning // Journal of Criminal Law and Criminology. – 1996. – № 86. – P. 1177.

in the next case. Kelly Strader proposes a persuasive analyses of some policy implications of white collar jurisprudence[30]. Recent white collar cases have brought the issue of overcriminalization to the surface of decision-making by courts. Federal dockets reveal that sometimes courts are willing to join the "overcriminalization" camp. Federal prosecutor Preet Bharara points out that the Supreme Court had many opportunities to curb the expansion of corporate criminal liability or at least control exercise of prosecutorial discretion in this area of criminal law; instead this and other courts preferred to stay aside from regulating the ever growing borders of corporate criminal liability, while relying "on the need to facilitate the identification and punishment of elusive corporate wrongdoers"[31]. And as pointed by another commentator, "courts generally accept the white collar crime rationale … that the rules should not hamper the investigation of complex criminal activity, and consequently do not impose broad standards that restrict prosecutors"[32].

One good example is the recent Supreme Court case of *Yates v. United States* that has made big legal news due to its controversial statutory background[33]. There, the Court overruled conviction of a commercial fisherman under 18 U.S.C. § 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") for telling crew members to throw caught undersized fish overboard, instead of complying with the official order to segregate the undersized fish from other fish and return with them to port. The Supreme Court ruled that the term "tangible object," as it appeared in 18 U.S.C. § 1519, covered only objects that were used to record or preserve information, not all objects in the physical world, such as fish in that case.

While referring in her dissenting opinion to the majority's concern over the harsh twenty-year imprisonment penalties imposed in case of overbroad interpreta-

[30] Strader K. The Judicial Politics of White Collar Crime / K. Strader // Hastings Law Journal. – 1999. – № 50. – P. 1199–1273.

[31] Bharara P. Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants / P. Bharara // American Criminal Law Review. – 2007. – № 44. – P. 59.

[32] Henning P. Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors to Go? / P. Henning // University of Pittsburg Law Review. – 1993. – № 54. – P. 412.

[33] Yates v. United States, 135 S. Ct. 1074 (2015).

tion of 18 U.S.C. § 1519, Justice Kagan suggested that the case outcome "brings to the surface the real issue: overcriminalization and excessive punishment in the U.S. Code." Such words might serve as an indicator that members of the Supreme Court are also concerned by overcriminalization. As one commentator observed while analyzing *Yates*, despite different political ideologies, all nine justices appear to agree that there is an overcriminalization problem within the U.S. Code and/or U.S. attorneys' charging practices[34]. Traditionally American courts have served as an active arbiter of criminal law application. With different tools of statutory interpretation, they can read criminal statutes narrowly or broadly. Some critics, authors of dissenting opinions often among them, argue that when reading statutes broadly, judges might create new crimes – contrary to the Constitutional mandate. Though this is a somewhat overstretched argument, extending the reach of criminal statutes can obviously lead to negative consequences.

When thinking about the "right" criminalization balance from the courts' perspective, one should also take into account the implicit presence of liberal/conservative ideology in judicial decision-making. Thus, when courts, particularly on the appellate level, look at the criminal case through multiple lenses of Congressional intent, legislative history, prosecutorial approach, and public policy concerns, it becomes extremely hard for them to maintain proper balance of ideological neutrality and objectivity. As Professor Coffee wrote, when discussing interpretations of mail fraud in *McNally v. United States*, and *Carpenter v. United States*, the outcome of the latter case "illustrates the greatest deficiency with judicial legislation of the type that *Carpenter* exemplifies: legislation is never neutral"[35]. This commentator further added that "because the legislature is politically accountable, it is entitled to favor one coalition of interests over another, but this is

[34] Bashir A. Fish Jokes Aside: Yates Hints at the Court's View of Prosecutorial Discretion / A. Bashir // Criminal Justice. – 2015. – № 30. – P. 21.

[35] McNally v. United States, 483 U.S. 350 (1987); Carpenter v. United States, 484 U.S. 19 (1987).

an activity that courts should avoid")[36]. I personally agree with Professor Coffee in that checks and balances system should work smoothly, while interpreting federal criminal statutes, so that the balance between unlawful conduct and its legal stigmatization is preserved.

