

# Legal Memorandum

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## When Art Becomes a Crime: A Case Study in Overcriminalization

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When Steven Kurtz awoke one morning in his Buffalo home to find his wife, Hope, unresponsive, he rushed to dial 911 and summon paramedics. It was May 11, 2004. He had no reason to expect that his wife's fatal heart attack and his call to the authorities would mark the beginning of a four-year odyssey to the belly of the criminal-justice system.

The paramedics and police detectives who arrived at Kurtz's home that morning to tend to his wife found more than they expected. Off the upstairs bedroom was a small table on which was arranged a home laboratory containing Petri dishes and various items of lab equipment. The detectives spent hours—nearly the entire day—interrogating Kurtz about the equipment and his relationship with his wife and then called in local health department officials, who ran tests on the cultures in the Petri dishes. They were harmless.

Unsatisfied with Kurtz's answers, however, and still suspicious of the lab, the police decided to call in federal authorities. The next day, three or four vehicles came screeching up to Kurtz as he walked across a funeral home's parking lot, intending to make arrangements for his wife's cremation. It was the FBI. Kurtz was detained on suspicion of bioterrorism and held for 22 hours.

While Kurtz was being questioned in a downtown Hyatt, his home was being ransacked. Agents from the FBI, the Joint Terrorism Task Force, the Department of Homeland Security, and the Department of Defense, as well as officers from the local police and

### Talking Points

- At a time when he should have been in mourning for his wife, artist Steven Kurtz was placed at the center of a major terrorism investigation that was botched from the start.
- Rather than acknowledge that Kurtz had been mistakenly targeted, federal prosecutors indicted him for what was, at most, a technical violation of a contract, not a crime.
- Kurtz fought the charges against him and won, but he is the exception. Many unjustly charged lack the resources and strength to defend themselves. Kurtz's "accomplice," for example, pleaded guilty after suffering several strokes and facing a possible jail sentence that could have killed him.
- Broadly worded, vague laws like those wielded against Kurtz give prosecutors unbridled discretion to target nearly any individual or conduct and put all Americans at risk of criminal punishment for conduct that they have no reason to believe is unlawful.

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/LegalIssues/lm0039.cfm](http://www.heritage.org/Research/LegalIssues/lm0039.cfm)

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fire departments and the state marshal's office, arrived on the scene and cordoned off the entire block with crime-scene tape. As the TV cameras looked on, federal agents wearing hazmat suits and bearing guns entered Kurtz's home and seized all of his equipment, as well as books, personal papers, and his computer. Authorities went door-to-door, questioning Kurtz's neighbors about his habits and their impressions of him.

### Nine-Day Ordeal

Their search went on nine days, and the authorities even seized his dead wife's body, despite the fact that the local coroner had already determined that her death was due to natural causes. Then federal officials announced triumphantly that they had thwarted a major bioweapons manufacturing plot.

But Steven Kurtz, a professor of visual studies at the University of Buffalo, was no terrorist, "home-grown" or otherwise. He is an artist and activist who works in unusual media. As a review of one of his recent exhibits explains, "Kurtz has never been shy about challenging the establishment, using a blend of performance art and science with his Critical Art Ensemble to stir debate about such things as genetically modified crops and germ warfare."

The CAE, which Kurtz co-founded in 1987, is an art ensemble that produces Web projects, books, and gallery shows intended to engage viewers on the impact of technology on modern life. Its exhibits regularly include computers and electronics, as well as cultured bacteria, which are sometimes thrown at audience members. According to one of the collective's members, "We're...tactical media. We're mainly interested in how issues of cultural representation, how things are represented to the public, and what's the ideology and the subtext to how something is being represented."

At the time of his wife's death, Kurtz had been at work on three projects. The small laboratory was intended for an exhibit on genetically modified organisms contained in store-bought foods at the Massachusetts Museum of Contemporary Art. Most of the Petri dishes and harmless bacteria growing in them were meant for an exhibit called "GenTerra," the subject of which was the genetic engineering of organisms. The rest of the Petri dishes, as well as

many books and papers, were part of Kurtz's early research for "Marching Plague," a project critical of the development and use of biological weapons agents. Those bacteria, as well, were harmless.

