

## IS THE WHITE COLLAR OFFENDER PRIVILEGED?

SAMUEL W. BUELL<sup>†</sup>

### ABSTRACT

*Much public commentary has asserted or implied that the American criminal-justice system unjustly privileges individuals who commit crimes in corporations and financial markets. This Article demonstrates that this claim is not accurate—at least not in the ways commonly believed. Law and practice of sentencing, evidence, and criminal procedure cannot persuasively be described as privileging the white collar offender. Substantive criminal law makes charges in white collar cases easier to bring and harder to defend against than in other cases. Enforcement institutions, and the political economy in which they exist, include features that both shelter corporate offenders and heighten their exposure to criminal liability. Corporate actors enjoy a large advantage in legal-defense resources relative to others. That advantage, however, does not pay off quite as one might expect. A fully developed claim of privilege can be sustained only by showing that basic American arrangements of criminal law and policing have been misguided. This argument would fault the justice system for failing to treat illegal behavior within firms as requiring omnipresent policing, looser definitions of criminality, the harshest of punishments, and rethinking of the right to counsel. Those who believe corporate offenders are privileged should confront the difficulties that argument entails. And they should be aware of the*

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<sup>†</sup> Professor of Law, Duke University School of Law. Many thanks to Miriam Baer, Stuart Benjamin, Rick Bierschbach, Joseph Blocher, Jamie Boyle, Guy Charles, Don Clarke, Brandon Garrett, Lisa Griffin, Susan Klein, Bill Laufer, Maggie Lemos, Dan Richman, Steve Sachs, Ron Wright, and participants in faculty workshops at Duke University School of Law and the Wharton School of the University of Pennsylvania for comments on a preliminary draft, and to Taylor Crabtree, Andrew Jennings, and Luke Ricci for excellent research assistance.

*complications that follow from overreliance on punishment to deal with intractable problems of ex ante regulatory control.*

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## INTRODUCTION

A popular belief holds that the American criminal-justice system has been favoring those who commit crime in the corporate domain.<sup>1</sup>

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1. See generally, e.g., *Investigating and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–4 (2010) (statement of Sen. Kaufman); JEFF CONNAUGHTON, *THE PAYOFF: WHY WALL STREET ALWAYS WINS* 65–95 (2012); GOV'T ACCOUNTABILITY INST., *JUSTICE INACTION: THE DEPARTMENT OF JUSTICE'S UNPRECEDENTED FAILURE TO PROSECUTE BIG FINANCE* (2012), available at <http://g-a-i.org/wp-content/uploads/2012/08/DOJ-Report-8-61.pdf>; Charles Ferguson, *Obama and Corporate Crime*, CORP. CRIME REP., June 11, 2012, at 1, 12–14; Editorial, *Going Soft on Corporate Crime*, N.Y. TIMES, Apr. 10, 2008, at A26; Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES, Feb. 26, 2011, at B1; Joe Nocera, *How To Prevent Oil Spills*, N.Y. TIMES, Apr. 14, 2012, at A19; *60 Minutes: Prosecuting Wall Street* (CBS News television broadcast Dec. 4, 2011), available at <http://www.cbsnews.com/video/watch/?id=7390540n>; Victoria Finkle, *Are Some Banks "Too Big To Jail?"*, AM. BANKER (Jan. 22, 2013, 12:48 PM), [http://www.americanbanker.com/issues/178\\_15/are-some-banks-too-big-to-jail-1056033-1.html?pg=4](http://www.americanbanker.com/issues/178_15/are-some-banks-too-big-to-jail-1056033-1.html?pg=4); *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), available at <http://www.pbs.org/wgbh/pages/frontline/untouchables>; Arianna Huffington, *Send the Bastards to Jail!*, SALON (July 16, 2002, 2:36 PM), [http://www.salon.com/2002/07/16/corporate\\_reform](http://www.salon.com/2002/07/16/corporate_reform); Peter Schweizer, *Obama's DOJ and Wall Street: Too Big for Jail?*, FORBES (May 7, 2012, 5:36 PM), <http://www.forbes.com/sites/realspin/2012/05/07/obamas-doj-and-wall->

This charge deserves attention. Harmful wrongs committed with the powers of large private institutions are pressing concerns for public policy. If law and legal institutions do not respond seriously to wrongdoing in business firms, they will fail to protect the public and may produce or harden inequities in the administration of justice. It is an important question whether American law and legal institutions shield the white collar offender without justification.

This Article addresses that question in depth—as to the individual, not the firm—and finds two perspectives that produce opposing answers. If one broadly examines the contemporary criminal-justice machine as it is applied, day in and out, to the serious white collar offender, one cannot find systematic privilege. Rather, one can see a case for privilege only from a perspective that blames foundational arrangements of American criminal justice for having misconceived the phenomenon of white collar crime. This view would call for reordering basic punishment scales, renovating substantive criminal law, creating entirely new modes of policing in the business world, and rethinking rights to counsel. The conversation invited by this perspective is worth having. But recent discussions of this subject have been unproductive and misleading in suggesting that the issues are more superficial than is true.

Consider the first perspective: in its operation, the present criminal-justice system routinely favors the corporate criminal. The overwhelming weight of academic opinion and a slowly broadening spectrum of public opinion have determined that America's gigantic, exceptional system of arresting and incarcerating its people is at least itself broken, if not also opening dangerous social fissures.<sup>2</sup> If one

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street-too-big-for-jail; Matt Taibbi, *Jon Corzine Is the Original George Zimmerman*, ROLLING STONE (Apr. 24, 2011, 8:37 AM), <http://www.rollingstone.com/politics/blogs/taibblog/jon-corzine-is-the-original-george-zimmerman-20120424>; Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011, 9:00 AM), <http://www.rollingstone.com/politics/news/why-isnt-wall-street-in-jail-20110216> [hereinafter Taibbi, *Why Isn't Wall Street in Jail?*].

2. The literature is too voluminous to cite fully. For some of the major voices, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN*

tunes one ear to claims about American corporate crime and the other to voices of alarm about the scale and severity of American criminal justice, the sound can be discordant.

Both assertions—that criminal justice shields the business criminal while also producing an inhumane and costly “carceral state”—could be true only if there were some mechanism by which the power of the American system were diverted from throwing its full weight at the corporate violator. One would expect to find a place where the institutions and officials who administer law and criminal justice engaged in such deflection efforts, as well as reasons for them regularly to do so.

Efforts to search for such mechanisms in the aftermath of the 2008 financial crisis have been limited to the press, where discussions have been more confusing than illuminating. For example, the *New York Times* editorial board scolded the U.S. Department of Justice (Justice Department) for declining to prosecute bankers responsible for practices that unleashed the 2008 financial crisis.<sup>3</sup> The *Times* described the relevant conduct as “reckless lending, heedless securitizations, exorbitant paydays and illusory profits.”<sup>4</sup> Without discussing a legal theory on which such conduct could support a federal prosecution, the *Times* speculated that the Justice Department’s supposed fecklessness resulted from the zeal of its political overseers to please the banking sector.<sup>5</sup> Meanwhile, the *New Yorker* published a long exploration of President Obama’s soured relationship with leading bankers and other corporate chieftains, warning that his campaign’s poor record in cultivating wealthy contributors might cost the President reelection.<sup>6</sup> All the while, the *Wall Street Journal* has steadily beaten a drum of alarm about a Justice Department it has described as out of control in its zealous pursuit of financiers and public officials.<sup>7</sup>

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CRIMINAL JUSTICE (2011); MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE (2004); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003); and FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT (1991).

3. Editorial, *No Crime, No Punishment*, N.Y. TIMES, Aug. 26, 2012, at SR10.

4. *Id.*

5. *Id.*

6. Jane Mayer, *Schmooze or Lose*, NEW YORKER, Aug. 27, 2012, at 24.

7. See, e.g., Editorial, *Abuse of Privilege*, WALL ST. J., Sept. 20, 2007, at A12; Editorial, *Bear Market Victory*, WALL ST. J., Nov. 12, 2009, at A24; Editorial, *Black and Blue*, WALL ST. J., July 16, 2007, at A12; Editorial, *Brandon and Buffet Redux*, WALL ST. J., Feb. 5, 2011, at A14;

Clearer thinking is in order. It has been some time—perhaps going back to the work of the sociologist and legal scholar Stanton Wheeler and his colleagues at Yale in the 1980s, who took up the project begun by the sociologist Edwin Sutherland in the 1930s—since the busy legal discussion of crime in corporations has taken a healthy step back to consider the overall position of the individual white collar offender in the United States. In the modern legal academy, the problem of white collar crime has been addressed mostly by arguing about how to define criminal wrongs and about whether and how to criminalize firms.<sup>8</sup> There is need for comprehensive discussion of how procedure and institutions treat the white collar offender—specifically the individual who offends within the corporate and financial sectors that draw so much of the public’s attention today.

To assert that the offender in the corporate world is privileged because of her class is conclusory. The important question is how that status might affect criminal-justice outcomes. Sutherland, the path-breaking criminologist who invented the unfortunate but now inescapable term white collar crime, defined it as “a crime committed by a person of respectability and high social status in the course of his occupation.”<sup>9</sup> He really meant it. Sophisticated as his work was in its

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Editorial, *Corporate Injustice*, WALL ST. J., Apr. 6, 2006, at A14; Editorial, *Department of Injustice*, WALL ST. J., Mar. 17, 2012, at A14; Editorial, *Dishonest Prosecutorial Services*, WALL ST. J., Oct. 27, 2010, at A18; Editorial, *Enron Overstretch*, WALL ST. J., Apr. 20, 2005, at A16; Editorial, *The KPMG Fiasco*, WALL ST. J., July 10, 2007, at A20; Editorial, *White-Collar Justice*, WALL ST. J., Aug. 29, 2008, at A16.

8. For some of the most important works on conceptualizing white collar crime, see generally STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE-COLLAR CRIME (2006); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001); John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991); Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423 (1963); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609, 618–22 (1998); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 (1997).

9. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949); see also DAVID WEISBURD, STANTON WHEELER, ELIN WARING & NANCY BODE, CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 5 (1991) (explaining that Sutherland was trying to bring attention to ignored criminality, so he moved among “casual” conceptions of white collar crime based in social status, occupation, and organizational context). For extended discussion of Sutherland’s influence in a series of essays by sociologists and criminologists, see generally WHITE-COLLAR CRIME RECONSIDERED (Kip Schlegel & David Weisburd eds., 1992).

time, Sutherland's project was to accuse the management class of getting away with the business equivalent of murder.<sup>10</sup>

The bare question of class is not the one pressing hardest at the moment on the legal system, at least not overtly.<sup>11</sup> Today, lawyers more plausibly define white collar crime as a realm of substantive criminal offenses that share certain characteristics—in how they are committed, in the settings where they arise, and in the way statutes define them—and which are committed by a diversity of persons.<sup>12</sup>

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10. See John Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC. 1, 2–3 (1985) (stating, in an admiring treatment, “Sutherland’s mission was to turn muckraking into sociology”).

11. Cf. WEISBURD ET AL., *supra* note 9, at 2 (“White-collar crime evokes images of rich and powerful Americans often immune from apprehension and prosecution in the criminal justice system, Americans who can use their power in ways that lead them to be rewarded rather than punished for their misdeeds.”); *id.* at 4 (“The idea that the advantaged, like the disadvantaged, may be prone to criminality, but that their crimes are of a different type, fit easily into the American tradition of reform.”). Survey research suggests that the public views forms of white collar crime as equally serious or more serious than forms of street or violent crime involving comparable degrees of harm. See, e.g., Francis T. Cullen, Jennifer L. Hartman & Cheryl Lero Jonson, *Bad Guys: Why the Public Supports Punishing White-Collar Offenders*, 51 CRIME L. & SOC. CHANGE 31, 39 (2009); Kristy Holtfreter, Shanna Van Slyke, Jason Bratton & Marc Gertz, *Public Perceptions of White-Collar Crime and Punishment*, 36 J. CRIM. JUST. 50, 57 (2008); Nicole Leeper Piquero, Stephanie Carmichael & Alex R. Piquero, Research Note, *Assessing the Perceived Seriousness of White-Collar and Street Crimes*, 54 CRIME & DELINQ. 291, 306 (2008). It is a serious question—though beyond the subject of this Article—whether social status enables or explains the tendency to violate the law, or at least certain kinds of laws. See Paul K. Piff, Daniel M. Stancato, Stéphane Côté, Rodolfo Mendoza-Denton & Dacher Keltner, *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROC. NAT’L ACAD. SCI. 4086, 4089 (2012) (summarizing the results of seven observational and experimental studies that yielded evidence that positive attitudes toward greed tend to make persons more likely to engage in and look favorably upon unethical behaviors, and that such attitudes are more prevalent among persons of higher social classes).

12. See WEISBURD ET AL., *supra* note 9, at 62 (“[W]hite-collar criminals are generally much closer in background to average Americans than to those who occupy positions of great power and prestige.”). Weisburd and his coauthors’ observation is based on an empirical study of 1,094 federal criminal prosecutions from 1976 to 1978 involving securities fraud, antitrust, bribery, bank embezzlement, mail and wire fraud, false claims and statements, credit and lending-institution fraud, and tax fraud that demonstrated the prevalence of middle-class offenders and routine offenses. *Id.* at 9–11, 15, 45–46, 180, app. 1 tbl.A-1; see also HERBERT EDELHERTZ, NAT’L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, *THE NATURE, IMPACT AND PROSECUTION OF WHITE COLLAR CRIME* 3 (1970) (defining white collar crime as “an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, or to obtain business or personal advantage” (emphasis omitted)); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 32–33 (2004) (suggesting that white collar crime be defined as a category of offenses bearing a family resemblance because they involve certain forms of diffuse and aggregate harm, certain forms of moral wrongfulness, and a distinctive role for mens rea). See generally Gilbert Geis, *White Collar Crime: What Is It?*, in *WHITE-COLLAR CRIME RECONSIDERED*, *supra* note 9, at 31 (summarizing the academic debate about definitions of white collar crime in the period from the 1940s to the 1990s).

