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Prosecution of Process Crimes: Thoughts and Trends

Allison Caffarone
Maurice A. Deane School of Law at Hofstra University

Karen Patton Seymour

Steven R. Peikin

PROSECUTION OF PROCESS CRIMES: THOUGHTS AND TRENDS

KAREN PATTON SEYMOUR* STEVEN R. PEIKIN** ALLISON CAFFARONE**

The United States Department of Justice has come under attack in recent years because of its increased attention to, and prosecution of, crimes committed during the course of its investigations[1]—obstruction of justice,[2] perjury,[3] and making false statements.[4] These crimes have been labeled "cover-up"[5] or "process crimes,"[6] and the charging prosecutors have been criticized as bringing such charges only against

* Karen Patton Seymour is a partner at Sullivan & Cromwell LLP and heads the firm's Criminal Defense and Investigations Group. Her practice focuses on white-collar criminal defense and internal investigations. From 2002-2004, Ms. Seymour served as the Chief of the Criminal Division for the United States Attorney's Office for the Southern District of New York, where she was lead trial counsel for the government in the prosecution of Martha Stewart and Peter Bacanovic.

** Steven Peikin is a partner at Sullivan & Cromwell LLP, where he is a member of the firm's Criminal Defense and Investigations Group. He was an Assistant United States Attorney in the Southern District of New York for eight years, including service as Chief of the Office's Securities and Commodities Fraud Task Force.

*** Allison Caffarone is an associate in Sullivan & Cromwell's Criminal Defense and Investigations Group.

1. Christopher A. Wray, Assistant Attorney Gen., U.S. Dep't of Justice, Criminal Div., Remarks to the Association of Certified Fraud Examiners, Mid-South Chapter (Sept. 2, 2004), *available at* http://www.usdoj.gov/criminal/pr/ speeches/2004/09/2004_2954_rmks2CFC_TN090204.pdf ("I also want to offer you some quick observations about three other areas we're tying to give renewed emphases: aggressive response to efforts to obstruct criminal or administrative investigations . . . ."); *see also id.* ("Just as we're looking harder at the extent of a company's cooperation, we're also taking obstructive conduct more seriously, and not just in our own investigations.").

2. Arthur Andersen, Enron's accounting firm, was charged with violating 18 U.S.C. § 1512 for allegedly instructing its employees to destroy documents pursuant to its document retention policy. Section 1512 provides, in part, that it is a crime to "alter, destroy, mutilate or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding." *See* Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005). Martha Stewart was charged with obstruction of agency proceedings under 18 U.S.C. § 1505 for providing false and misleading information to the SEC regarding her sale of ImClone stock. *See* United States v. Stewart, 433 F.3d 273, 280 (2d Cir. 2006). Frank Quattrone, a senior officer of CSFB, was charged with obstructing justice under 18 U.S.C. §§ 1503, 1505, and 1512 for allegedly directing the destruction of documents relating to IPOs that were the subject of regulatory and law enforcement investigations. *See* United States v. Quattrone, 441 F.3d 153, 170 n.18 (2d Cir. 2006).

3. Major League Baseball player Barry Bonds was recently charged with perjury regarding his use of steroids under 18 U.S.C. § 1621, which provides in part that whoever has "taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury." *See* Duff Wilson & Michael S. Schmidt, *Bonds Charged With Perjury in Steroids Case*, N.Y. TIMES, Nov. 16, 2007, at A1.

4. Martha Stewart was charged with violating 18 U.S.C. § 1001, which provides in part, "[w]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up . . . a material fact, or makes any false, fictitious or fraudulent statements . . . shall be fined under this title or imprisoned not more than five years, or both." *See Stewart*, 433 F.3d at 280.

5. *See* Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 607 (2006); *see also* Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 17–24 (2005).

6. *See* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1333 (2006); *see also* David Chase & Neal Wilson, *When the SEC Comes Knocking*, BUS. L. TODAY, May/June 2000, *available at* http://www.abanet.org/buslaw/blt/blt00may-sec.html.

high-profile defendants as to whom there is insufficient evidence to charge the "more serious" underlying offenses that prompted the initial investigation.[7] Some critics have gone so far as to label these prosecutions "vindictive."[8]

Much of this criticism is misplaced. These are serious—not minor—crimes, wholly deserving of prosecutorial attention and which, if ignored, threaten to undermine the integrity of our criminal justice system. In our adversarial system of justice, individuals have near-absolute rights to refuse to testify or to refuse to speak to investigators. Ignoring perjury and obstructive conduct poses a risk of diminishing the significance of these important rights.