In general, federal criminal jurisprudence, especially at the Supreme Court level, has a somewhat inconsistent record of white collar crime interpretation, narrowing statutory scope in some cases and expanding it in others. Thus, it seems plausible that sooner or later, the Supreme Court will face a fundamental question of political nature – how should it react to the Congressional failure to construct relevant criminal statutes both rationally and carefully.

Finally, I would like to turn to the representatives of the executive branch of American government – federal prosecutors. They are most often blamed for creating white collar overcriminalization by widely abusing professional discretion and by often being too "tough on crime" and too "tough on business".

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

Despite wide critique of excessive employment of federal criminal statutes and unwarranted excessive prosecution approaches, the federal prosecution community has been recently demonstrating some aspirations toward a more balanced, efficient and cost effective approach to fighting crime in this country. One of these promising steps, the so-called "Smart on Crime" initiative, was launched in early 2013 by then-Attorney General Eric Holder[37]. Unfortunately, not much has been heard from DOJ on "Smart on Crime" agenda since 2013. The lack of continuous

[36] Coffee J. Hush!: The Criminal Status of Confidential Information After McNally and Carpenter and the Enduring Problem of Overcriminalization / J. Coffee // American Criminal Law Review. – 1988. – № 26. – P. 154.

[37] U.S. Dep't of Justice, The Attorney General's Smart on Crime Initiative. [Електронний ресурс]. – Режим доступу : http://www.justice.gov/ag/attorney-generals-smart-crime-initiative. – Заголовок з екрану.

record may demonstrate that the former Attorney General designed and promoted this initiative as part of his own professional agenda. This DOJ program, named "Reforming The Criminal Justice System for the twenty-first Century," pursues five main goals: 1) to ensure finite resources are devoted to the most important law enforcement priorities; 2) to promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system; 3) to ensure just punishments for low-level, nonviolent convictions; 4) to bolster prevention and reentry efforts to deter crime and reduce recidivism; and 5) to strengthen protections for vulnerable populations[38]. Modern approaches to prosecuting crimes seem to restore the long established *status quo*, with some rare exceptions: prosecute as many wrongdoers as resources allow, get as many convictions or pleas as possible, and push for sentences as severe as possible, all this done without much cost/benefit analysis.

Indeed, prosecutorial discretion makes lawyers for the government "the most powerful actors in the criminal justice system." As Professor Erik Luna put it, they decide whether to accept or decline a case, and, on occasion, whether an individual should be arrested in the first place; they select what crimes should be charged and the number of counts; they choose whether to engage in plea negotiations and the terms of an acceptable agreement; they determine all aspects of pretrial and trial strategy; and in many cases, they essentially decide the punishment that will be imposed upon conviction. As such, the prosecutor is the criminal justice system, in effect making the law, enforcing it against the accused, adjudicating his guilt, and determining the punishment[39].

In contrast, Ukrainian prosecutors traditionally do not possess significant discretion, especially when compared to their American counterparts. Ukraine belongs to a group of European and Latin American countries, where, quite opposite to American discretionary prosecution model, prosecution is viewed as a mandato-

[38] U.S. Dep't of Justice, Smart on Crime: Reforming the Criminal Justice System for the 21st Century. Електронний ресурс]. – Режим доступу : http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf. – Заголовок з екрану.

[39] Luna E. Prosecutorial Decriminalization / E. Luna // Journal of Criminal Law and Criminology. – 2013. – № 102. – P. 795.

ry government enforcement process – every single crime has to be prosecuted based on the information gathered by police, provided by crime victims and other citizens, or even identified by prosecutors and judges while working on other criminal cases.

The new Criminal Procedure Code of Ukraine, enacted in 2012, unlike its Soviet Union predecessor, is geared toward balancing the interests of government to prosecute crime versus individual rights of defendants, in addition to equipping defense counsel with more and broader procedural rights. Under Article 8 of the Criminal Procedure Code of Ukraine, criminal proceedings shall be conducted in accordance with the principle of the rule of law, under which a human being, his or her rights and freedoms are recognized as the highest values in the country and for all official activities within it. In addition, the principle of the rule of law in criminal proceedings is applied with due consideration of the practices of the European Court of Human Rights.