### Claims Unravel, but Investigation Continues

After more than a week of searches and analysis, the FBI determined that Kurtz's home presented no public health risk—and never had. The agency further confirmed that his wife's death had nothing to do with anything Kurtz might have done in his lab. Kurtz returned home to find the place ransacked, the detritus of a rushed investigation—stacks of pizza boxes and piles of sports drink bottles, discarded hazmat suits, used chemical test-kits—strewn throughout. Many possessions were missing—apparently confiscated—including a draft manuscript for his book on biowarfare.

The authorities' initial terrorism claims unraveled almost immediately, but the federal investigation dragged on for weeks, with FBI agents questioning museum curators and university administrators with ties to Kurtz's art collective. Agents issued 10 subpoenas to shocked guests at the opening reception for the CAE's Mass MoCA exhibit, which the artists had had to cobble together from materials that had not been seized from Kurtz's home. One CAE member was subpoenaed on the street by an FBI agent and made to appear before a federal grand jury for an inquiry into a possible charge of "possession of biological agents," a criminal offense created by the Patriot Act. The offense prohibits the possession of "any biological agent...that, under the circumstances, is not reasonably justified by a prophylactic, protective, bona fide research, or other peaceful purpose."

Kurtz and his allies believed he had two sure-fire defenses to that charge that would keep him from being indicted.

First, the bacteria were completely harmless. Indeed, their safety had been an essential component of the planned exhibit. "We were kind of demystifying the whole procedure and trying to alleviate inappropriate fear of transgenic science and redirect concern toward the political implications of the research," one CAE member told *The New*

*York Times*. As one leading biochemist explained in a letter to the lead prosecutor, the bacteria found in Kurtz's home "are so safe that they are cultured on open lab benches and used in public education." He continues: "You have more dangerous organisms likely growing on soft cheeses in your refrigerator."

Second, the work done by Kurtz and his allies clearly fit into the "peaceful purpose" exception in the statute—after all, they were artists, not belligerents, and their work was actually critical of bioweapons.

### The Indictment

It was a surprise, then, when nearly two months after the death of Kurtz's wife, a federal indictment came down: Steven Kurtz and Robert Ferrell, a CAE associate who researches genetics at the University of Pittsburgh, were charged not with possessing biological agents, but with mail fraud and wire fraud. According to the indictment, Kurtz had used Ferrell to purchase several strains of bacteria from an academic supplier, American Type Culture Collection (ATCC), in violation of ATCC's terms of sale: that its customers be associated with an approved lab or business, use the bacteria for research purposes only, and not distribute or transfer the bacteria.

The "crime," in other words, was breaking the terms of a private contract. Scheming to violate these contractual terms, under the prosecution's theory, was fraud, and both ATCC and the University of Pittsburgh were victims. And since Kurtz and Ferrell had discussed the matter over e-mail and the bacteria were shipped by mail, they could be prosecuted under the federal wire fraud and mail fraud statutes.

Just because the grand jury had declined to approve the charge that they had feared most—possession of biological agents—did not mean that Kurtz and Ferrell would get off easily. The fraud charges carried penalties of up to 20 years in jail and potentially \$1 million in criminal fines apiece.

Kurtz and Ferrell vowed to fight the charges and were better positioned than most to do so. Their friends had established a defense fund to pay legal

expenses, which would ultimately top \$250,000, and the art world rallied on their behalf. Dozens of newspapers and magazines ran articles and columns on the case, most of them critical of the prosecution. Both of their universities stood by them. Few defendants in their position, Kurtz explains, would have the connections that they did and the resources and support needed to fight such a prosecution.