One can hardly overstate how much the practice of prosecuting crime in the milieu of the business firm (termed here “corporate crime”) has mushroomed since the late 1980s.<sup>13</sup> And today’s management class, though far from a model of diversity, is open to newcomers in ways that would have been unrecognizable in Sutherland’s day.<sup>14</sup>

The bulk of this Article is devoted to showing that study of the routine operation of criminal-justice institutions belies the claim that the American system unjustly shields individual corporate offenders, that is, persons who commit financial crimes in business firms.<sup>15</sup> Privilege cannot be found in sentencing law and practice, which nowadays treat the corporate offender with genuine harshness. Nor in substantive law, which turns out to be more problematic for the financial criminal than for many other offenders. Nor in the laws of evidence and procedure, which do not produce an identifiable advantage in case outcomes for the white collar defendant. Nor in contemporary enforcement regimes, which—though they direct fewer conventional policing resources to the corporate sector—have structural features that heighten the exposure of business actors to criminal sanctions. Clear privilege can be found in access to well-

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13. For empirical examination of the contemporary scope of corporate criminal prosecutions and defense practice, see generally Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853 (2007) (discussing the rise in federal prosecution of organizations); Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221 (2011) (discussing the growth of white collar practice in law firms and the demographics of practitioners in these firms).

14. See, e.g., ANITA RAGHAVAN, *THE BILLIONAIRE’S APPRENTICE: THE RISE OF THE INDIAN-AMERICAN ELITE AND THE FALL OF THE GALLEON HEDGE FUND* (2013).

15. There is no claim here with regard to firms. Many public discussions of these issues have engaged in a category mistake by mixing arguments about the prosecution of individuals with arguments about the prosecution of firms. See generally, e.g., Finkle, *supra* note 1; *Frontline: The Untouchables*, *supra* note 1. The two regulatory and public policy issues have important connections but yield quite different analyses. Compare Jennifer Arlen & Reineer Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (using economic analysis to assess the optimal legal structures for imposing liability on firms to deter individual law violations), and Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006) [hereinafter Buell, *The Blaming Function*] (discussing the social meaning of imposing liability on firms and its potentially beneficial message effects), with Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007) [hereinafter Buell, *Criminal Procedure*] (examining how rules of criminal procedure and evidence apply when individuals are prosecuted within the context of business firms), and Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971 (2006) [hereinafter Buell, *Novel Fraud*] (discussing how theories and doctrine of criminal fraud should be understood, as applied to individuals in contemporary business cases). These sources also cite helpful background literature.

funded counsel. But there, the advantage is not as decisive as generally believed.

The secondary objective is to argue that, in light of this Article's primary analysis, those who would cast the corporate offender as privileged must question foundational features of American law and legal systems that mainstream academic discussion usually treats as sacrosanct. Given the increasing severity of sentencing laws governing financial crime over the last twenty years, these critics would need to argue for such things as routine imposition of maximal terms of imprisonment for nonviolent crimes. The argument would also need to consider abandoning Anglo-American principles of substantive criminal law holding that serious property crimes, as well as theories of accomplice and conspiratorial liability, require purposeful states of mind; discarding constitutional and other commitments to laws of evidence and procedure that are trans-substantive; reordering the relationship between the state and firms to include surveillance and policing practices that have not existed in markets other than those subject to complete prohibition; and altering basic rights, including constitutional rights, to private and public funding of lawyers.

Perhaps economic and social circumstances have reached a point at which radical change is required in white collar justice. If so, critics of the treatment of corporate offenders might do well to take up such an argument. But advocates of such positions need appreciate not just the ambitions of their agenda but also its possible consequences. A desire to compel the criminal-justice system to consume a wider swath of business cases might be a "nothing else works" resort to criminalization, propelled by painfully understandable exasperation with repeated failures of *ex ante* regulatory control in financial markets. If so, the argument would turn out to stretch conventional theories of crime. And it would be liable to criticisms that have been leveled at reliance on criminalization to deal with, for example, America's addiction epidemic or its problem of immigration control.

Three prefatory points before proceeding with the argument. First, the lion's share of recent discussion about white collar crime has concerned the corporate offender—the law violator who is employed by the sizable business firm (incorporated or not), which serves as the site of conduct that is said to warrant legal sanction. Many white collar offenses, maybe even most of them, are committed by



pedestrian hucksters, scam artists, cheaters, and liars.<sup>16</sup> Such persons have been among us for ages. This Article makes few claims about the treatment of this class of offenders—the home buyer who lies to obtain a mortgage, the taxpayer who cheats the Internal Revenue Service (IRS), the restaurant manager who bribes the health inspector, and their ilk.

The discussion here responds to a public debate that does not often mention the small-time crook. Citizens of the early twenty-first century keenly appreciate how large private institutions and markets influence so many aspects of human life.<sup>17</sup> When people talk these days about “corporate crime,” “the corporate criminal,” or “white collar criminals,” usually they are talking about people who staff such institutions. The subject of this Article is therefore the employee of the sizeable business firm who is potentially subject to criminal punishment for conduct relating to her job.<sup>18</sup> Nonetheless, the term white collar crime remains ubiquitous in this Article as elsewhere because it pervades public discourse and, for lawyers, it references the legal concepts, statutes, and doctrines that govern the field of corporate crime.

Second, assertions about privilege are, of course, assertions about equality. To say that law and legal institutions privilege the white collar offender is to posit an elevated position relative to other offenders. In comparing classes of criminal offenders, one runs into normative thickets such as deciding, for example, whether mass manufacture and sale of methamphetamine cause more or less social harm than the draining of large numbers of retirement accounts. The objective here is not to argue the case for or against any particular comparative advantage in the legal system—or to address any of the

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16. See generally John Braithwaite, *Crime and the Average American*, 27 LAW & SOC'Y REV. 215 (1993).

17. It has long been understood, and continues to be appreciated with greater sophistication, that institutional context—particularly that of corporations and other business firms—has strong explanatory power with respect to the commission of white collar offenses and plays an essential role in the detection and control of such offenses. See WEISBURD ET AL., *supra* note 9, at 93, 177; Arlen & Kraakman, *supra* note 15, at 695–99; Buell, *The Blaming Function*, *supra* note 15, at 491–506; Stanton Wheeler & Mitchell Lewis Rothman, *The Organization as Weapon in White Collar Crime*, 80 MICH. L. REV. 1403, 1422–26 (1982).

18. See MARSHALL B. CLINARD & RICHARD QUINNEY, CRIMINAL BEHAVIOR SYSTEMS: A TYPOLOGY 188–89 (2d ed. 1973) (distinguishing white collar crime from corporate crime and defining corporate crimes as those committed for the corporation's purposes by corporate officials and the corporation itself).

many critical questions about the American treatment of drugs, guns, violence, and immigration.

To the extent reference to the “street” offender will facilitate the discussion that follows, that shorthand is meant to represent the typical case of a nonwealthy violator charged with an offense involving violence, drugs, or weapons committed more or less apart from the workplace. Because most corporate crime is pursued in federal court,<sup>19</sup> the most direct reference point is treatment of the street criminal in federal court. Though this obviously excludes the great majority of criminal offenders in the United States,<sup>20</sup> it should not affect the substance of this Article’s claims. Scholars of criminal law do not assert that the federal law of crime and punishment is less severe on the street criminal than are state regimes—at least once offenders have been selected for prosecution.<sup>21</sup>

Third and last, this Article makes many empirical claims but has no pretensions to being a rigorous empirical study. A wide-angle view of the criminal-justice system is needed to develop a better understanding of the normative question posed here. At such distance, the system is not amenable to quantitative modeling. It is too complicated and the available data are beset by gaps and omissions. Data are nonetheless presented as suggestive and useful, and are supplied against the background of qualitative institutional description. The claim is made now (and in the interests of brevity will not be repeated) that empirical uncertainty—even large uncertainty—should be no basis for scholarship to decline to lend a clarifying voice to a noisy and important public debate. Many issues discussed in the following pages beg for full empirical treatment and the following discussion may help define such research questions.

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19. I have been unable to locate data to establish this point. It is certainly true with respect to the highest-profile cases. New York also actively prosecutes in the corporate realm. But the only major individual defendant in a state prosecution in a corporate case who comes to mind from the last decade or so is Dennis Kozlowski, the former CEO of Tyco Corporation, who was severely prosecuted by the Manhattan district attorney. *See* *People v. Kozlowski*, 898 N.E.2d 891, 894 (N.Y. 2008) (“After a nearly six-month trial, a jury convicted defendants of 12 counts of first degree grand larceny, eight counts of first degree falsifying business records, one count of fourth degree conspiracy and one Martin Act count of securities fraud.” (citations omitted)).

20. *See* Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097, 1099–1100 (2013) (reporting that federal prisons held about 200,000 persons versus 1.4 million in state prisons).

21. Quite to the contrary. *See, e.g.*, Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 668–75 (1997) (“Notwithstanding some significant exceptions, defendants typically fare considerably worse when prosecuted in federal court.” (footnote omitted)).

This Article examines five parts of the criminal process that determine outcomes for offenders, proceeding from least to most difficult in terms of the question of privilege. Part I looks at sentencing. Part II addresses the scope of substantive crimes. Part III deals with the law of procedure and evidence. Part IV discusses the allocation of enforcement resources. Part V takes up the matter of defense resources.

## I. SENTENCING

White collar offenders used to receive notoriously lighter sentences than street offenders in federal court.<sup>22</sup> Probation, community service, fines, and short terms of imprisonment followed by early parole were commonplace. Such relatively lenient sentencing was one of the major motivations for Congress to create the U.S. Sentencing Commission, which in turn promulgated the Federal Sentencing Guidelines.<sup>23</sup> The seemingly unbridled subjectivity with which judges sentenced white collar offenders created inter-offender, inter-judge, and inter-district disparities that did not square with a

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22. For discussions of the history of federal white collar sentencing since 1970, and the role it has played in the creation and evolution of the Federal Sentencing Guidelines, see S. REP. NO. 98-225, at 91–92 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3274–75 (considering the use of probation and concluding that in many cases “the heightened deterrent effect of incarceration” was not given its due, “particularly in instances of major white collar crime”); Frank O. Bowman, *Pour Encourager les Autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J. CRIM. L. 373, 385–91 (2004) (discussing the U.S. Sentencing Commission’s adherence to and departure from its historical approach to sentencing for economic crimes in crafting the Federal Sentencing Guidelines); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20–21 (1988) (discussing the compromises made in the creation of the Federal Sentencing Guidelines, including “the Commission’s decision to increase the severity of punishment for white-collar crime”); Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1644–45 (2007) (criticizing excessively harsh increases in the length of fraud sentences as a result of the Sarbanes-Oxley Act of 2002); Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 LAW & CONTEMP. PROBS. 53, 55–62 (2013) (discussing the rise and fall of sentence lengths under the guidelines in the context of judicial discretion). A study of federal prosecutions in New York found that imprisonment was not as rare a sanction in white collar cases as may have been believed in the late 1970s and early 1980s: 46.4 percent of white collar defendants received some prison time whereas 49.7 percent of defendants who committed “[c]ommon [c]rimes” received some prison time. The mean sentence length was 21.3 months for white collar defendants versus 25.1 months for “[c]ommon [c]rime” defendants. WEISBURD ET AL., *supra* note 9, at 130–31.

23. S. REP. NO. 98-225, *supra* note 22, at 91–92.

commitment to equality in punishment.<sup>24</sup> As with much of the sentencing-reform movement, there were also many who believed that, equality aside, sentences for financial crimes had just been too lenient for too long.<sup>25</sup>

Things have come a long way since enactment of the guidelines in 1987. As much as the first-generation statutes and guidelines constrained judges from case-specific leniency, channeled more white collar cases toward imprisonment, and abolished parole, later legislation and amendments in the 1990s and early 2000s turned white collar sentencing in federal court into a harsh business. Without repeating what observers have documented elsewhere,<sup>26</sup> one can see the gravity of contemporary punishment in three ways.

First, look at how the present iteration of the guidelines governing fraud work out for a prototypical corporate defendant. In a public company accounting-fraud case, it is possible for an offender with no prior record to find himself at a level on the guidelines that requires a sentence of life imprisonment.<sup>27</sup> Like all federal sentences, this would mean life with no possibility of parole: a terminal prison sentence. Potential life sentences for financial crimes, and those carrying scores of years of imprisonment, primarily result from two features. First, guidelines calculations in economic cases start with total dollar loss to victims, which can be extremely high in cases involving financial instruments traded in large liquid markets.<sup>28</sup> Second, the guidelines governing white collar cases have a dizzying array of add-ons to an offender's point total—for things ranging from abuse of trust to “jeopardiz[ing] the safety and soundness of a financial institution”—that end up applying commonly rather than rarely in corporate fraud cases.<sup>29</sup>

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24. A high degree of subjectivity in sentencing, of course, did not mean that sentencing was necessarily unprincipled. A famous deep-interview study of sentencing decisions by federal judges in white collar cases showed that judges coalesced around a series of common considerations, most of them unsurprising and uncontroversial. *See generally* STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988).

25. Bowman, *supra* note 22, at 385.

26. *See supra* note 22.

27. *See* Buell, *supra* note 22, at 1643–44.

28. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2012). I have calculated the suggested sentencing range for a hypothetical white collar offender elsewhere. Buell, *supra* note 22, at 1643–44.

29. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1(b)(15), 3B1.3.

These “specific offense characteristics,” in the argot of federal sentencing, have accreted over time, as Congress and the U.S. Sentencing Commission (not to mention the public) have responded to waves of market disruption by looking for ways to make punishments more severe for corporate criminals.<sup>30</sup> Although the guidelines bear most of the responsibility for the potential for such extremely long sentences, Congress has also raised the statutory maxima for major federal offenses in the white collar realm, thereby removing any real ceilings on punishment for complex corporate cases, which almost always include multiple counts of charge and conviction.<sup>31</sup>

Second, look at recent sentencing reports from the field. Particularly in the last several years, it has become common for a federal district judge to impose a sentence of imprisonment on a white collar offender that is measured in double-digit years, and not infrequently in decades. An unscientific review of the biweekly *White Collar Crime Report*, a reliable source published by Bloomberg BNA that reports on notable developments in white collar cases, illustrates that severe sentences have become normal. In an arbitrarily selected eighteen-month period (January 10, 2011, to June 19, 2012), Bloomberg BNA reported on 187 sentences of 60 months or more of imprisonment imposed in federal white collar prosecutions. The mean term of imprisonment in those 187 cases was 144 months; the median was 108 months. An imprisonment term of ten years (120 months) or more was imposed in 84 of the 187 sentences (45 percent).<sup>32</sup> Dozens and dozens of financial offenders are now being routinely sentenced to serve a decade or more in prison. Even if Bloomberg BNA reports only cases with greater notoriety, the numbers belie any assertion that courts are reliably lenient on white collar defendants.