The principle of legality under Article 9 of the Criminal Procedure Code of Ukraine directly establishes that during a criminal proceeding prosecutor is not only required to comply with the Constitution of Ukraine, the Criminal Code and other applicable laws, but also has to fully and impartially examine all circumstances of the crime, while also explicitly requiring the prosecutor to find circumstances of both incriminating and exculpatory nature in respect to the suspect or the accused, as well as the circumstances mitigating and aggravating their punishment, and also to make adequate legal evaluation of all circumstances and procedural decisions in a given criminal case. Thus, prosecutorial discretion in Ukraine remains within the Code's oversight and is controlled by the Constitution.

There are two prosecutorial avenues of undercriminalization in Ukraine. They are especially noticeable in economic crimes cases. The first is with regard to guilty pleas, which are becoming more and more popular under the new Criminal Procedure Code framework, particularly in the areas of nonviolent, fraudulent types of crimes. Often prosecutors will promise fines as penalties under proposed

plea bargain and courts will go along by approving them in the way most favorable for the defendant. The second avenue is present when a prosecutor asks for less harsh penalties in criminal trials. Indeed, in an environment where statutory criminal penalties are rather low, Ukrainian prosecutors often remain quite modest in their requests for sentencing.

It seems that the only force available to address the issues of twisted criminalization policy in the United States (and Ukraine as well) is the scholarly community. While discussing the old and obvious topic of overciminalization in legal literature, Professor Stuntz stated that "criminal law's breadth … has long been the starting point for virtually all the scholarship in this field"[40]. Some legal minds seem to understand and promote the idea that a strictly codified and thus internally balanced system of criminal laws possesses a significant potential for the criminal justice system's improvement and will enable the government to be both "right" and "smart" on crime. Indeed, the amount of published works on overcriminalization and overfederalization, written by both established and emerging names in American criminal law scholarship is significant. Scholars take quite different positions on the criminal law's multidimensional expansions, but what seems to unite them is the search for solutions on how to narrow down the scope of criminal law in order to make it easily comprehensible and objectively reasonable[41]. Here are a few of the elaborated ideas/solutions to criminalization problems: (1) the careful balancing of all "gains and losses" when adopting new criminal statutes (2) the recognition and resistance of problematic amendments to laws before their codification; (3) the adoption of the "overcriminalization canon (more precisely, an anti-overcriminalization canon)," which will enable the Supreme Court to consider the practicality of prosecution under broad criminal statutes; (4) the abandonment of the practice of rewriting facially inadequate criminal statutes (specifically in the

[40] Stuntz W. The Pathological Politics of Criminal Law / W. Stuntz // Michigan Law Review. – 2001. – № 100. – P. 507.

[41] Klein S. Debunking Claims of Over-Federalization of Criminal Law / S. Klein, I. Grobey // Emory Law Journal. – 2012. – № 62. – P. 79.

white collar area) by the courts; (5) the application of desuetude doctrine in order to address the controversial issues of prosecutions under old and ambiguous criminal statutes; (6) the establishment of an appropriate discretionary balance in prosecutorial decision-making; (7) the allowance of a mistake of law defense, when a *malum prohibitum* crime is charged; and 8) the evoking of merciful discretion mechanisms in criminal justice institutions[42].

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

Since scholars address issues of overcriminalization in the United States from different angles, a diverse approach to solving such issues is optimal. Multiplicity of statutes, broad and overlapping statutes, abuse of professional discretion, politically motivated criminal lawmaking, and inconsistent judicial interpretation should be accordingly addressed on various fronts. Only a comprehensive, multidimensional effort to combat overcriminalization will balance the state of criminal justice system.

[42] Kadish S. The Crisis of Overcriminalization / S. Kadish // American Criminal Law Quarterly. – 1969. – № 7. – P. 33; Dieterle J. The Lacey Act: A Case Study in the Mechanics of Overcriminalization / J. Dieterle // Georgetown Law Journal. – 2014. – № 102. – P. 1306; Pierce M. The Court and Overcriminalization / M. Pierce // Stanford Law Review Online. – 2015. – № 68. – P. 58–59; Larkin P. Finding Room in the Criminal Law for the Desuetude Principle / P. Larkin // Rutgers Law Review Commentaries. – 2014. – № 65. – P. 4–5; Meese E. Reconsidering the Mistake of Law Defense / E. Meese, P. Larkin // Journal of Criminal Law and Criminology. – 2012. – № 102. – P. 783–784.