### A Reputation Ruined

Even so, the pressure and uncertainty eventually proved too much for Ferrell. The prosecution put a major blot on what had been a long and outstanding career during which he had contributed over 200 articles on the causes of diseases such as schizophrenia, muscular dystrophy, and diabetes. With criminal charges and the possibility of jail time hanging over his head, Ferrell, 64, was forced to curtail much of his research.

The prosecution also took a toll on his health. Previously diagnosed with non-Hodgkin's lymphoma, an incurable disease, Ferrell had undergone a bone-marrow transplant shortly after the indictment came down. The stress of the case contributed to a series of strokes, further weakening him.

In October 2007, Ferrell reached a deal with prosecutors and, in exchange for avoiding a prison sentence that would probably kill him, pleaded guilty to a single misdemeanor count of mailing the bacteria to Kurtz. Ferrell was sentenced to a year of unsupervised release and a \$500 fine. At Ferrell's sentencing hearing, the judge almost apologetically explained that this was "the most lenient sentence that I could give" under law.

Kurtz, however, declined to plead guilty to a lesser charge and insisted that the government take the case to court. He argued that the indictment was defective because it failed to allege several elements of fraud: that the alleged victims—ATCC and the University of Pittsburgh—had been deprived of property and that he had intended to commit fraud. According to Kurtz, the prosecution had simply failed to demonstrate, even assuming the truth of the facts in the indictment, that he had done anything amounting to a crime under either of the fraud statutes.

## Two Theories of Fraud

Chief Judge Richard Arcara of the Western District of New York heard oral arguments on Kurtz's motion to dismiss the charges in late 2007 and early 2008, at which the prosecution put forward two theories of the fraud committed.

The first theory was plain fraud. ATCC and the university, prosecutors argued, were each deprived of two types of property—the bacteria and intellectual property rights in the bacteria—through Kurtz and Ferrell's scheme.

In a crisp page of analysis in its April 2008 opinion, the court rejected these arguments out of hand. ATCC, the court observed, “was in the business of selling biological agents in exchange for money, and in this case it got what it bargained for. Ferrell, using the [University of Pittsburgh] account, paid ATCC for the biological agents. Therefore, ATCC was not deprived of the biological agents—it simply sold them.”

As for the intellectual property, the court observed that “it is not clear what this allegation even means” and that it “appear[s] to be simply another way of saying that the defendant sought to obtain the biological agents from ATCC.” Again, however, there was no evidence that Kurtz did anything to deprive ATCC of its intellectual property rights, such as reproducing the bacteria and selling them.

Finally, the University of Pittsburgh could not be a victim of fraud, since it never possessed the bacteria or had any property interest in them and, in any case, the indictment did not allege any type of fraudulent conduct directed toward the university.

Recognizing the weakness of its charges, the government belatedly put forward a “no-sale” theory of fraud as well. Under this theory, ATCC simply would not have sold the bacteria to Ferrell if he had not misrepresented the use to which they would be put—in other words, he and Kurtz used fraud to induce ATCC to make a sale it would not otherwise have made.

The court, relying on reasoning from a recent appeals court opinion, drew a distinction between “schemes that do no more than cause their victims

to enter into transactions they would otherwise avoid,” which are not crimes, and “schemes that depend for their completion on a misrepresentation of an essential element of the bargain,” which are.

The distinction can sometimes be difficult to draw. False claims made by a distributor to a manufacturer of military goggles that its products would not be sold to restricted nations “went to an essential element of the bargain between the parties” because illegal exports would have dire consequences for the manufacturer, and so could be criminally charged; but falsely claiming that one had been referred by a friend of a potential customer is not criminal fraud, because the misrepresentation “was not directed to the quality, adequacy or price of goods to be sold.” In short, the false claims, to be chargeable as wire fraud or mail fraud, must have “relevance to the object of the contract.”

In Kurtz's case, the inquiry was relatively straightforward. The prosecution, ruled the court, did not make a proper “no-sale” claim because it did not present *any* evidence that ATCC's terms of sale were an essential part of the sales agreement or that Kurtz and Ferrell had intended to violate the terms and thereby defraud ATCC. Indeed, the court observed, “the indictment does not allege that either [Kurtz] or Ferrell even knew about the transfer restriction” in the terms of sale.