Some of these lengthy sentences are nonetheless substantially below much longer ones dictated by the guidelines. The hedge fund manager Raj Rajaratnam, for example, received an unprecedented sentence of eleven years in prison for insider trading, although the guidelines called for twenty years.<sup>33</sup> It is important to remember that

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30. Bowman, *supra* note 22, at 400–01.

31. *Id.* at 404–05.

32. A table of these cases, including the defendant’s name, the nature of the offense, the date of sentence, the jurisdiction, the sentence of imprisonment, and the fine (when available) is on file with the author.

33. United States v. Rajaratnam, No. 09 Cr. 1184(RJH), 2012 WL 362031, at \*1 (S.D.N.Y. Jan. 31, 2012).

these sentences do not come with any possibilities for reconsideration or early release. Some federal judges have openly expressed shock and alarm about nominal guidelines results in fraud cases that they see as deeply irrational.<sup>34</sup>

As best as can be determined, no literal sentence of life without parole has been imposed in a corporate crime case. Given the age of many corporate violators, however, the longest sentences are effectively life sentences. There has been no serious call to authorize the death penalty for white collar offenders. But if the absence of death sentences and the scarcity of sentences of life without parole distinguish the corporate offender from the street criminal, one cannot argue that federal sentencing law and practice—which govern most corporate violators—privilege the white collar criminal without arguing for a reordering of longstanding arrangements around proportionality in punishment.<sup>35</sup>

Third, the recent severity of sentences in cases covered by media such as Bloomberg BNA occurred against the background of a substantial increase in average sentences for all types of white collar offenders. U.S. Sentencing Commission data show major increases in fraud sentences. In 1996, the mean sentence in all federal fraud cases was 13.2 months imprisonment.<sup>36</sup> Between 1996 and 2011, that mean fraud sentence steadily rose through the mid- and high-teens into the low twenties, reaching a high of 23.2 months in 2010.<sup>37</sup> (The mean

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34. See, e.g., *United States v. Parris*, 573 F. Supp. 2d 744, 750–51 (E.D.N.Y. 2008) (characterizing the guidelines-prescribed punishment as “draconian”); *United States v. Adelson*, 441 F. Supp. 2d 506, 512, 515 (S.D.N.Y. 2006) (criticizing “the utter travesty of justice that sometimes results from the guidelines’ fetish with abstract arithmetic” as “patently absurd on [its] face”); see also *United States v. Ovid*, No. 09-CR-216 (JG), 2010 WL 3940724, at \*1 (E.D.N.Y. Oct. 1, 2010) (“[I]n some cases the fair sentence can drift quite far away from the advisory range, which is, after all, but one of eight factors the sentencing judge must consider.”).

35. See generally PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* (2008).

36. See U.S. SENTENCING COMM’N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/1996/TAB-13.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/1996/TAB-13.pdf).

37. See U.S. SENTENCING COMM’N, 2010 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13, available at [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2010/Table13.pdf](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table13.pdf). Many of the data files that make up the United States Sentencing Commission’s Interactive Sourcebook are available on the U.S. Sentencing Commission’s website, see *Commission Datafiles*, U.S. SENT’G COMMISSION, [http://www.ussc.gov/Research\\_and\\_Statistics/Datafiles/index.cfm](http://www.ussc.gov/Research_and_Statistics/Datafiles/index.cfm) (last visited Oct. 29, 2013), as are the Annual Sourcebooks, see *Annual Reports & Sourcebooks Archive*, U.S. SENT’G COMMISSION, [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/Archives.cfm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/Archives.cfm) (last visited Oct. 29, 2013).

fraud sentence in 2011 was 23.0 months.<sup>38</sup>) Meanwhile, the mean federal sentence for all bribery prosecutions rose from 13.1 months to 19.0 months.<sup>39</sup>

Perhaps surprisingly, federal sentences for violent and drug crimes have declined. During the same years 1996 to 2011, the overall mean federal criminal sentence fell from 50.7 to 43.0 months.<sup>40</sup> The mean federal robbery sentence dropped from 110.9 months to 83.0 months, and the mean sentence for drug trafficking declined from 82.8 months to 70.0 months (albeit with greater fluctuation from year to year in these two categories than in the fraud and bribery categories).<sup>41</sup>

Federal robbery and drug cases are, generally speaking, serious criminal cases. They represent large portions of the federal docket. One might want to argue that a typical federal fraud case should be punished the same as a typical federal drug case. Fair enough, perhaps. But the data show that sentences in the two types of cases have been moving in opposite directions.

Of course, narcotics enforcement in the United States remains more punitive than white collar enforcement for the overall U.S. population. In 2011, federal courts imposed three times as many drug-trafficking sentences as fraud sentences, and the mean sentence length was three times greater in the drug cases than in the fraud

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Preguidelines (pre-1987) sentence means for fraud cases were nominally lower. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1984, at 42 tbl.4.3 (1989) (reporting that the mean federal fraud sentence in 1984 was 27.6 months); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1986, at 40 tbl.4.2 (1990) (reporting that the mean federal fraud sentence in 1986 was 32.6 months); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING, 1982-93, at 17 tbl.17 (1996) (reporting that the mean federal fraud sentence in 1982 was 28.3 months); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASES, 1980-87, at 5 tbl.10 (1989) (reporting that the mean federal fraud sentence in 1980 was 27.1 months). However, these preguidelines sentences were imposed under a parole system at a time when federal prisoners on average served about 60 percent of the time imposed at sentencing. WILLIAM J. SABOL & JOHN MCGREADY, URBAN INST., TIME SERVED IN PRISON BY FEDERAL OFFENDERS, 1986-97, at 1 (1999); *see also id.* at 5, 7 (reporting that, in 1986, the average time served for fraud was 16.9 months for sentenced offenders and 13.2 months for offenders released from prison).

38. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13, *available at* [http://www.ussc.gov/Research\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2011/sbtoc11.htm](http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm).

39. *Compare* U.S. SENTENCING COMM'N, *supra* note 36, tbl.13, *with* U.S. SENTENCING COMM'N, *supra* note 38, tbl.13.

40. *See supra* note 39.

41. *See supra* note 39.

cases.<sup>42</sup> But consider, for sake of contrast, the serious white collar sentence next to the federal narcotics sentence. Many people probably think drugs are nearly always punished more harshly than white collar crime in the federal system. However, the 2011 mean federal drug-trafficking sentence of 70 months was half the mean sentence of 144 months imposed in the 187 Bloomberg BNA-reported white collar sentences of 60 months or more examined above.<sup>43</sup>

For measuring the overall criminal-justice system, these two data points are apples and oranges. The point is simply that anyone who believes that the serious corporate offender is routinely allowed to carry on with life after criminal conviction, whereas prison life is reserved for the drug dealer and violent criminal, is under a misapprehension.<sup>44</sup>

Before moving on from sentencing, one should note something else. In 2005, the Supreme Court declared in *United States v. Booker*<sup>45</sup> that Congress could not make the Federal Sentencing Guidelines binding on judges without violating the Sixth Amendment.<sup>46</sup> As the Court has stressed in later decisions, sentencing judges not only may but must treat the guidelines as only an advisory starting point in imposing sentence.<sup>47</sup> Why then do judges continue to impose severe

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42. See U.S. SENTENCING COMM'N, *supra* note 38, tbl.13.

43. See *supra* note 32 and accompanying text.

44. Unfortunately, the sentencing data cannot tell us a great deal about who these offenders are: big fish versus little fish, rich versus middle class or poor, and other deeper descriptions. The data do show that, as compared to federal drug defendants, federal fraud defendants are less male, slightly less white, substantially older, and much more often college educated. Compared to federal violent crime offenders, federal fraud defendants are much less male, very slightly more white, substantially older, and much more often college educated. A table summarizing this demographic information is on file with the *Duke Law Journal*. The statistics reflect data maintained by the Bureau of Justice Statistics as part of its Compendium of Justice Statistics Series, many of which reports are available online. See *Publications & Products: Compendium of Federal Justice Statistics*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=pbse&sid=4> (last visited Oct. 29, 2013). The data tables for 2004 and 2006–2010 have not been published but were obtained from the Bureau of Justice Statistics and are on file with the *Duke Law Journal*. Average percentages were then calculated by adding the data from each year between 2000 and 2010 and dividing by ten. (The data from 2005 were not used because the bureau changed its calculation methods for that year.) Thanks to Charles Weisselberg for urging this line of inquiry.

45. *United States v. Booker*, 543 U.S. 220 (2005).

46. *Id.* at 226–27.

47. See *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (recognizing that sentences may vary from the guidelines, especially where the individual case deviates from the “heartland” of what the commission intended that the guidelines cover); *Gall v. United States*,



sentences on corporate offenders, while at the same time the Justice Department and even the U.S. Sentencing Commission have begun to worry that the pre-guidelines dynamic of disparate sentencing is creeping back into federal courtrooms?<sup>48</sup>

There is not space here for treatment of the complex judicial, legislative, and administrative politics of sentencing law. However, consider two speculative points. First, if sentences are not veering back to the “old days” of probation and community service for corporate violators, maybe that is because today’s federal judges have internalized the view that such crimes usually should be punished with imprisonment. Second, if many sentences (even longer ones) are now imposed in deviation from what the guidelines dictate, maybe

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552 U.S. 38, 49 (2007) (“[T]he Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however.”); *Rita v. United States*, 551 U.S. 338, 350 (2007) (“The sentencing courts, applying the Guidelines in individual cases, may depart [from the Guidelines].”).

48. See Lanny A. Breuer, Assistant Attorney Gen., U.S. Dep’t of Justice, Address at the American Lawyer/National Law Journal Summit (Nov. 15, 2011), *available at* <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111115.html> (identifying federal sentencing disparities, particularly in financial fraud cases as a “serious challenge[]” to sentencing policy). According to the U.S. Sentencing Commission, post-*Booker* white collar offenders received sentences 9.7 percent lower than drug-trafficking offenders, whereas in the period immediately prior to *Booker*, the disparity was not statistically significant. U.S. SENTENCING COMM’N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 75 (2006); Casey C. Kannenberg, *From Booker to Gall: The Evolution of the Reasonableness Doctrine As Applied to White-Collar Criminals and Sentencing Variances*, 34 J. CORP. L. 349, 358–72 (2008) (describing decisions of the federal courts of appeals since *Booker* that have approved a variety of grounds for sentencing white collar offenders more leniently than provided for by the Federal Sentencing Guidelines); Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 30–34 (2010) (finding, in the examination of one district, significant increases in sentence disparities from judge to judge in the wake of the Supreme Court’s decision in *Booker*). See generally *Federal Sentencing Options After Booker: Current State of Federal Sentencing: Hearing Before the U.S. Sentencing Comm’n* (Feb. 16, 2012), *available at* [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20120215-16/Hearing\\_Transcript\\_20120216.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Hearing_Transcript_20120216.pdf). One federal judge has sharply questioned why the Justice Department is complaining in public fora yet not challenging more white collar sentences on appeal. *United States v. Ovid*, No. 09-CR-216 (JG), 2010 WL 3940724, at \*9–10 (E.D.N.Y. Oct. 1, 2010) (Gleeson, J.); see also *United States v. Tomko*, 562 F.3d 558, 581 (3d Cir. 2009) (en banc) (observing that one of the key reasons behind the introduction of the Federal Sentencing Guidelines was the disparity in sentencing between white collar and street crime); *United States v. Whitehead*, 559 F.3d 918, 921 (9th Cir. 2009) (Gould, J., dissenting) (“We should not, by inaction and excessive deference, be inviting people to open up shop scamming law-abiding individuals or corporations out of hundreds of thousands or even millions of dollars, and then accepting that if on conviction they say that they are sorry, they need not serve any jail time.”); *United States v. Ruff*, 535 F.3d 999, 1006 (9th Cir. 2008) (Gould, J., dissenting) (“To provide for a mere slap on the wrist of those convicted of serious economic crimes, with no or virtually no time imprisoned as punishment, strikes a blow to the integrity of our criminal justice system.”).

that is not because judges favor leniency for white collar violators but because the fraud guidelines have become so harsh that they are no longer much help to the sensible jurist trying to punish rationally and proportionately.<sup>49</sup>

Among the harder questions in American criminal justice are which sorts of white collar offenders should go to prison and whether prison sentences in such cases ought commonly to exceed, for example, five or even ten years. Some would argue that corporate offenders, who are apt to be heavily invested in, and supported by, economic and social structures such as jobs, houses, cars, bank accounts, class networks, and families, have much more to lose when punished criminally—and therefore can be deterred by, or will suffer sufficient retribution through, short terms of imprisonment.<sup>50</sup> Others would say that a legal system that confers a leniency or mercy resting on economic and social capital offends principles of equal justice.<sup>51</sup>

However one comes out on these questions, federal law appears not to have much interest in them, at least in significant corporate cases.<sup>52</sup> Present arrangements allow one to demonstrate the genuine

49. That problem is not unique to the white collar context, as the long struggle over the treatment of crack cocaine in federal sentencing illustrates. *See, e.g.,* Kyle Graham, *Sorry Seems To Be the Hardest Word: The Fair Sentencing Act of 2010, Crack, and Methamphetamine*, 45 U. RICH. L. REV. 765, 789–91 (2011) (listing reasons why Congress reconsidered “the erroneous 100:1 powder-crack ratio”); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1305 (1995) (“Even while affirming the [crack] sentences, federal judges repeatedly have condemned them . . . as excessive and unjust.”).

50. For example, consider the disagreement between the en banc majority and dissent in *United States v. Tomko*. *Compare Tomko*, 562 F.3d at 575 (holding that the lower court did not abuse discretion in sentencing), *with id.* at 586 (Fisher, J., dissenting) (arguing that “relying on a hefty fine in lieu of imprisonment as a means to deter [the defendant] from future criminal activity only reinforces the perception that wealthy defendants can buy their way out of a prison sentence”). *See also* *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006) (“With [the defendant’s] reputation ruined by his conviction, it was extremely unlikely that he would ever involve himself in future misconduct.”).

51. For example, examine the arguments advanced by the Government in *United States v. Rajaratnam*. *See* Government’s Reply Sentencing Memorandum at 16–17, *United States v. Rajaratnam*, No. S2 09 Cr. 1184 (RJH), 2012 WL 362031 (S.D.N.Y. Jan. 31, 2012), 2011 WL 4021120 (“[G]iven [the defendant’s] background, privileges, resources, and position in society, his crimes warrant a more severe . . . sentence of imprisonment.”).