It is also clear, however, that federal prosecutors must exercise restraint and refrain from attempting to characterize legitimate defensive conduct as obstruction. Criminal charges should not be brought against individuals when their alleged obstructive conduct is not sufficiently tied to an official proceeding. It is troublesome when, for example, prosecutors stretch obstruction law to attempt to reach allegedly false statements made in the context of an internal corporate investigation. As the Supreme Court held in *United States v. Aguilar*, there must be a sufficient nexus between the alleged obstruction of justice and the judicial or grand jury proceeding that the accused is alleged to have intended to obstruct.[9]

While the Court's holding in *Aguilar* was limited to 18 U.S.C. § 1503, commonly known as the "Omnibus Obstruction Provision," the Court's reasoning should be extended to cover each of the statutes discussed herein. Indeed, when prosecutors fail to extend *Aguilar*'s reasoning—and fail to read a nexus requirement into these statutes—individuals are deprived of their constitutional right to fair notice of the forbidden conduct. Under the Due Process Clause of the Fifth Amendment, a criminal statute must be sufficiently definite such that it gives a "person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[10] To avoid impermissible vagueness, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[11] The consequences to those charged with obstructive conduct are considerable, and citizens have a right to understand exactly what conduct falls within the statute's prohibitions. When prosecutors pin the "obstruction" label on all false or misleading statements, regardless of whether they are made to government

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7. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 614 & n.11 (2005); *see also* Barbara Amiel, *Rain Over Martha*, N.Y. SUN, June 10, 2003, at 6 ("They are prosecuting Ms. Stewart for who she is because on the core charge of insider trading they do not have enough evidence.").

8. For example, Professor Stephen Bainbridge wrote:

> I find something vaguely Star Chamberish about the Quattrone conviction, just as I did with respect to the earlier Martha Stewart conviction. In neither case did the government indict the defendant with respect to the alleged underlying violations. Instead, both were indicted for subsequent acts that allegedly obstructed the investigation. Yet, if that investigation did not result in charges, it seems vindictive to charge obstruction (especially since in neither case was the obstruction very successful in interfering with the investigation).

Green, *supra* note 5, at 12–13 (quoting Stephen Bainbridge). Similarly, Howard Chapman wrote, "In the Martha Stewart case, doesn't it look like the prosecutors are angry because they can't prove insider trading, and are being vindictive in pursuing these other charges?" Howard Chapman, *Both Martha and Justice Have Suffered, and Now It Will Get Even Worse*, FORT WAYNE NEWS-SENTINEL, Mar. 12, 2004, *available at* http://www.discovery.org/scripts/viewDB/index.php?command=view&program=Misc&id=1926.

9. 515 U.S. 593, 599–600 (1995).

10. United States v. Harriss, 347 U.S. 612, 617 (1954).

11. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

officials, the contours of legal and illegal conduct are rendered dangerously unclear. In the words of Sir Thomas More, "[t]he law is a causeway upon which, so long as he keeps to it, a citizen may walk safely."[12] When the line between what does and does not constitute a crime blurs, this causeway's edges crumble.

Some of the criticism of obstruction and perjury prosecutions—particularly those involving high-profile defendants—stems from the misconception that proving such crimes is easy, and that these crimes are pursued to conserve prosecutorial resources or win "easy" convictions. In actuality, proving perjury and obstruction is often extraordinarily difficult and can take considerable time and energy. While many instances of perjury and obstruction committed by ordinary, unknown individuals go uncharged, that is no surprise given the difficulty of proving such offenses and the scarcity of prosecutorial resources. Just because the system cannot pursue *every* instance, though, should not lead to the conclusion that the system should not prosecute *any* instance of such conduct. Prosecutors must bring such cases to uphold the integrity of the criminal process and must, when possible, prosecute those people who commit these crimes, regardless of whether they are famous or unknown.[13]

Given resource constraints and the fact that not all process crimes can be prosecuted, prosecutors must look at a variety of factors in making their charging decisions. Where possible, the prosecution of well-known defendants provides an added benefit—"the deterrent effect is immeasurable."[14] Prior to the high-profile prosecutions of Arthur Andersen and Martha Stewart, public awareness of obstruction crimes was limited. Prosecution of well-known individuals and entities undoubtedly deters the same behavior by those lesser-known. But this result, while desirable, should not alone be the reason prosecutors bring such cases.[15]

The importance of ensuring truthfulness during the criminal investigation process cannot seriously be questioned—to do so is to question the importance of ensuring the integrity of our legal system. Witness testimony typically forms the crux of any criminal case. A witness whose false testimony leads to the wrongful conviction of an innocent person has done enormous harm not only to the wrongfully accused, but also to public confidence in the integrity of the criminal process as a whole. If obstruction of justice and perjury are left unpunished, what is to deter a person from wrongfully accusing an innocent person? What will deter people from lying when telling the truth might lead to harmful consequences for themselves? "Individuals who lie to federal agents interfere with the government's ability to investigate criminal conduct and undermine the efficiency of government investigations."[16]

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12. United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996) (quoting ROBERT BOLT, A MAN FOR ALL SEASONS 89 (Vintage 1960) (speech of Sir Thomas More)).