Familiarizing oneself with legal comments on the state of criminalization policy in Ukraine reveals a largely different point of view on the effective criminal justice system. Several Ukrainian scholars have recently included criminalization and decriminalization issues into their research agendas[43].

One of the scholarly proposed recommendations on security and the rule of law in Ukraine stated that the latest achievements of criminal law science, the active cooperation between scholar community, national lawmaker and law enforcement representatives, as well as the quality improvements in the application of criminal law, have to be taken into account[44].

As the conclusion part, I would like to underline the following. This Article has analyzed some of the overcriminalization-related issues in the United States. It is impossible within one piece to identify and discuss all forms of over/undercriminalization. For example, sentencing policies are among some of the major areas of concern in criminal law jurisprudence, yet it is not fully touched upon in this piece. But even with these limitations, I hope this piece provides an outline of the enormous potential for future research of over/undercriminalization, with the ultimate goal of achieving a better balanced criminalization policy. After all, it is important to remember that any criminal law, just as any national legal system, is based on its unique pillars, employs its own enforcement tools and sets the ultimate goal of serving people's needs for justice, order and security.

A more consistent approach in designing the construct of criminal law is needed. That structure should be one that is capable of diminishing or even eliminating broadness of, gaps in and overlapping of criminal statutes, combined with

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[43] Дорохіна Ю. А. Щодо визначення підстав криміналізації і декриміналізації злочинів проти власності / Ю. Дорохіна // Юридична наука. – 2014. – № 6. – С. 81; Лопашенко Н. А. Основы уголовно-правового воздействия: уголовное право, уголовный закон, уголовно-правовая политика / Н. А. Лопашенко – СПб. : Издательство Р. Асланова «Юридический центр Пресс», 2004. – С. 288; Матвійчук В. К. Проблема криміналізації та декриміналізації діянь проти навколишнього природного середовища / В. К. Матвійчук // Юридична наука. – 2013. – № 67. – С. 67–81.

[44] Рябчинська О. П. Суб'єкти наукового супроводу правотворчої та правозастосовної діяльності в Україні / О. П. Рябчинська // Проблеми науки кримінального права та їх вирішення у законотворчій та правозастосовній діяльності : матеріали міжнар. наук-практ. конф. (8–9 жовтня 2015 р.) / редкол.: В. Я. Тацій (голов. ред.), В. І. Борисов (заст. голов. ред.) та ін. – Х. : Право, 2015. – С. 92.

permanent partnership between legislature and the criminal scholarship community, and the obligation on federal prosecutors to exercise their discretion narrowly, with specific targeting of exact crimes committed instead of an "all and now" approach. It should be a design that will push the scales of criminalization to a balanced position.

By moving gradually toward the point of right criminalization, even without necessarily reaching it, will teach us a great deal along the way and might help American lawyers as well as their Ukrainian counterparts improve many law-related matters.

Каменський Д. Надмірна криміналізація білокомірцевих порушень у США: що пішло не так?

Запропонована стаття приділяє увагу деяким основним питанням феномену надмірної криміналізації у сфері білокомірцевої злочинності США. Досліджується унікальна проблема надмірної криміналізації у її різноманітних проявах; проаналізовано її вплив на занадто широкий і занадто агресивний прокурорський підхід до переслідування економічних злочинів; наведені основні фактори цього правового феномену. Заключна частина статті присвячена виявленню адекватних механізмів відновлення балансу американської криміналізаційної політики до її нормального стану.

***Ключові слова**: надмірна криміналізація, білокомірцеві злочини, кримінальне переслідування, регуляторні злочини.*

Каменский Д. Чрезмерная криминализация беловоротничковых нарушений в США: что пошло не так?

Предложенная статья уделяет внимание некоторым основным вопросам феномена чрезмерной криминализации в сфере беловоротничковой преступности США. Исследуется уникальная проблема чрезмерной криминализации в ее разнообразных проявлениях; проанализировано ее влияние на чрезмерно широкий и чрезмерно агрессивный прокурорский подход к преследованию экономических преступлений; приведены основные факторы этого правового феномена. Заключительная часть статьи посвящена выявлению адекватных механизмов восстановления баланса американской криминализационной политики до ее нормального состояния.

***Ключевые слова**: чрезмерная криминализация, беловоротничковые преступления, уголовное преследование, регуляторные преступления.*