52. Some would put the point both more strongly and more generally:

There is no point in discussing the abstractions and nuances of proportionality when in some rough sense American punishment is so wildly disproportionate to crime, whether we focus on crime and punishment in the collective sense or in regard to the specific misconduct of individuals. . . . [W]e are long past the point of marginally identifying bad acts to punish but instead use our penal laws to add new tranches of offenders to a vast and self-reinforcing status.

harshness of sentencing in this field without having to answer fraught questions of proportionality in punishment between white collar and street crimes. Sentences of twenty years and up, with no possibility for parole, for offenders who are typically in midlife do not leave much room for further increases, at least not without a theory of why fraud should be punished like murder. One looking to establish the privilege of the corporate violator must look elsewhere than sentencing law and practice.

## II. DEFINING CRIME

### A. *White Collar Offense Definition*

Turning to how the law defines crimes, the potential white collar defendant is in particular jeopardy in at least four ways.

First, white collar crimes typically take place in benign social settings in which the only difference between crime and commerce may be the defendant's state of mind. For example, to commit fraud is to do a usually innocuous act—such as to make a representation of fact in a business transaction—with a prohibited state of mind, namely, the specific intent to defraud the counterparty. To criminally possess drugs or a firearm, or to victimize another through an aggravated form of assault, is to engage in conduct that is facially—or, if one prefers, presumptively—criminal, assuming that a basic mental state like being aware of engaging in that conduct can be inferred, as is typical, from the conduct itself.<sup>53</sup> By contrast, a prosecution that involves an actus reus that is usually benign, and therefore turns on the unobservable phenomenon of mental state, can be more difficult to anticipate, harder to defend against, and more likely to produce error by the fact finder.

Mental states may be harder to observe than actions but they are also easier to mistake. And when mistakes are made, they may be more difficult to expose. “I wasn’t there” or “I didn’t do it” are not typically winning arguments in white collar cases.

Second, white collar offenses sometimes turn on fine points about degree of activity or harm that are not often pivotal with street

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Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1237 (2012).

53. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 115–18 (1978) (discussing the “pattern of manifest criminality” among crimes that are “objectively discernible at the time that [they] occur[.]”).

crimes, at least not as to guilt. Though a certain amount of waste emission is legal and necessary to the manufacture of industrial products, exceeding a specified allowable amount can transform permissible discharge into pollution and trigger criminal liability.<sup>54</sup> Any amount of killing, theft, or controlled-substance possession is facially, or presumptively, criminal. The large number of federal regulatory offenses, many of them fine-grained in definition, means that a corporate actor may commit a crime by doing less than the street offender and may find it harder to prevail against a determined prosecutor.<sup>55</sup>

Third, white collar offenses are often both vaguer and broader than their street crime cousins. It is much less clear what it means to “devise a scheme or artifice to defraud” another,<sup>56</sup> or convey something of value to an official that counts as a bribe,<sup>57</sup> or engage in a borderline form of coercion that constitutes extortion,<sup>58</sup> than what it means to break and enter a dwelling house with intent to commit a felony therein or “possess heroin with the intent to distribute.”<sup>59</sup> A statute that prohibits all false statements in matters of federal government jurisdiction<sup>60</sup> covers a massively larger realm of behavior than one that bans possession of firearms by convicted felons.<sup>61</sup> The notoriously sprawling federal criminal code can be mined for dozens of these comparative examples.

In the corporate realm, substantive-offense definitions cast a longer shadow than they do over the street. That is true even if one considers only the within-statute breadth of a few commonly

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54. See, e.g., *United States v. Pruett*, 681 F.3d 232, 239–40 (5th Cir. 2012) (affirming the defendant’s criminal conviction of violating effluent restrictions when a company’s discharges were “double or triple the levels allowed by the permit”); see also *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1993) (Kleinfeld, J., dissenting from denial of hearing en banc) (“We have now made felons of a large number of innocent people doing socially valuable work.”).

55. For a more complete discussion of the criminalization of regulatory offenses, especially in the environmental realm, see generally George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: The Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417 (2007).

56. See, e.g., 18 U.S.C. § 1341 (2012).

57. See, e.g., 15 U.S.C. § 78dd-1.

58. See, e.g., 18 U.S.C. § 1951.

59. See 21 U.S.C. § 841.

60. See 18 U.S.C. § 1001.

61. See *id.* § 922(g).

prosecuted offenses, such as fraud<sup>62</sup> and obstruction of justice.<sup>63</sup> The shadow grows much larger when one accounts for the well-known proliferation, duplication, and overlap of white collar and regulatory offenses in the federal criminal code, as well as the duplication of many of those offenses in state criminal codes, some of which are more actively enforced than before.<sup>64</sup>

Fourth, when definitions of white collar crime do not turn on the element of mental state, they often dispense with mens rea. The federal code is famously full of strict-liability crimes (sometimes termed “regulatory” or “public welfare” offenses), many of them supplements to broader projects of the administrative state in areas such as environmental protection, product safety, and control of government ethics.<sup>65</sup> These kinds of crimes, which have fewer and less

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62. See Buell, *Novel Fraud*, *supra* note 15, at 1987–96 (“Expansion of fraud law . . . appears to be a persistent and unavoidable feature of the liberal regulatory state.”).

63. See Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 678–79 (2006) (“[T]he non-coercive obstruction provisions are . . . overbroad—leaving much to the discretion of prosecutors.”).

64. See John S. Baker, Jr., *Measuring the Explosive Growth of Federal Crime Legislation*, ENGAGE, Oct. 2004, at 23, 23–27 (2004) (estimating that the federal code contains over four thousand criminal offenses and describing methodological problems involved in counting the offenses); John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM (Heritage Found., Wash., D.C.), June 16, 2008, at 1 (reporting that Congress has continued to add federal crimes at a rate of 56.5 per year and finding that there were over 4,450 federal crimes in 2007); Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell & Chad Vacarella, *States, Statutes and Fraud: A Study of Emerging State Efforts To Combat White Collar Crime*, 31 CARDOZO L. REV. 1523, 1535–36 (2010) (discussing the increasing implementation of state laws mirroring the Federal False Claims Act); Deborah L. Harris, *Achieving Worker Safety Through Environmental Crimes Prosecutions*, U.S. ATT’YS BULL., July 2011, at 58, 59–62 (discussing the overlap between federal environmental statutes and worker safety laws); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 713–14 (2005) (“[O]vercriminalization is not merely a problem of too many crimes . . . [but] encompasses a broad array of issues . . . .”); Roger J. Marzulla & Brett J. Kappel, *Nowhere To Run, Nowhere To Hide: Criminal Liability for Violations of Environmental Statutes in the 1990s*, 16 COLUM. J. ENVTL. L. 201, 204–06 (1991) (summarizing the expansion of environmental criminal statutes); see also TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AM. BAR ASS’N, *THE FEDERALIZATION OF CRIMINAL LAW* 5–14 (1998) (“Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably in areas in which existing state law already criminalizes the same conduct.”).

65. See BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND. AND NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW IX* (2010), available at [http://s3.amazonaws.com/thf\\_media/2010/pdf/WithoutIntent\\_lo-res.pdf](http://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf) (reporting a study finding that in the 109th Congress (2005–2006), 446 new nonviolent criminal offenses were proposed, 57 percent of which “lacked an adequate mens rea requirement”). This proliferation of strict-liability offenses in the white collar arena has also been noted on the state level. See Aaron F. Kass, Note, *Mindless Guilt: Negative Aspects of State Environmental Prosecutions Using the Public Welfare Exception*, 29

demanding mental state requirements than definitions of more traditional crimes, are easy to commit and can be hard to defend.

Other criminal offenders face arguably similar forms of offense: immigration crimes, for example, are mostly status offenses and are stuffing federal jails and prisons;<sup>66</sup> or drug-possession offenses that, as a practical matter, can criminalize large populations, especially chemically dependent and mentally ill persons.<sup>67</sup> But these still are not strict-liability crimes in the legal sense. Perhaps outside the context of sex crimes, where offense definitions have ballooned in recent years,<sup>68</sup>

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WM. & MARY ENVTL. L. & POL'Y REV. 517, 536–41 (2005) (discussing the increasing prosecution of environmental crimes as strict-liability offenses).

66. See ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2012) (reporting that the average U.S. Immigration and Customs Enforcement daily detention population increased by more than 50 percent, from 20,429 in 2001 to 32,953 in 2012); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-187, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COSTS 6–10, 34–37 (2011) (reporting that approximately three hundred thousand “criminal aliens,” defined as noncitizens convicted of any crime including an immigration crime, were housed in local, state, and federal prisons and jails in 2009, at a total annual cost of approximately \$1.6 billion); *Decline in Federal Criminal Immigration Prosecutions*, TRAC (June 12, 2012), <http://trac.syr.edu/immigration/reports/283> (reporting that criminal immigration prosecutions had been on the rise since 2006 but peaked at 21,686 in February 2011, before falling to 19,149 in March 2012); *DHS-Immigration Ranks First in Terms of Share of All Federal Criminal Convictions*, TRAC (2005), <http://trac.syr.edu/tracins/highlights/v04/dhsshare.html> (reporting that the Department of Homeland Security accounted for a greater percentage of federal criminal convictions than any other agency from 1999 to 2004, reaching almost 34 percent of convictions in 2004); *Prosecutions for March 2013*, TRAC (May 9, 2013), <http://trac.syr.edu/tracreports/bulletins/hsaa/monthlymar13/fil> (reporting that over 50 percent of all federal prosecutions in March 2012 were for immigration offenses).

67. See CELINDA FRANCO, CONG. RESEARCH SERV., R40732, FEDERAL DOMESTIC ILLEGAL DRUG ENFORCEMENT EFFORTS: ARE THEY WORKING? 29 (2012) (reporting that, between 1997 and 2007, there were more than 323,000 drug arrests and 258,204 convictions at the federal level and that, in September 2008, inmates convicted on drug-related charges made up over 50 percent of the federal prison population—with almost one hundred thousand inmates in federal prisons on drug-related charges); Stephanie Hartwell, *Triple Stigma: Persons with Mental Illness and Substance Abuse Problems in the Criminal Justice System*, 15 CRIM. JUST. POL'Y REV. 84, 84–87 (2004) (describing and citing multiple studies estimating that as many as 80 percent of incarcerated persons have histories of drug and alcohol abuse and that approximately 16 percent of persons incarcerated in state prisons have mental illness); H. Richard Lamb & Linda E. Weinberger, *Persons with Severe Mental Illness in Jails and Prisons: A Review*, 49 PSYCHIATRIC SERVICES 483, 483–85 (1998) (reporting that clinical studies estimate that 10 to 15 percent of state inmates have severe mental illness).

68. See Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 886–88 (1995) (identifying a “surge in popularity” of state sex-offender registration laws); Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Registration Laws*, 63 HASTINGS L.J. 1071, 1076–81 (2012) (“Since the 1990s, registration-worthy sex offenses have grown dramatically in number and scope.”); Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42

it is relatively rare for the common offender to confront felony prosecution in a situation in which the criminal law takes a genuinely no-fault approach to responsibility.

None of the foregoing should be surprising. Most major corporate crimes are committed in economic settings in which it is difficult for the law to draw boundaries. Trading securities to grow retirement accounts is socially valuable; it is a felony to do so while having in one's mind material nonpublic information acquired in breach of a duty. Seriously wrongful or highly undesirable conduct can be embedded within activities that are not just permissible but often beneficial and welcome. Line drawing is made harder by the frequent lack of consensus, across contexts and among different constituencies, about just which acts in ordinary business activities—such as complex, innovative financing devices—should be deemed sufficiently out of bounds to warrant criminal sanctions. As discussed elsewhere, breadth and flexibility in substantive law are unavoidable responses to modern economic wrongdoing, despite strains on commitments to legality and fairness.<sup>69</sup>

This description of substantive white collar criminal law as loose and expansive is not controversial. White collar crimes have long been prominent in the legion accounts of “overcriminalization” and “overfederalization” supplied by academics and practitioners over the last twenty years.<sup>70</sup> With the exception of some notable Supreme Court decisions affecting a small number of statutes,<sup>71</sup> the expansion

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HARV. C.R.-C.L. L. REV. 531, 533 (2007) (“The past several years have seen a number of increasingly severe restrictions imposed on criminal offenders . . . . The primary focus of these efforts has been on sex offenders . . .”).

69. See Buell, *Novel Fraud*, *supra* note 15, at 2018–21 (discussing how breadth in fraud law is in part a result of the need to accommodate new forms of wrongdoing); Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1563–64 (2008) (examining how important statutes and doctrine used to deal with sophisticated crime expand in response to innovations by offenders).

70. See, e.g., Coffee, *supra* note 8, at 234–38 (examining the increasing use of federal criminal sanctions for law violations previously treated primarily through civil regulation); Luna, *supra* note 64, at 709–10 (“[T]he federal government has assumed unlimited authority to prosecute various forms of deception, with criminal statutes stretched to embrace garden-variety dishonesty, promise-breaking, and breaches of fiduciary duty.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525 (2001) (“[T]hrough the 1970s and 1980s . . . [t]he areas of biggest [federal criminal law] expansion involved white-collar crime . . .”).

71. See, e.g., *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703 (2005) (holding that a statute relating to obstruction of justice via witness tampering requires “consciousness of wrongdoing”); *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994) (holding that criminal structuring of currency transactions requires awareness that structuring is prohibited by law);

of white collar crime definition comes not just from the legislative process but also from routine statutory interpretation by federal judges.<sup>72</sup> Although this Article's subject is individual justice, the expansion of criminal liability for corporations themselves, especially in terms of agency liability for their employees' crimes, also has been the subject of voluminous commentary and criticism.<sup>73</sup>

### *B. Claims of Failure To Prosecute*

How could some observers still perceive the substantive criminal law to be insufficiently tough on the corporate offender? The problem must be more fundamental than gaps, loopholes, or oversights within and among statutes and judicial decisions. To the practitioner on either side of a corporate criminal investigation, there just do not seem to be many places left in federal law where a prosecutor cannot find a legal theory on which to rest any strong evidentiary case.