13. Despite commentary to the contrary, statistical data belie the contention that only high-profile defendants are charged with perjury, obstruction of justice, and making false statements. Indeed, all but a handful of cases in which these crimes are charged do not involve well-known individuals. From 2001 to 2006 there were 1,153 criminal cases filed in United States District Courts charging obstruction of justice and 529 cases charging perjury. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.5.10.2006 (31st ed. 2008), *available at* http://www.albany.edu/sourcebook/pdf/t5102006.pdf. From 2001 to 2006 there were 5,328 criminal cases filed in the United States charging a violation of 18 U.S.C. §1001 as the lead charge. *See* TRAC Reports, Inc., TRAC—Criminal Enforcement (2007), http://tracfed.syr.edu/index/crimindex.html (last visited May 11, 2008).

14. Kurt Eichenwald, *Prosecutors Have Reasons for Stalking Celebrities*, N.Y. TIMES, June 5, 2003, at C4 (quoting Christopher Bebel, former Securities and Exchange Commission lawyer and federal prosecutor).

15. *Id.* ("Martha Stewart [was] prosecuted not for who she is, but for what she did." (quoting James B. Comey, then United States Attorney for the Southern District of New York)).

16. Lynn Zinser & Michael S. Schmidt, *Jones Admits to Doping and Enters Guilty Plea*, N.Y. TIMES, Oct. 5, 2007, at D1 (quoting Scott N. Schools, United States Attorney for the Northern District of California).

While obstructive behavior may be far from rare, the criminal justice system plainly benefits from deterring this conduct through the threat of prosecution.

This is especially appropriate in the United States, where a criminal defendant's right against self-incrimination is secured by the Fifth Amendment to the Constitution. Under U.S. law, a criminal defendant at trial has an absolute right to silence—he need not take the witness stand, and the fact-finder is not permitted to hold his silence against him. It is precisely this right to silence that allows for the rigorous enforcement of process crimes. Indeed, if we value this right to remain silent, then society should ensure that when people choose to speak to the government, they do so truthfully.

Today, most common and civil law jurisdictions recognize some version of a right to silence, but outside of and in comparison to the United States, the right is limited in many respects. In the common law jurisdiction of England, for example, prosecutors may comment during trial on a defendant's unwillingness to answer questions and juries may draw adverse inferences from his silence.[17] Additionally, an individual cannot stop police questioning by invoking his or her right to silence.[18]

In the civil law jurisdiction of France, an individual's right to silence extends to judicial proceedings, but does not cover police interrogations.[19] As in most civil law jurisdictions, France has an inquisitorial rather than adversarial system of justice. The defendant, although not placed under oath, is the first person to be questioned at trial.[20] And although he has a right to silence, if the defendant chooses not to speak, the court may draw an adverse inference from his silence.[21]

In certain socialist or communist nations, there is simply *no* right to silence.[22] Under Chinese law, for example, Chinese suspects have an affirmative obligation to answer any and all questions posed to them.[23]

It is no surprise that in these jurisdictions, therefore, defendants often assert their innocence and make false exculpatory statements; such is to be expected and to a large degree is tolerated.[24] But in the United States, defendants are not required to speak with investigators or to testify; they have the right to remain silent, and their silence may not be held against them in any criminal proceedings. If we begin to tolerate defendants' false assertions of innocence and exculpatory statements in official proceedings—or worse, if we begin to expect such statements—our comparatively broad right to silence becomes unnecessary and begins to slowly lose its significance.[25]

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17. *See* Erik Luna, *A Place for Comparative Criminal Procedure*, 42 BRANDEIS L.J. 277, 315 (2004).

18. *Id.*

19. Jeffrey K. Walke, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y. L. SCH. J. INT'L & COMP. L. 1, 19 (1993).

20. Luna, *supra* note 17, at 316.

21. *Id.*

22. *See* Walke, *supra* note 19, at 27 ("Although sometimes viewed as a distinct form, socialist jurisdictions are generally codified civil law jurisdictions with peculiarly socialist substantive law. Many of these jurisdictions recognize an accused's right to silence.").

