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# Response of Defense Counsel to the United States Attorney's Indictment of David LaMacchia

## Author(s)

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## Description

Response of Defense Counsel to the United States Attorney's Indictment of David LaMacchia (on wire fraud charges).

## Body

**ATTENTION** - the FORMAT of the following article has been modified from its original appearance for ease of reading. No content or information has been removed from this article.

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Sadly, the United States Attorney for Massachusetts, Donald K. Stern, has chosen in this case to attempt to exert control over the use of the Internet and computer communication by an inappropriate use of criminal law. It is almost always inappropriate to use criminal prosecution, as opposed to legislative deliberation, to mold the law in new and gray areas, as this area most certainly is. It requires a stretching and bending of existing criminal statutes never meant to be employed as

the U.S. Attorney seeks to employ them, which is precisely why, rather than prosecuting an individual, he or the Department of Justice should be asking Congress to determine, clearly and unequivocally, what conduct is criminal and what conduct is not.

An indictment is particularly inappropriate in this case. In indicting David LaMacchia, a 20-year-old junior at M.I.T., the U. S. Attorney and his staff are trying to brand as a computer systems operator (a so-called "SYSOP" in computer jargon) as a criminal, for what other people place on, and take off of, a computer system that the SYSOP creates and maintains but does not control. It is not at all clear that a SYSOP who neither controls what is placed on the system nor profits one cent from any copyrighted software that others upload to and download from the system (that he and others create and operate) has committed any crime. In short, this case raises the hotly disputed question of whether the operator of a "common carrier" may be held criminally responsible for the manner in which others use his communications system. Obviously, the people who run the telephone company and who publish newspapers should be watching this case carefully, lest they find themselves criminally responsible for misuses of their communications media and systems.

The United States Attorney is quoted in The Boston Globe of April 8, 1994, as saying that the role played by young LaMacchia in this case demonstrates an "intent to illegally distribute" software placed on and taken off the system by others, and that this "takes this far beyond the bounds of the First Amendment." On the other hand, Harvard Law School Prof. Laurence H. Tribe, widely acknowledged to be the foremost constitutional scholar of our time, is quoted in the same edition of the Globe as describing this prosecution as an "excessive" use of "the criminal justice system to police the outer boundaries of property in these gray areas, where it can't be alleged that someone is deliberately profiting." We believe that the outcome of this case will vindicate the view of Prof. Tribe rather than the less educated view of U.S. Attorney Stern and his assistants.

If the government wishes to outlaw the activities in which David LaMacchia is alleged to have engaged, it should ask Congress to pass a statute clearly making such conduct criminal. We frankly believe that the Department of Justice would have trouble convincing Congress to do so, because of the troubling statutory, constitutional, and policy problems involved. So, instead, the U. S. Attorney will use this to case as a vehicle to try to convince the federal courts to make David LaMacchia into a felon by stretching and mangling the meaning of certain existing

criminal laws.

David LaMacchia's conduct was not in violation of the criminal law, and we are confident that the courts will agree with us. It is unfortunate that this young man -- among the best and the brightest that our society produces -- will have to suffer while this process goes forward. Given the explosion of violent crime and other criminal pathologies in our society, one would think that the U. S. Attorney's staff of lawyers and FBI agents would have better things to do with their time and the taxpayers' money than to imitate guppies, the fish that devour their own young.

We and our client hope to have much more to say about this case and its implications at that point in time when we are able to say more. Meanwhile, we ask that David LaMacchia be accorded the presumption of innocence to which our Constitution and laws entitle him. We ask that all citizens concerned with liberty and fair play follow this case closely and then, at the end, ask some hard questions about the motives and judgment of the prosecutors who have brought this prosecution.

## **Notes**

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