An answer might lie in considering recent complaints about a dearth of criminal prosecutions for banking practices that led to the 2008 financial crisis. Banking activities said by critics to deserve criminal prosecution typically involved alleged fraud in which clear proof of any particular trader's or executive's knowledge of the falsity or deceptiveness of the relevant statement or nondisclosure appeared to be lacking—and in which the sophisticated (and sometimes culpable) nature of counterparties muddled questions of deception and intent to deceive.<sup>74</sup> The most persuasive criticism in this vein, by

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Cheek v. United States, 498 U.S. 192, 196 (1991) (holding that a conviction for willful tax-evasion requires proof of the defendant's "voluntary and intentional violation of a known legal duty").

72. See Buell, *supra* note 69, at 1526–55.

73. See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 144–203 (Alon Harel & Keith N. Hylton eds., 2012) (providing a full descriptive and normative assessment of the law and current practice of corporate criminal liability).

74. An illustrative example is the purportedly evidentiary analysis, almost all of which is conclusory, of "blatant criminality" in the mortgage-backed securities (MBS) industry by Charles Ferguson, director of the Academy Award-winning documentary *Inside Job*. CHARLES H. FERGUSON, PREDATOR NATION: CORPORATE CRIMINALS, POLITICAL CORRUPTION, AND THE HIJACKING OF AMERICA 2, 186–207 (2012). A more informative and factual analysis is a recent report on the extensive debates within the government about evidence and legal theories involving Lehman Brothers, which ultimately concluded in a decision not to charge the bank's executives. See Ben Protess & Susanne Craig, *Inside the End of the U.S. Bid To Punish Lehman Executives*, N.Y. TIMES DEALBOOK (Sept. 8, 2013), <http://dealbook.nytimes.com/2013/09/08/inside-the-end-of-the-u-s-bid-to-punish-lehman-executives>.



Professor Frank Partnoy, concedes that the substantive criminal law—at least as interpreted, if not also as drafted—would have to be relaxed, in response to pressure from novel prosecution theories, for the relevant cases from the banking sector to succeed criminally.<sup>75</sup>

Those questioning the Justice Department's exercise of prosecutorial discretion have described a variety of cases as criminal candidates: from accounting strategies used by Lehman Brothers to improve its balance sheet toward the end of its days; to banks' disregard of their underwriting standards in reviewing mortgages they securitized; to institutions selling mortgage-backed securities (MBS) while shorting the housing market in their own portfolios based on expectations that the real-estate bubble would burst.<sup>76</sup>

Some of these matters have been the subject of civil enforcement actions and lawsuits.<sup>77</sup> But nowhere has anyone described the particular evidence that could be used in these cases to prove any individual's specific intent to defraud to the criminal standard of proof beyond a reasonable doubt. Nor has anyone demonstrated how to overcome defenses of good-faith reliance on purportedly adequate disclosure to reviewing accountants and lawyers or to sophisticated buyers of derivatives who were well-informed about the housing market.

In considering theories of fraud in the MBS market, and the sort of evidence needed to prove such theories, remember that—at least in sophisticated markets for securities products that position a buyer long and a seller short, or vice versa—each party by definition believes the other is mistaken to execute the trade.<sup>78</sup> That structural

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75. Jeff Madrick & Frank Partnoy, *Should Some Bankers Be Prosecuted?*, N.Y. REV. BOOKS, Nov. 10, 2011, at 23, 25–26; Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, ATLANTIC, Jan./Feb. 2013, at 60, 70–71.

76. See, e.g., *Investigating Fraud and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 1–4, 21–29 (2010) (statements of Sen. Kaufman) (describing “[a] bank [that] decides to relax its official underwriting standards” in a discussion of “[c]riminals on Wall Street [that] must be held to account”). See generally CONNAUGHTON, *supra* note 1, at 65–95.

77. E.g., *Fed. Hous. Fin. Agency v. Goldman, Sachs & Co.*, No. 11 Civ. 6198 (DLC), 2012 WL 5494923, at \*1 (S.D.N.Y. Nov. 12, 2012); *In re Citigroup Inc. Sec. Litig.*, 753 F. Supp. 206, 212 (S.D.N.Y. 2010); Complaint at 1, *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)), 2011 WL 4965843; Complaint at 1, *People v. J.P. Morgan Sec. LLC*, No. 0451556-2012 (N.Y. Sup. Ct. filed Oct. 1, 2012), 2012 WL 4479076.

78. See Robert B. Thompson, *Market Makers and Vampire Squid: Regulating Securities Markets After the Financial Meltdown*, 89 WASH. U. L. REV. 323, 330–43 (2011). That remains true even when the short-selling trader chortles in a repellant way about the buyer's choice to go long on the product. See Jesse Eisinger, *Financial Crisis Suit Suggests Bad Behavior at Morgan*

reality in trading markets makes fraud theories based on nondisclosure exceedingly difficult to construct in the absence of strong and well-defined fiduciary duties resting with those who went short on MBS.<sup>79</sup>

Perhaps a fictional example would help. Suppose oil production finally starts to approach its limit as demand continues to increase. Global prices for oil begin to rise for good. Tex owns lots of property in North America with (expensively) reachable petroleum deposits. Tex believes that prices will now rise so fast that a historic breakthrough in energy technology will be forced, come to market relatively soon, and cause oil prices to crash. Tex begins selling off his properties. He packages different portfolios of property for buyers, including ones that have only the deposits that will be the most expensive to reach but that are also among the largest. Tex also buys lots of derivative securities products that give him extensive short positions on the value of petroleum deposits like those on his former lands.

Rex, who runs an energy fund with numerous institutional and individual investors, believes there is big money to be made in what he sees as an irreversible spike in the oil market. Rex buys up Tex's land and purchases derivatives that give him extensive long positions on the value of like properties. As oil prices keep rising, Rex keeps buying, and borrowing to buy more. In the end, Tex is proved right. A new, much-cheaper technology quickly hits the market and oil prices plunge so fast that Rex is unable to liquidate much of his property or

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Stanley, N.Y. TIMES DEALBOOK (Jan. 23, 2013, 12:00 PM), <http://dealbook.nytimes.com/2013/01/23/financial-crisis-lawsuit-suggests-bad-behavior-at-morgan-stanley>. Unattractive trader behavior and how it reveals incentives that require regulatory control are not new issues. See FRANK PARTNOY, *FIASCO: THE INSIDE STORY OF A WALL STREET TRADER* 256–83 (1999) (providing an entertaining insider account of the activities of currency derivatives traders at major investment banks).

79. A different story might be a bank that originated MBS products while engaging in practices of reviewing individual mortgages involving far less scrutiny than was represented to buyers of the MBS. The U.S. Attorney for the Southern District of New York has brought such a case against Bank of America (as successor to Countrywide Financial), but it is a civil False Claims Act case and no individuals have been charged. Complaint-In-Intervention of the United States of America at 2, *United States ex rel. O'Donnell v. Bank of Am. Corp.*, No. 12 Civ. 1422 (JSR), 2012 WL 5974137 (S.D.N.Y. Nov. 27, 2012), 2012 WL 5235021. If there were good evidence of intentional deceit about loan standards by individual bankers, it would seem unlikely that the prosecutor would take the effort to bring this civil case but forgo a criminal case. Unfortunately the civil complaint is not detailed enough to discern the quality of the evidence of scienter. See also *Frontline: The Untouchables*, *supra* note 1 (interviewing former due-diligence reviewers who reported that they were instructed not to use the word “fraud” when describing problems with Countrywide mortgage loans that were not up to standards).

unwind his derivative positions fast enough. Rex and his investors are wiped out. Tex is rich.

Tex has not committed fraud.<sup>80</sup> Nor has he committed insider trading, which is a species of fraud. Rex is not guilty of fraud either, as long as his clients, no matter how naïve they were, gave Rex the authority to buy oil properties. Tex might be guilty of criminal fraud if Rex had asked about new energy technologies before buying Tex's properties and Tex had falsely told Rex that Tex employed scientists and engineers who assured him that nothing would be viable for several decades. Or if Tex were also Rex's realtor when Tex sold him the land and Tex did not say anything about his views on the energy market, his reasons for selling, or his means of selecting properties for each portfolio.

These are the kind of facts a prosecutor needs to prove that a market trade constituted criminal fraud when executed—no matter how much an ex post perspective on the deal, or the market as a whole, points in favor of much tougher ex ante regulation. And, of course, even if the prosecutor solves the problem of constructing a viable theory of fraud, cases often founder on the problem of insufficient evidence to prove the theory beyond a reasonable doubt. (Envision the cross-examination of the “victim” in an MBS case: the derivatives trader from Bank B who bought the long position from her counterpart trader at Bank A.)

Another refrain in criticism of recent prosecutorial strategies is that Congress added a tough new substantive criminal law, as part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley),<sup>81</sup> that is said to be tailor-made for holding corporate managers criminally responsible for wrongdoing that occurs on their watches.<sup>82</sup> The statutory scheme requires a chief executive officer or chief financial officer of a public company to certify that she has reviewed her company's public financial statements and that—to her knowledge—the filings are not false or misleading, that the company has controls to ensure that material information reaches her, and that any fraud or deficiency has been disclosed to the company's auditors and board of directors.<sup>83</sup> A

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80. For a more extensive analysis, see Samuel W. Buell, *The Court's Fraud Dud*, 6 DUKE J. CONST. L. & PUB. POL'Y 31, 32–33 (2010) (examining the problem of fraud in fiduciary relationships).

81. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

82. See, e.g., *60 Minutes: Prosecuting Wall Street*, *supra* note 1.

83. 15 U.S.C. § 7241 (2012).

companion criminal provision imposes a sentence of up to ten years on any executive who makes such a certification “knowing that the periodic report . . . does not comport with all the [certification] requirements.”<sup>84</sup>

This offense did not much change criminal law. To convict a corporate executive of fraud, it has always been necessary to prove actual knowledge (or close to it) that material false or misleading information was disseminated.<sup>85</sup> A criminal Sarbanes-Oxley certification case, as it has been called, would require the very same proof of mental state. The new offense is not a sword with which prosecutors can now slice through the complexity and layers of hierarchy in corporate finance to imprison top managers for the misdeeds of their underlings. At most, the new statutes marginally enhance deterrence by reminding executives of their longstanding obligation not to knowingly disseminate false information about a company’s finances.

To “hold Wall Street criminally responsible” for marketing derivative products that unleashed mayhem in 2007 and 2008 would require, at the least, two sharp departures from the traditions and architecture of Anglo-American criminal law.<sup>86</sup> First, neglect and disregard of risk would have to be sufficient bases to hold a person criminally responsible, at pain of long imprisonment, for fraud—a form of serious property crime. Conceptions of property crime have expanded over centuries to include not just direct physical takings but also takings by cheating, deception, and ever-novel forms of craftiness.<sup>87</sup> But it has never been the case that a person can be convicted of a morally serious criminal intrusion on another’s property interests without proof that the offender engaged in the

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84. 18 U.S.C. § 1350(c)(1).

85. See generally Samuel W. Buell, *What Is Securities Fraud?*, 61 DUKE L.J. 512, 526–61 (2011).

86. See, e.g., *Frontline: The Untouchables*, *supra* note 1 (statement of Sen. Ted Kaufman) (noting that something like the financial crisis “doesn’t happen if there isn’t something bad going on,” and that for Goldman Sachs to have taken extensive short positions in the MBS market while selling long positions “sounds like fraud to me”); *id.* (statement of attorney David Boies) (noting that when “improper” things are done, you expect someone to go to jail).

87. See, e.g., 3 JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 285–91 (1986) (discussing how the contours of property crime have evolved to prohibit fraudulent conduct, trickery, false pretenses, and false promises); FLETCHER, *supra* note 53, at 90–113 (discussing—in the context of larceny and embezzlement—the evolution of the definition of “takings” to include intrusions on others’ property rights achieved by trickery or intimidation).

conduct with the specific objective of transgressing the relevant interests of the victim.

To be sure, the criminal law occasionally treats risk taking as a grave matter. But it generally does so when life is at stake and social justifications are lacking—as with the crazed actor who gins up a game of Russian roulette while high on drugs, or the drunk who gets behind the wheel and careens into a pedestrian. Setting aside the appeal of applying colorful metaphors to Wall Street, moral desert is just not the same for the drunk driver who snuffs out the life of a complete stranger as it is for the trader who unloads a sketchy basket of securities on a less savvy trader, even if the loser in the trade was managing the assets of retail investors or pension funds. To equate such cases, one has to open a discussion about reordering the deontological structure of the criminal law.

Second, principles of derivative responsibility in criminal law would have to be recast. The imposition of criminal liability for the conduct of another—through theories of accomplice and conspiratorial liability, or through special statutes designed to impose such responsibility—typically requires proof that the defendant was fully aware of the criminal nature of the primary actor's conduct and shared the purpose that the criminal effort succeed.<sup>88</sup> Exceptions have been crafted in which criminal liability can rest on a person's supervisory responsibility for another who engages in criminal behavior—generally limited, by the way, to the corporate context.<sup>89</sup> But those exceptions have been approved only for certain kinds of offenses carrying light penalties.<sup>90</sup> To hold a bank executive responsible for fraud on the basis of having looked the other way, or behavior of that sort, while her traders built up a financial house of

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88. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 440–46, 477–84 (5th ed. 2009); WAYNE R. LAFAVE, CRIMINAL LAW 663–71, 712–21 (5th ed. 2010).

89. See *United States v. Park*, 421 U.S. 658, 671 (1975) (describing how courts have consistently interpreted the Federal Food, Drug, and Cosmetic Act “as holding criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of”); *United States v. Dotterweich*, 320 U.S. 277, 284 (1943) (“[An] offense is committed [under the Federal Food, Drug, and Cosmetic Act] . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws . . .”).