23. Luna, *supra* note 17, at 317.

24. *See* INT'L COMPETITION NETWORK, CARTELS WORKING GROUP, OBSTRUCTION OF JUSTICE IN CARTEL INVESTIGATIONS (2006), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ObstructionPaper-with-cover.pdf (finding that other than the United States Department of Justice, most anti-cartel enforcers were not prosecuting acts of obstruction in cartel cases; of the fifteen jurisdictions included in the report, only the United States and Canada prosecuted an oral false statement case within the last five years).

25. The Supreme Court has held that there is no exception to criminal liability under 18 U.S.C. § 1001 for a false statement that constituted a mere denial of guilt. *See* Brogan v. United States, 522 U.S. 398, 408 (1997). Prior to *Brogan*, seven circuits had recognized this "exculpatory no" exception. *See* Moser v. United States, 18 F.3d 469, 473–74 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801, 805 (8th Cir.

For these reasons, prosecution of these crimes is imperative and should remain a high priority. But these laws should not be stretched to reach instances where the alleged obstruction is far removed from the government investigation or judicial proceeding that was allegedly obstructed. There is a considerable difference between cases where a defendant lies directly to government officials or to a grand jury and cases where, for example, a defendant lies to a lawyer hired by a company's audit committee during an internal corporate investigation.

In 1995, the Supreme Court reversed the obstruction of justice conviction of a federal judge, holding that in order to be guilty of violating 18 U.S.C. § 1503, there must be a sufficient nexus between the alleged obstruction of justice and the judicial or grand jury proceeding that the accused is alleged to have intended to obstruct.[26] To satisfy this nexus requirement, the alleged obstructive conduct must have some "relationship in time, causation, or logic" to a judicial proceeding such that the "natural and probable effect" of the conduct is to interfere with justice.[27] The Court held that even though the judge had lied to FBI agents who had specifically advised him that a grand jury investigation had commenced, he was not liable for obstructing justice because "[t]he action taken by the accused must be with an intent to influence judicial or grand jury proceedings; it is not enough that there be an intent to influence some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority."[28] The crucial point was that even though the defendant was aware of the pending judicial proceeding, there was no evidence that he knew that his false statements would be provided to the grand jury. In the words of Chief Justice Rehnquist, "[w]e do not believe that uttering false statements to an investigating agent—and that seems to be all that was proved here—who might or might not testify before a grand jury is sufficient to make out a violation of the catch-all provision of §1503."[29] In addition to obstruction of justice, Chief Justice Rehnquist's reasoning regarding the required nexus between the accused's conduct and a judicial proceeding applies with equal force to perjury and false statements.

Unfortunately, prosecutors do not always enforce the process crime statutes with an *Aguilar*-type nexus in mind. For example, in 2004, the United States Attorney's Office for the Eastern District of New York charged three former executives of Computer Associates International, Inc. with obstruction of justice under § 1512(c) for making false statements to their own company's lawyers.[30] The three executives allegedly "failed to disclose, falsely denied and concealed" the existence of certain accounting practices to lawyers hired by the company's audit committee to conduct an internal investigation.[31] Alleging that the defendants knew and intended that the lawyers would present these false findings to the government, the prosecutors charged the executives with obstruction of justice. This strained theory has since been adopted by a number of other prosecutors.[32]

1990); United States v. Equihua-Juarez, 851 F.2d 1222, 1224 (9th Cir. 1988); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Tabor, 788 F.2d 714, 717–19 (11th Cir. 1986); United States v. Fitzgibbon, 619 F.2d 874, 880–81 (10th Cir. 1980); United States v. Chevoor, 526 F.2d 178, 183–84 (1st Cir. 1975).

26. United States v. Aguilar, 515 U.S. 593, 599–600 (1995).

27. *Id.*

28. *Id.* at 599 (citing United States v. Brown, 688 F. 2d 596, 598 (9th Cir. 1982)).

29. *Id.* at 600.

30. *See* Press Release, U.S. Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm.