The indictment, concluded Judge Arcara, did not spell out any scheme that actually amounted to a crime. He dismissed all charges against Kurtz.

## A Bittersweet Victory

For Kurtz, the victory was bittersweet. Though he was ultimately exonerated, the government's misguided prosecution imposed enormous costs on him, Ferrell, and many other artists and scientists. Kurtz, in particular, remains angry that he was denied the opportunity to mourn for Hope, his wife and artistic partner of 20 years, whose death launched the strange series of events that consumed him for four years. “I think all adults know the feelings of intense grief and depression that are brought about by the loss of a loved one,” Kurtz told writer Ken Goffman. “But when you spice it up with the adrenalin and the hyperanxiety of being

attacked by the full weight of federal forces, which in turn causes all your survival instincts to really kick in, you have a bad trip from which you are not going to come down for a long time.”

Dr. Patrick Moore, a professor of genetics at the University of Pittsburgh who has received many awards for his cancer research, laments the effect that the prosecution has had on his and his colleagues’ research. Foreign collaborators, he writes, “have described to me their befuddlement over the Ferrell–Kurtz case,” and this apprehension has stymied his labs’ efforts to recruit foreign scientists to conduct genetic research in the United States. The case, he believes, “marks a low-tide for American scientists.”

Moreover, the prosecution has impeded his research because shipments from biological agent suppliers are now reviewed multiple times and delayed out of the fear of criminal liability. In a letter to the prosecution, Moore is especially blunt: “You are interfering with my work on finding the cause of a cancer because of your prosecution.”

Other cancer researchers found the Kurtz prosecution unsettling. One prominent government scientist, who asked not to be identified, explained that “We share cells every day as a part of our research.... We couldn’t replicate experimental results if we didn’t.” Further, “The suppliers are aware of it” but don’t mind, because the purpose of transfer agreements is to prevent labs from competing against suppliers, not to keep them from sharing cells with other scientists engaged in the same work. If transfer agreements were enforced in that way, she said, basic research “would grind to a halt.”

## Conclusion

Despite everything, Kurtz is proud that he was able to fight the charges against him and prevent the government from establishing a precedent that exchanging harmless biological agents and running afoul of other contractual terms are criminal offenses:

[W]hat we were most worried about and why I wanted to fight this case to the end

was this precedent, as we were talking about earlier. What should have been at best a civil suit, and it wasn’t even that, the Department of Justice wanted to be able to say, “You know, whenever there’s a contract dispute that involves the mail or internet”—and what contract dispute doesn’t?—“we’re going to have the right to come in and decide whether or not it’s a civil case or, if we wanted to be, however arbitrary, a criminal case. And then we are going to prosecute it as a criminal case....” So, you know, if you filled out a warranty card wrong and mailed it in, that could now be a twenty-year jail sentence. That’s what they were after, and happily the judge ruled against them and said this is an abuse of the law and that mail fraud cannot be used this way. So the precedent went our way and narrowed the law instead of expanding it.

The law, however, remains almost unimaginably broad. Despite Kurtz’s successful defense, prosecutors continue to abuse the federal mail and wire fraud statutes to go after contractual violations, local-government patronage politics, minor regulatory violations, and other conduct that may not warrant civil lawsuits, let alone criminal prosecution. In one recently prominent case, a prosecutor brought charges based on a violation of a Web site’s terms of service—terms that many courts refuse to enforce in contract lawsuits.

In short, prosecutors still wield the unbridled discretion to bring criminal charges against almost any individual, whether or not he or she has done anything typically regarded as a crime. Most of these defendants, like Dr. Ferrell, accept plea bargains to avoid the risk of lengthy sentences. A few, like Kurtz, have the resources and stamina to fight the charges, at great personal expense, and actually win—but they are the rare exception that proves the rule.

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