90. See *Staples v. United States*, 511 U.S. 600, 605–07 (1994) (explaining that “public welfare offenses have been created by Congress, and recognized by [the Supreme Court], in ‘limited circumstances’” (quoting *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978))); see also Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 56–71 (2012) (providing a detailed account of the limited doctrines of “responsible corporate official” and “public welfare offense” liability).

cards that was doomed to collapse would, again, require discussion about revising principles of responsibility fundamental to criminal law's general part.<sup>91</sup>

Some of the civil actions that have followed the 2008 financial crisis supply evidence for the point that those displeased with the enforcement landscape are actually disgruntled with basic principles of law. Consider, for example, the attorney general of New York's suit against J.P. Morgan (as acquirer of Bear Stearns). This splashy case of fraud in the packaging and sale of large quantities of MBS during the terminal stages of the housing bubble looked like an aggressive prosecutorial move to cast a net over a large representative pattern of abusive conduct in securitization of the housing market.<sup>92</sup> But the attorney general's complaint, while reciting facts styled as constituting fraud, cited as legal authority New York's exceptionally broad Martin Act,<sup>93</sup> which prohibits far more than fraud. And the complaint did not invoke that statute's criminal provisions.<sup>94</sup> No individuals were named as responsible in the J.P. Morgan complaint and the state's press release left the impression that proof of any criminal violation of the Martin Act was lacking and would not be forthcoming.<sup>95</sup>

In the Securities and Exchange Commission's (SEC) civil case against Citibank for marketing a basket of MBS that it filled with hand-picked losers, while simultaneously shorting the same products, the SEC charged an individual Citi banker who assembled the deal

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91. Professor Sanford Kadish stressed this point fifty years ago in his foundational article on the use of criminal law in the economic sector. Kadish, *supra* note 8, at 430–31.

92. See Jean Eaglesham & Dan Fitzpatrick, *J.P. Morgan Sued on Mortgage Bonds*, WALL ST. J., Oct. 2, 2012, at A1; Gretchen Morgenson, *JPMorgan Unit Is Sued over Mortgage Pools*, N.Y. TIMES, Oct. 2, 2012, at B1.

93. N.Y. GEN. BUS. LAW §§ 352–353 (McKinney 2012).

94. Complaint at 29, *People v. J.P. Morgan Sec. LLC*, No. 0451556-2012 (N.Y. Sup. Ct. filed Oct. 1, 2012), 2012 WL 4479076.

95. *Id.* at 1; see also *Fed. Hous. Fin. Agency v. Goldman, Sachs & Co.*, No. 11 Civ. 6198 (DLC), 2012 WL 5494923, at \*1 (S.D.N.Y. Nov. 12, 2012) (providing another example of a civil case lacking individual defendants); Complaint, *SEC v. Citigroup Global Mkts. Inc.*, 827 F. Supp. 2d 328 (S.D.N.Y. 2011) (No. 11 Civ. 7387 (JSR)), 2011 WL 4965843 (same); Peter J. Henning, *In JPMorgan Suit, a Lack of New News*, N.Y. TIMES DEALBOOK (Oct. 2, 2012, 6:16 PM), <http://dealbook.nytimes.com/2012/10/02/in-the-j-p-morgan-suit-a-lack-of-new-news> (“The decision to pursue civil charges . . . means that the state’s attorney general will not have to prove fraudulent intent, only that the firm was negligent . . . . While easier to prove, that also indicates that the evidence to prove fraud was not strong enough to bring more serious charges.”).

with fraud.<sup>96</sup> A jury acquitted him, on the *civil* burden of proof. The jurors said they thought others at the bank might have been more responsible.<sup>97</sup> But, as the journalist James Stewart has explained in some detail, however shaky Citi's products were at the time its traders sold them, the SEC's case lacked clear evidence that Citi's disclosures to the sophisticated buyers—about how the mortgages were selected and that the bank might take contrary positions in its own portfolio—were negligent, much less intentionally fraudulent.<sup>98</sup> This barrier would be present no matter who might have been charged within the organizational structure at Citi, including the firm itself.

One might say that major changes in the substantive law of white collar crime would look less radical if seen in light of the long arc of criminal law's development. White collar crimes as we know them formed no part of the old common law of crimes. The concept itself was not introduced into legal discourse until the twentieth century. But the definitions of the most serious white collar offenses involve either broader conceptions of how preexisting harms can be inflicted (for example, larceny evolved to fraud) or broader forms of harm regarded as serious enough to warrant punishment (for example, dumping substances harmful to public health, manipulating modern bureaucracies through corruption, or marketing faulty medicines). Although there has been an expansion of strict liability for low-penalty regulatory offenses, the statutes and jurisprudence of white collar criminal law's most serious offenses have adhered to the commitments of criminal law's general part.

Maybe there is a case for making serious crimes out of negligence, recklessness, or failure to supervise for those who control the levers of financial institutions that have the potential to inflict massive damage on average investors, employees, and citizens. As it

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96. Complaint at 1–4, *SEC v. Stoker*, 865 F. Supp. 2d 457 (S.D.N.Y. 2011) (No. 11 Civ. 7388(JSR)), 2011 WL 4965844 (charging Citi banker Brian Stoker with securities fraud for “misrepresenting key deal terms” and “engaging in a course of business that operated as a fraud upon investors”).

97. See Peter Lattman, *S.E.C. Gets Encouragement from Jury That Ruled Against It*, N.Y. TIMES DEALBOOK (Aug. 3, 2012, 5:23 PM), <http://dealbook.nytimes.com/2012/08/03/s-e-c-gets-encouragement-from-jury-that-ruled-against-it> (noting that the jurors wondered “why the bank’s C.E.O. wasn’t on trial”).

98. See James B. Stewart, *Few Avenues for Justice in the Case Against Citi*, N.Y. TIMES, Dec. 3, 2011, at B1 (“[B]ad deals, even really bad deals like Citigroup’s, aren’t illegal. They’re not criminal. They’re not inherently fraudulent. If Citigroup’s clients, all of them sophisticated institutional investors, were foolish or careless enough to buy what Citigroup sold them, then arguably they deserved their losses.”).

happens, serious discussion is underway in the United Kingdom about adopting a highly novel criminal offense, punishable by imprisonment, of “reckless misconduct in the management of a bank.”<sup>99</sup>

Perhaps the economy has reached a stage of development that requires rethinking of basic commitments about lines between criminal and other forms of legal responsibility. (Not to mention that other realms of behavior, such as drug consumption, may be subject to debate about *decriminalization* in equal measure.) First, though, one ought to appreciate the nature of a claim that present criminal law privileges the corporate offender. At its root, it is a claim external to existing structures—one that calls into question first principles of legal ordering and that faces a much steeper slope of argument than commonly believed.

### III. PROCEDURE AND EVIDENCE

The law of criminal procedure and evidence does not afford a clearly identifiable advantage to the corporate offender. To see this point, it is necessary to set aside for the moment two factors addressed in Parts IV and V of this Article. One can think of these as potential selection effects bearing on the impact of procedural and evidentiary law. First, the government’s extent and methods of applying enforcement resources to the corporate offender (addressed in Part IV) might affect the kind and frequency of legal claims that arise and succeed in these prosecutions relative to others. Second, the resources available for legal defense in corporate cases relative to street crime prosecutions (addressed in Part V) might filter out claims before litigation.

With those temporary caveats, the present contention is limited but important. Progressing through the major stages of a contested criminal prosecution—pretrial litigation, trial, and appeal—it is hard to see how one could claim that American law typically affords corporate actors charged with crimes a better chance of success than others subject to prosecution. Maybe this assertion is not surprising given that procedural and evidentiary laws are, in theory, rigorously trans-substantive. Still, it is important to appreciate that any

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99. HM TREASURY & DEPARTMENT FOR BUSINESS, INNOVATION & SKILLS, THE GOVERNMENT RESPONSE TO THE PARLIAMENTARY COMMISSION ON BANKING STANDARDS, 2013, Cm. 8661, at 47 (U.K.); PARLIAMENTARY COMMISSION ON BANKING STANDARDS, CHANGING BANKING FOR GOOD, 2013-4, H.C. 175-II, at 516 (U.K.).



appearance of advantage to the white collar defendant does not derive from formal procedure and evidence.

### A. *Pretrial Litigation*

In federal criminal prosecutions, a defendant has but three ways to defeat a case short of trial. One is to establish that the charges are legally defective in some fundamental way—that they fail to state a crime<sup>100</sup> or that they are the product of a prosecutor’s exceptionally grave misconduct.<sup>101</sup> The second is to persuade the court to suppress evidence that the government obtained in violation of a constitutional protection<sup>102</sup> or contrary to a legal privilege, such as the one protecting attorney-client communications, and then to persuade the government to abandon its case because the excluded evidence is dispositive.<sup>103</sup> The third avenue of pretrial defense, rejection of charges by a grand jury, is so famously rare that it can be treated as unimportant.<sup>104</sup>

The first line of attack—dismissal of an indictment—infrequently succeeds in any federal criminal case. Between 2005 and 2009, less than 7 percent of federal felony cases were dismissed.<sup>105</sup> One might

100. See, e.g., *United States v. Huet*, 665 F.3d 588, 594–95 (3d Cir. 2012) (explaining that an indictment must “validly [state] the elements of [an] offense” to survive a pretrial motion to dismiss); *Indictments*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 279, 281–317 (2011) (explaining that a defendant may, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), bring a motion to dismiss a legally defective indictment at any time).

101. See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–57 (1988) (explaining that prosecutorial misconduct, when prejudicial to the defendant, is grounds for dismissal of an indictment); *Indictments*, *supra* note 100, at 281–90 (“A defendant may move to dismiss an indictment based on government misconduct, including vindictive prosecution, prosecutorial misconduct in grand jury proceedings, or prosecutorial misconduct outside the indictment process, though the conduct generally must be so outrageous that it violates ‘fundamental fairness’ or is ‘shocking to the universal sense of justice.’” (footnotes omitted)).

102. See *The Exclusionary Rule*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 208, 208–27 (2011) (“Under the exclusionary rule, evidence obtained in violation of the Fourth, Fifth, or Sixth Amendment may not be introduced at trial to prove a defendant’s guilt.” (footnotes omitted)).

103. See, e.g., *United States v. Bauer*, 132 F.3d 504, 510–12 (9th Cir. 1997) (reversing a conviction because of the erroneous admission of testimony that was protected by the attorney-client privilege); *Government Intrusion into Attorney-Client Relationship*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 557, 557–59 (2011) (“Once a defendant’s right to counsel has attached, government intrusion into the attorney-client relationship violates the Sixth Amendment if the defendant can show a realistic possibility that he or she was prejudiced by that intrusion.”).

104. See, e.g., Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 22–25 (2004); Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 274–76 (1995).

105. Mark Motivans, *Federal Justice Statistics, 2005—Statistical Tables: Table 4.2*, BUREAU JUST. STAT. (Sept. 1, 2008), <http://www.bjs.gov/content/pub/html/fjsst/2005/tables/fjs05st402.cfm>

think dismissal claims have better chances on the margin in corporate cases, given that greater complexity and fuzziness of substantive law would leave more room for judicial discretion on the legal soundness of a charge. Or one could see flexibility in substantive law cutting the other way: leaving more room for novel prosecution theories and making courts hesitant to prevent the government from trying its case.

The data do not support either of these theories. Between 2005 and 2009, the dismissal rate for nonfraudulent property-crime cases (9 percent) was slightly greater than for fraudulent property-crime cases (8 percent).<sup>106</sup> The dismissal rates for violent crime and drug cases were 7 percent, equal to the general rate of dismissal for federal felony cases.<sup>107</sup> The rarity of pretrial dismissals and the negligible differences in rates of dismissals make doubtful any claim that white collar defendants enjoy a particular advantage in persuading courts to stop prosecutions short of trial.

The law of evidence suppression is even less likely to favor the individual defendant in a corporate case—again, holding aside how aggressively law enforcement authorities collect evidence in the first place. Unfortunately, the federal courts have not reported data on rates of grants and denials of suppression motions, overall or broken out by offense type.<sup>108</sup> It is well known that criminal procedure on the

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[hereinafter *Motivans, Statistical Tables 2005*]; Mark Motivans, *Federal Justice Statistics, 2006*, BUREAU JUST. STAT. 25 tbl.4.2 (May 1, 2009), <http://www.bjs.gov/content/pub/html/fjsst/2006/fjs06st.pdf> [hereinafter *Motivans, Statistical Tables 2006*]; Mark Motivans, *Federal Justice Statistics, 2007—Statistical Tables*, BUREAU JUST. STAT. 20 tbl.4.2 (Aug. 31, 2010), <http://www.bjs.gov/content/pub/html/fjsst/2007/fjs07st.pdf> [hereinafter *Motivans, Statistical Tables 2007*]; Mark Motivans, *Federal Justice Statistics, 2008—Statistical Tables*, BUREAU JUST. STAT. 18 tbl.4.2 (Nov. 3, 2010), <http://www.bjs.gov/content/pub/html/fjsst/2008/fjs08st.pdf> [hereinafter *Motivans, Statistical Tables 2008*]; Mark Motivans, *Federal Justice Statistics, 2009—Statistical Tables*, BUREAU JUST. STAT. 18 tbl.4.2 (Dec. 21, 2011), <http://www.bjs.gov/content/pub/pdf/fjs09st.pdf> [hereinafter *Motivans, Statistical Tables 2009*].

106. Motivans, *Statistical Tables 2005*, *supra* note 105; Motivans, *Statistical Tables 2006*, *supra* note 105, at 25 tbl.4.2; Motivans, *Statistical Tables 2007*, *supra* note 105, at 20 tbl.4.2; Motivans, *Statistical Tables 2008*, *supra* note 105, at 18 tbl.4.2; Motivans, *Statistical Tables 2009*, *supra* note 105, at 18 tbl.4.2.

107. Motivans, *Statistical Tables 2005*, *supra* note 105; Motivans, *Statistical Tables 2006*, *supra* note 105, at 25 tbl.4.2; Motivans, *Statistical Tables 2007*, *supra* note 105, at 20 tbl.4.2; Motivans, *Statistical Tables 2008*, *supra* note 105, at 18 tbl.4.2; Motivans, *Statistical Tables 2009*, *supra* note 105, at 18 tbl.4.2.

108. Survey research based on responses from four hundred judges, prosecutors, and defense attorneys indicated that a suppression motion was made in 7.34 percent of federal cases and that suppression motions led to an acquittal or dismissal in 11.62 percent of those cases. Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses*,

street is dominated by the seizure of physical evidence and the eliciting of inculpatory statements—activities that have produced the lion’s share of constitutional law governing the investigation of crime. That body of doctrine, housed mostly in the Fourth and Fifth Amendments, is hardly friendly territory for street crime defendants. But the exclusionary rule survives and is enforced. When a street crime defendant does succeed in a pretrial suppression motion, such suppression often terminates the prosecution because of the dispositive nature of a confession in a murder case or seized narcotics in a drug prosecution.<sup>109</sup>

Constitutional criminal procedure is a much different enterprise for the corporate defendant.<sup>110</sup> Physical evidence in such cases, which consists of documentary records and hardly ever anything else, is rarely seized. It is usually subpoenaed and often supplied to the government voluntarily or through noncriminal regulatory channels. The Fourth Amendment has long been held not to require a warrant or probable cause for issuance of a subpoena for documents.<sup>111</sup>

Suspects more frequently refuse to speak to investigators, usually do not give uncounseled statements to the government when they do, and often contract for forms of limited immunity before agreeing to speak.<sup>112</sup> In modern white collar practice, the important issues of

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*Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1711, 1728 (2005). Older but more comprehensive data based on court records of several Midwest counties indicate that motions to suppress physical evidence were filed much more frequently in drug cases (13 percent) and weapon cases (12 percent) than property offense cases (3 percent). Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 594. These motions were successful 16.9 percent of the time and only 22 percent of those making successful motions were convicted as compared with 89 percent of those who were unsuccessful. *Id.* at 594–600.