31. *Id.*

32. *See, e.g.*, Indictment, United States v. Stockman, No. 07-0220 (S.D.N.Y. filed March 21, 2007) (prosecutors in the Southern District of New York indicted David Stockman and others of Collins &

This theory represents a misuse of the obstruction statutes. While it is important to prosecute process crimes, it is equally important to refrain from prosecuting individuals where the *Aguilar* nexus is absent or stretched so far that it loses all meaning. Under the Due Process Clause of the Fifth Amendment, individuals are guaranteed the right to fair notice before the government may deprive them of a protected liberty interest. Where criminal statutes are insufficiently definite to provide such notice, such statutes will be struck down as impremissibly vague.[33] The Supreme Court has explained that the most important aspect of the vagueness doctrine is establishing minimal guidelines to govern law enforcement: "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."[34] Specifically in the context of § 1512, where the legislature has failed to include a nexus requirement in the text of the statute itself, prosecutors must take it upon themselves to exercise discretion and avoid criminalizing behavior that ordinary citizens—indeed, even the most sophisticated witnesses—would not have thought to be criminal.

In *Aguilar*, the Court was concerned that criminalizing Judge Aguilar's behavior violated the principle that an individual have fair and adequate notice of what constitutes a crime. Although the Court briefly remarked that it need not reach the question of vagueness, it went on to state that, absent a nexus requirement, "a man could be found guilty under § 1503 if he knew of a pending investigation and lied to his wife about his whereabouts at the time of the crime, thinking that an FBI agent might decide to interview her and that she might in turn be influenced in her statement to the agent by her husband's false account of his whereabouts. The intent to obstruct justice is indeed present, but the man's culpability is a good deal less clear from the statute than we usually require in order to impose criminal liability."[35]

While the *Computer Associates* defendants were charged under § 1512(c), not § 1503, the prosecutors should have made sure that the *Aguilar* nexus requirement was satisfied before bringing this charge. Indeed, the language of sections 1503 and 1512(c) are nearly identical. An individual is liable under § 1503 if he "corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." He is liable under § 1512(c) if he "corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so." Because the language of § 1512(c) is as broad as the language of § 1503, the Supreme Court's overriding concern that society have fair notice of what constitutes a crime applies with equal force to both statutes. And for the same reason that the Supreme Court did not see fit to criminalize Aguilar's statements to the FBI agent, it is equally wrong to criminalize the *Computer Associate* defendants' statements to their own company's lawyers. In both cases, the alleged conduct falls beyond what a "person of ordinary intelligence" would have "contemplated [was] forbidden by the statute."[36]

There are significant policy reasons to avoid these types of strained prosecutions.

Aikman, Inc. for obstructing an SEC proceeding under 18 U.S.C. §1505 by allegedly seeking to mislead the company's Audit Committee regarding a matter under investigation by the SEC, while knowing that the Audit Committee would keep the SEC apprised of its findings); Indictment, United States v. Singleton, No. 4:04-cr-514-1 (S.D. Tex. filed Nov. 17, 2004) (prosecutors in the Southern District of Texas charged Greg Singleton, an El Paso Corp. employee, with violating § 1512(c)(2) based on statements he made to El Paso's outside counsel in the course of an internal investigation).

33. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

34. *Id.*

35. United States v. Aguilar, 515 U.S. 593, 599–600 (1995).

36. United States v. Harriss, 347 U.S. 612, 617 (1954).

First, these ill-conceived prosecutions lead to confusion about the demarcation between legal and illegal behavior, and promote public distrust of prosecutors. The perceived illegitimacy of these prosecutions may indeed drown many of the societal benefits received from the otherwise entirely legitimate and necessary process crime prosecutions. Second, when obstruction statutes are applied too aggressively and used to capture conduct occurring in the context of internal corporate investigations, the result is likely that employees may choose not to cooperate with future internal investigations. This chilling effect hampers a company's ability to gather facts, which may be critical to a company's ability to ferret out, correct, and sanction misconduct, as well as to the government's ability to rely on corporate cooperation in its own efforts to investigate and prosecute such misconduct.

By using these statutes to reach conduct only remotely related to an official proceeding, prosecutors deprive individuals of their constitutional right to be fairly notified of the proscribed conduct and lose sight of greater policy concerns. In our society, where the right to remain silent is so deeply protected and the criminal justice process relies so heavily on witness testimony, it is necessary that prosecutors continue to charge individuals whose false statements and conduct are intended to impede government investigations and judicial proceedings. That said, prosecutors must refrain from criminalizing behavior when a merely tenuous nexus exists between an individual's alleged obstructive acts and the obstructed proceeding. "The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons . . . of their liberty [and] reputation . . . must be watched carefully in a country that values the liberties of its private citizens. Never can we allow federal prosecutors to make up the law as they go along."[37]

37. United States v. Brown, 79 F.3d 1550, 1562 (11th Cir. 1996).