109. See STUNTZ, *supra* note 2, at 216–36 (describing how the attractiveness of low-cost suppression motions in street crime cases can divert defense counsel from efforts to investigate and contest ultimate guilt).

110. See generally Buell, *Criminal Procedure*, *supra* note 15 (describing some of the structural differences between criminal procedure in street crime cases and in corporate cases).

111. See *Fisher v. United States*, 425 U.S. 391, 407 (1976) (describing how the application of the Fourth Amendment to subpoenas has been limited); *Wilson v. United States*, 221 U.S. 361, 376 (1911) (holding that “there is no unreasonable search and seizure [in violation of the Fourth Amendment] when a writ, suitably specific and properly limited in its scope, calls for the production of documents which . . . the party procuring its issuance is entitled to have produced”).

112. See generally Karen Patton Seymour & Allison Caffarone, *Defending Individuals in Government Investigations*, in *DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS* §§ 12:9–12:21 (Daniel J. Fetterman & Mark P. Goodman eds., 2011).

criminal procedure tend to include conflict-of-interest matters governed by the Sixth Amendment and ethical codes, strictures involving secrecy and the Fifth Amendment in the grand jury context, barriers erected by the attorney-client privilege and, once in a while, the narrow Fifth Amendment protections that apply to compelled production of documents.<sup>113</sup>

A white collar defendant rarely succeeds in suppressing before trial a pivotal item of proof, or even attempts to do so. Even when she does win such a motion, suppression of some contested evidence is unlikely to stop a case that is typically based on a mosaic of documents and testimony rather than a pivotal admission or piece of forensic proof. The smaller role for evidence suppression by courts may be due to the structure of evidence gathering in white collar cases: with fewer uncounseled interactions with law enforcement, there are fewer items of evidence to attempt to suppress. There is little reason to believe that corporate offenders benefit in any particular way from the exclusionary rule.

#### *B. Trial*

Conventional wisdom holds that white collar trials, at least the complex ones typical of the corporate context, are harder for the government. They take longer. They are heavy on documents and light on compelling eyewitnesses or decisive physical evidence. They involve technical issues that can be difficult to understand. They are dry. They turn on questions of intent that depend on inferences. And they often lack a victim with a face and a voice, or any victim at all.<sup>114</sup> All of this can make it hard to hold a jury's attention, achieve clear jury comprehension, tell a compelling narrative to which jurors can

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113. See Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237, 1292–95 (2008) (arguing that the attorney-client privilege is the only effective legal tool remaining to resist evidence disclosure in corporate criminal cases, at least for firms).

114. See Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White Collar Criminal Defendants*, 58 DUKE L.J. 857, 863–66 (2009) (noting that because “[s]tandards for criminality are vague, unsettled, and still developing,” there is a great deal of uncertainty regarding the “exact contours of the illegality” of certain corporate activities); Edmund W. Searby, *Defending Complex Corporate Fraud Prosecutions*, in WHITE COLLAR FRAUD INVESTIGATIONS: LEADING LAWYERS ON ANALYZING RECENT TRENDS, BUILDING A DEFENSE STRATEGY, AND DEVELOPING COMPLIANCE PROGRAMS 27, 28 (2009) (noting that there is generally a “question of whether a crime has even occurred” in white collar crime cases).

relate, and motivate a jury to convict if doubt creeps into the ample spaces left for defense counsel by the sprawling and confusing aspects of a “paper case.”<sup>115</sup>

The white collar offender would appear to come to trial with built-in advantages. The allegations against her lend themselves to doubt because her conduct took place within a generally benign business setting that provides ready fodder for “innocent” explanations.<sup>116</sup> And she is likely to have socioeconomic characteristics and a life history that, for many jurors, may dampen the tendency to believe that the defendant, just because she was charged with a serious crime, probably did something wrong.<sup>117</sup> She has no particular leg up when it comes to the legal rules governing admission of evidence, competency and examination of witnesses, jury argument, and the like. (Documents can be stubborn in the face of cross-examination.) But she may more easily tap into sympathies through the storytelling process that trial lawyers know is crucial to win over a juror.

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115. See DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 169–70 (2012) (emphasizing the importance of developing a persuasive courtroom narrative due to the “heavy reliance on live testimony and advocacy” in the Anglo-American criminal trial system); Samuel W. Buell & Lisa Kern Griffin, *On the Mental State of Consciousness of Wrongdoing*, 75 LAW & CONTEMP. PROBS. 133, 150–63 (2012) (discussing the role of narratives in jurors’ determinations about a defendant’s mens rea); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 286–302 (2012) (discussing how narratives factor into jury determinations and highlighting the distinctions of these narratives with respect to white collar trials). Recent examples of white collar trials that appear to fit this profile include prosecutions involving the broadband trading business of the Enron Corporation, see *Yeager v. United States*, 557 U.S. 110 (2009), *United States v. Shelby*, 447 F. Supp. 2d 750 (S.D. Tex. 2006), *United States v. Hirko*, 447 F. Supp. 2d 734 (S.D. Tex. 2006), *United States v. Yeager*, 446 F. Supp. 2d 719 (S.D. Tex. 2006), MBS trading by Bear Stearns employees in New York, see Zachary Kouwe & Dan Slater, *2 Bear Stearns Fund Leaders Are Acquitted*, N.Y. TIMES, Nov. 11, 2009, at A1, and charges of accounting fraud between executives of the AOL and PurchasePro companies in Northern Virginia, see Carrie Johnson, *3 Acquitted in Lengthy AOL Trial*, WASH. POST, Feb. 7, 2007, at D1. The SEC also lost a recent trial involving alleged fraud in an MBS transaction by a Citibank trader, but the jury took the unusual step of asking the trial judge to read aloud a note urging the government to continue to pursue fraud in the banking industry. See Lattman, *supra* note 97.

116. Some have argued that there is evidence of reluctance among jurors to criminally penalize morally ambiguous conduct. See, e.g., Pamela H. Bucy, *Moral Messengers: Delegating Prosecutorial Power*, 59 SMU L. REV. 321, 335–36 (2006).

117. See William Alden & Azam Ahmed, *A Conflicted Jury Finds Rajat Gupta Guilty*, N.Y. TIMES DEALBOOK (June 15, 2012, 5:41 PM), <http://dealbook.nytimes.com/2012/06/15/a-conflicted-jury-finds-rajat-gupta-guilty> (noting that some jurors considered “what he had done professionally . . . [and] were hoping he would walk out of [the] courthouse”).

Another important trial factor is bail, a matter in which the white collar offender typically has a big advantage.<sup>118</sup> The American system of pretrial detention is one of self-insurance. If a person can place sufficient assets at risk to assure a judge that she is not likely to flee, she makes bail. If she cannot, she does not. On the issue of flight risk, assets are a double-edged sword for some white collar offenders who have used their wealth to establish properties and other ties offshore. But this concern can usually be overcome because one who can afford an offshore home can usually post many times the value of such a property in bail.

In addition, pretrial detention decisions in many jurisdictions rest heavily on considerations of “danger to the community.” (In federal court, such danger is statutorily presumed in all serious narcotics cases.<sup>119</sup>) It might go without saying that danger in these legal regimes does not mean risk that the defendant will defraud or mislead others and is very rarely a basis to deny bail to a white collar defendant.

As any defense lawyer will explain, bail matters a great deal to a defendant’s leverage and chances of prevailing in criminal litigation.<sup>120</sup> The logistics of jails and prisons make it extremely difficult to prepare an effective trial defense when the defendant is in custody—especially if represented by an overworked public defender or court-appointed attorney who does not have enough hours in the day. All else equal, denial of bail makes a trial victory less likely.

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118. See WEISBURD ET AL., *supra* note 9, at 113 (finding that white collar offenders were more likely to receive bail than those who committed “[c]ommon [c]rimes” (1.7 percent of white collar defendants were denied bail, as opposed to 19.9 percent in “[c]ommon [c]rimes”)); see also Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (2002) (reporting the results of an experimental study in Baltimore showing that represented persons were far more likely to achieve pretrial release). Justice Department data from 2003 to 2004 indicate that a much greater percentage of defendants charged with white collar offenses were released on bail than those charged with other offenses. Defendants charged with fraudulent property offenses were released 70 percent of the time, more than double the percent released for all offenses (32.6 percent) and the percent released for violent crimes (27.4 percent). BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 46 tbl.3.1 (2006), available at <http://www.bjs.gov/content/pub/pdf/cfjs04.pdf>. Defendants charged with ordinary property offenses were released at a slightly higher rate (71.9 percent) than their white collar counterparts. *Id.*

119. See 18 U.S.C. §§ 3142(e)–(g) (2012). Some states have implemented similar regimes. See, e.g., R.I. GEN. LAWS § 12-13-5.1 (2002); UTAH CODE ANN. § 77-20-1(1)(c) (LexisNexis 2012).

120. See 1 CRIMINAL DEFENSE TECHNIQUES § 1.02[2] (Irene H. Rosen, Michella A. Zeppetello & Douglas L. Winston eds., 1992).

More importantly, pretrial detention increases a defendant's incentives to accept a plea bargain. It is a nearly direct reduction in negotiating power. As a case drags along before trial, each day a defendant spends in jail is one less day of freedom to trade the prosecutor for a sentence reduction or to weigh against taking a run at acquittal. Time spent in pretrial detention is typically credited against the sentence ultimately imposed. If one is facing, for example, a likely sentence of four or five years in prison in the event of a trial loss and has spent a year in jail awaiting trial, a plea bargain for a sentence of eighteen or twenty-four months becomes nearly irrational to reject, regardless of the merits of the prosecution.

The foregoing story about the trial prospects of the corporate defendant runs into a surprising fact. In the federal system at least, the acquittal rate in white collar trials is not significantly higher than in other cases.<sup>121</sup> This bears repeating. Among the small percentage of federal criminal defendants who choose to contest a prosecution at trial, white collar defendants do not enjoy a higher chance of acquittal than others.<sup>122</sup>

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121. Between 2005 and 2010, the 0.62 percent acquittal rate in federal white collar cases (embezzlement, fraud, and forgery) was close to the 0.54 percent acquittal rate across all federal criminal prosecutions. Over the same period, 7.6 percent of federal white collar cases and 9.5 percent of all federal cases resulted in a disposition other than conviction. *See* ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2005, at 81 tbl.D-4 (2006) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2005]; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2006, at 81 tbl.D-4 (2007) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2006]; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2007, at 81 tbl.D-4 (2008) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2007]; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2008, at 82 tbl.D-4 (2009) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2008]; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2009, at 82 tbl.D-4 (2010) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2009]; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2010, at 83 tbl.D-4 (2011) [hereinafter ADMIN. OFFICE, STATISTICAL TABLES 2010]. These reports are available on the United States Courts website. *Statistical Tables Archive*, U.S. COURTS, [http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables\\_Archive.aspx](http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary/StatisticalTables_Archive.aspx) (last visited Oct. 30, 2013).

One scholar, who assembled a more granular set of data reflecting acquittals by federal statute charged, found that the highest acquittal rates at federal trials are in civil rights cases, some types of assault and sexual abuse cases, and marijuana cases. The lowest rates are for cases of failure to file a tax return and for using a firearm in a violent crime that results in death. Kyle Graham, *Crime, Widgets, and Plea Bargaining: An Analysis of Charge Content, Pleas, and Trials*, 100 CALIF. L. REV. 1573, 1608–14 (2012).

122. An illustrative case is *United States v. Ferguson*, 676 F.3d 260 (2d Cir. 2011). The opinion recounts an exceedingly complex, lengthy, nuanced, and vigorously contested trial

Both this data and the wisdom on the ground that white collar defendants have better trial chances deserve to be taken seriously. The simplest way to reconcile them would be selection effects—specifically what scholars often call in the litigation context the Priest-Klein effect.<sup>123</sup> On this account (discussed in Part IV), prosecutors choose their white collar prosecutions in the shadow of trials that appear hard and resource draining, for all of the reasons described above and more.

When observers wonder why, in the wake of the 2008 financial crisis, there has been a splashy wave of insider-trading prosecutions but almost no prosecutions relating to deals involving MBS, they often reach for elaborate speculation about government motives and the influence of the banking industry.<sup>124</sup> The simpler explanation is that prosecutors bring cases they think they can win. And, of course, the quality of defense advocacy (discussed in Part V) may exert considerable pressure, since the prosecutor's estimate of how difficult the case will be to prove could turn on how skilled the defense is likely to be in exploiting weak points in a messy and far-reaching case about communications among dozens of people within a large business organization.

An enduring obstacle to contemporary criminal-justice scholarship—maybe the biggest one—is the lack of good data for

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involving accounting fraud related to a “finite reinsurance” deal between the American International Group and General Reinsurance Corporation. *Id.* at 267. The jury apparently managed to understand the case in spite of the obscurity and subtlety of the criminal conduct, returning convictions after four days of deliberations. *Id.* at 273. The defendants nonetheless won grants of new trials on appeal, after the court painstakingly worked its way through a myriad of issues involving evidentiary rulings, jury instructions, and alleged prosecutorial misconduct. *Id.* at 273–94. Almost every claim of error was rejected, but the court nonetheless found reversible error in one ruling admitting a stock-price chart into evidence and a turn of phrase in one jury instruction. *Id.* at 277. Reading the case produces both appreciation for how profoundly different corporate prosecutions are from those involving street crime and uncertainty about whether the corporate defendant, at bottom, faces better prospects than others of prevailing at trial or on appeal.

123. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

124. See, e.g., Rich Kirchen, *Senate Candidate Hovde: Jail Wall Street Execs, Extend Social Security Age*, MILWAUKEE BIZTALK (Apr. 24, 2012, 2:43 PM), <http://www.bizjournals.com/milwaukee/blog/2012/04/hovde-jail-wall-street-execs-extend.html> (criticizing the Obama administration's Justice Department for not prosecuting Wall Street executives and accusing the administration of going soft on Wall Street because of campaign contributions). See generally Taibbi, *Why Isn't Wall Street in Jail?*, *supra* note 1 (pointing to the revolving door between the SEC or Justice Department and white collar defense firms, as well as the large campaign contributions made by banks, as reasons why bankers have not been prosecuted in the wake of the 2008 financial crisis).



measuring and understanding prosecutors' charging decisions, especially in the federal system which grants extensive discretionary power. One can only speculate that the white collar offender's trial advantage, if there is one, is cashed out well before trial—in the lower likelihood of being charged due to the discretionary enforcer perceiving the case as chancy. The salient comparative question might be whether prosecutors are more risk averse in corporate charging, not whether the evidentiary rules and trial procedures that actually control what happens in courtrooms make white collar convictions harder to secure. But more on this in Part V.

### C. Appeal

Complexity and ambiguity in substantive criminal prohibitions would seem to make the white collar offender's chance of reversal on appeal, or success on a later collateral attack, significantly higher than those of the defendant appealing a conviction and sentence for a routine street crime. It seems plausible that the white collar offender would benefit from greater attention and sympathy from appellate judges by virtue of her familiarity to them as a demographic matter, and the comfort these judges are likely to have with her more skilled, more frequently appearing advocate.

The data call these hypotheses into question. The overall reversal rate for federal criminal appeals decided on the merits was approximately 10 percent for the years 2002 through 2010.<sup>125</sup> That period included a year (2005) in which a change in sentencing law caused an extraordinary number of reversals. Typical annual reversal rates have been closer to 8 percent.<sup>126</sup> Offense-specific reversal rates do not vary greatly from that low average success rate: in 2010, the reversal rate was about 9.1 percent for fraud cases, 8.0 percent for "public order" cases (which include bribery, perjury, tax, and regulatory offenses, among others), 9.9 percent for violent crime

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125. This rate reflects data maintained by the Bureau of Justice Statistics as part of its Compendium of Justice Statistics Series. *See supra* note 44. Data tables from the years 2002–2004 are available online. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 84 tbl.6.4 (2004), available at <http://www.bjs.gov/content/pub/pdf/cfjs02.pdf>; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2003, at 88 tbl.6.4 (2005), available at <http://www.bjs.gov/content/pub/pdf/cfjs03.pdf>; BUREAU OF JUSTICE STATISTICS, *supra* note 118, at 86 tbl.6.4. The data tables from the years 2005–2010 have not been published but were obtained from the Bureau of Justice Statistics and are on file with the author.

126. *See supra* note 125.

cases, 6.0 percent for drug cases, 9.6 percent for weapons offenses, and 7.8 percent for immigration offenses.<sup>127</sup> Fraud reversal rates fluctuated between 9 and 15 percent during the years 2002 through 2010, averaging to a 12.5 percent reversal rate over the whole period.<sup>128</sup>

Perhaps really well-financed corporate offenders in the most sophisticated cases enjoy marginal advantages in the appellate process over average fraud offenders. But it would be hard—and perhaps impossible—to find signs of that in existing data because the data do not include case-specific information. In any event, marginal differences in the otherwise very low rates of success on appeal of federal criminal defendants cannot be the source of any substantial privileging of the white collar defendant by the criminal-justice system.

To summarize, available data and ground-level knowledge about the practice of federal criminal defense make it difficult to construct a plausible hypothesis that trans-substantive regimes of procedural and evidentiary law contain any mechanism of substantial advantage to the corporate crime defendant.

#### IV. ENFORCEMENT RESOURCES

As the national economy and its many markets have grown larger and more complex—and the modern regulatory state has expanded—the gulf between law as written and law as enforced has never been more consequential or more difficult to study and quantify. Some scholars have argued that, in the American criminal-justice system, decisions of executive-branch actors are not just the most important input into outcomes but the only one of real consequence.<sup>129</sup> The laws of sentencing, procedure, evidence, and substantive crime can be uninformative sources for assessing the chances that an individual will be subject to investigation, charged with a crime, or offered a particular disposition involving a plea and sentence.

One therefore cannot evaluate the position of the corporate offender without considering what might be called the market for criminal enforcement—a market that derives many of its most

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127. See *supra* note 125.

128. See *supra* note 125.

129. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–84 (2009).

important inputs from dynamic political systems. An argument can be mounted that current arrangements privilege the white collar offender. But, as with substantive crime definition, a clear-eyed understanding of enforcement practices should make one appreciate that radical change would be necessary to place the typical corporate actor in greater peril of criminal enforcement—rearrangements that would lead to a new order in the relationship between government and business. It should be equally appreciated that a call to rest the project of corporate control more heavily upon the system of criminal prosecution is open to general criticisms of the recent American tendency to criminalize intractable regulatory problems.

#### A. *Enforcement Systems*

On the face of matters, three factors could make an observer think that the street offender's likelihood of arrest and prosecution is much higher than the white collar offender's: where crimes are committed, how they are committed, and how many police patrol the spaces in which they are committed. Street-level police officers vastly outnumber investigators of fraud, regulatory, and like offenses in this country.<sup>130</sup> Street crimes are more often committed, after all, on the street, where conduct is more likely to be visible to police and to generate arrests, both because of location and, as discussed in Part II, the clearer act-based nature of street crimes. White collar crimes are committed indoors, with paper, on computers and the telephone, and at remove from the surveillance and evidence-gathering tools of everyday policing. If crime definitions, as in the corporate realm,

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130. In 2008, state and local law-enforcement agencies employed over 461,000 police officers and over 353,000 sheriffs but only 636 fraud investigators and 177 tax- or revenue-enforcement officers. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2, 8 (2011), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/cslla08.pdf>. In 2004, the U.S. Customs and Border Protection employed 28,200 officers. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FEDERAL LAW ENFORCEMENT OFFICERS, 2004, at 6 (2006), *available at* <http://www.bjs.gov/content/pub/pdf/fleo04.pdf>. In 2004, the U.S. Postal Inspection Service employed 2,999 officers, the IRS employed 2,791 criminal investigators, and the Environmental Protection Agency employed 209 investigators. *Id.* at 5–6. The Federal Bureau of Investigation (FBI) employed 12,414 officers in 2004, but white collar crime is only one of its investigative priorities. *Id.* at 6. After September 11, 2011, the number of FBI agents devoted to white collar crime investigation dropped because of the diversion of agents to terrorism matters, but the number has returned to a nearly pre-9/11 level of about two thousand agents—with a higher portion of those agents than before devoted to larger, more complex financial investigations. *See Investigating Fraud and Prosecuting Financial Fraud After the Fraud Enforcement and Recovery Act: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12–13 (2010) (testimony of FBI Assistant Director Kevin L. Perkins).

depend only partially on loosely defined act requirements like “defrauding” a person, these offenders naturally will be more difficult to “catch in the act.” Finally, of course, outcomes are easily observable: American jails and prisons are loaded with street offenders and contain a relatively small number of white collar criminals.<sup>131</sup>

Two considerations complicate the question of whether the white collar offender is subject to a much lower probability of detection and prosecution than the street offender. First, base rates of white collar crime are not known.<sup>132</sup> The data on most street crimes, though not without flaws, are ample and have been for many decades. The data provide a fair idea of how many murders, robberies, and assaults occur, year over year and city to city.<sup>133</sup> Researchers might even be able to derive reasonable estimates of rates of narcotics distribution and use.<sup>134</sup> Data supply no good idea, however, how much insider trading or accounting fraud there is, how many pharmaceutical companies are violating food and drug laws at any moment in time, how much testimony is perjured, and so on.<sup>135</sup> Popular beliefs about

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131. Of the 1,365,800 prisoners under state jurisdiction in 2009, only 33,200 (2.4 percent) were charged with fraud offenses. PAUL GUERINO, PAIGE M. HARRISON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 28–29 tbls.16B, 17B (2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>. Of the 190,641 prisoners under federal jurisdiction in 2010, only 8,063 (4.2 percent) were charged with fraud offenses. *Id.* at 30 tbl.18. Of the 83,946 federal criminal sentences imposed in 2010, 9.8 percent were for fraud and 3.6 percent were for other white collar crimes. U.S. SENTENCING COMM'N, *supra* note 38, fig.A.

132. See generally CYNTHIA BARNETT, U.S. DEP'T OF JUSTICE, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA (2000), available at [http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs\\_wcc.pdf](http://www.fbi.gov/about-us/cjis/ucr/nibrs/nibrs_wcc.pdf) (discussing the methodological problems involved in measuring rates of white collar crime using data-reporting systems routinely used to measure crime rates).

133. According to FBI data, there were 14,612 murders, 354,396 robberies and 751,131 aggravated assaults in the United States in 2011. *Crime in the U.S. 2011: Tables: Table 1*, FED. BUREAU INVESTIGATIONS, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-1> (last visited Nov. 2, 2013).

134. According to the U.S. Department of Health and Human Services, in 2010 an estimated 1.5 million Americans age 12 or older were cocaine users and an estimated 359,000 Americans were dependent on heroin. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 11-4568, RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 1, 72 (2011).

135. Feasible empirical methods are at best only suggestive. See generally Laura H. Beny & H. Nejat Seyhun, *Has Insider Trading Become More Rampant in the United States? Evidence from Takeovers* 23 (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 12-012, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2103673](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103673) (finding that in recent years stock prices have increased more before the announcement of tender offers than they used to, and describing this as potential evidence of an increase in insider trading).

the incidence of corporate crime are likely based primarily on journalism that is not systematic and can be highly misleading. Consider, for example, a recent headline on the front page of the *New York Times*: “Madoff Aside, Financial Fraud Defies Policing,” under which appeared an article consisting of a description of a single Ponzi scheme in Los Angeles and one plaintiff-side attorney stating that “financial scams continue to happen at an alarming rate.”<sup>136</sup>

The only observable data for these offenses are the number and visibility of prosecutions, which may have no value as a proxy for rates of violation. Federal white collar prosecutions, measured broadly to include all types of such offenses, fluctuated reasonably moderately in a range between about eight thousand and ten thousand cases annually in the years from 1992 to 2012, spanning several presidential administrations.<sup>137</sup>

One can only speculate that if something like an old-fashioned patrol force walked the beat within America’s banks and other corporations, a much higher rate of apprehension of white collar offenders would result. Certainly deployment of more Federal Bureau of Investigation (FBI) agents in the white collar field would enhance the probability of detection, and therefore number of convictions, at the margin. But the difference between several hundred agents nationally and several hundred more is not going to fundamentally alter the nature of white collar policing.<sup>138</sup> The thought

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Employee surveys are hard to place a great deal of weight upon. See, e.g., ETHICS RES. CTR., 2011 NATIONAL BUSINESS ETHICS SURVEY: WORKPLACE ETHICS IN TRANSITION 24 (2012), available at <http://www.ethics.org/nbes> (finding that 4 percent of survey respondents were aware of insider-trading activity); KPMG, INTEGRITY SURVEY 2008–2009 iii, 4, available at <http://www.financialexecutives.org/eweb/upload/chapter/Portland/KPMG%20Integrity%20Survey1.pdf> (finding, in a survey of approximately 5,000 respondents who worked in firms employing 200 or more persons, that 13 percent of respondents who were employed in accounting and finance functions were aware of “falsification” or “manipulation” of financial information).

136. Jessica Silver-Greenberg & Susanne Craig, *Madoff Aside, Financial Fraud Defies Policing*, N.Y. TIMES, Jan. 7, 2013, at A1. See generally Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

137. TRANSACTIONAL RECORDS CLEARINGHOUSE, WHITE COLLAR CRIME PROSECUTIONS FOR 2012 (2012) (on file with the *Duke Law Journal*). For example, the total for 2011 was 10,162 cases, whereas the 2012 total is projected to be 8,485 cases. *Id.* The early 2000s saw figures mostly in the low to mid-9,000s. *Id.* There was a dip to numbers in the low 8,000s during the years 2005–2008. *Id.* It seems likely that such fluctuations would turn at least in part on economic conditions and market disruptions.

138. See *Frontline: The Untouchables*, *supra* note 1 (interviewing an FBI official about reduction in white collar investigative force when several hundred agents shifted to terrorism matters after September 11, 2001).

experiment is further complicated by the fact that white collar offenses are not detected by traditional policing methods but rather by complex surveillance systems that include everything from stock market computers to regulatory filings to reporting in the *Wall Street Journal*.

Second, consideration of policing in the white collar realm must account for a large universe of enforcement that those who do not specialize in this area tend to elide. Institutions of the American administrative state heavily regulate most industries in which white collar offenses are committed. The securities fraudster must contend with the SEC, the polluter with the Environmental Protection Agency, the pharmaceutical company with the Food and Drug Administration, the hospital with the Department of Health and Human Services, the tax cheat with the IRS, the arms dealer with the Department of Defense, and so on. These agencies wield potent tools like investigative staffs, subpoena power, inspection rights, debarment authority, contract denying and awarding powers, access to prosecutors to initiate criminal cases, elaborate civil-enforcement mechanisms in which costly penalties can be imposed, and sometimes even guns, badges, and vests. Advances in information technology heighten the effects of mandatory reporting regimes and monitoring programs in the regulatory realm.

Some observers of the administrative state argue, of course, that regulatory regimes in numerous industries are far too weak to do their jobs—understaffed, underfunded, undercut by members of Congress who do not support their missions, captured by industry, undermined by the campaign finance system, and so on.<sup>139</sup> These complaints address the effectiveness of these agencies in accomplishing their primary missions: use of their civil regulatory powers to intervene ex ante to prevent harms from occurring in the first place. The point relevant to this Article is narrower. Whether or not these agencies “do a good job” according to any account of what regulatory agencies ought to do, their existence and activities introduce a layer and type of monitoring into the world of corporate activity that does not exist on the street and heightens exposure to criminal enforcement.

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139. See generally RINA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* (2010).

Moreover, legislative schemes empowering civil-enforcement agencies frequently permit and incentivize private plaintiffs to bring parallel causes of action that can force information disclosure.<sup>140</sup> Some of these legal frameworks protect and richly compensate corporate whistleblowers who provide information about law violations.<sup>141</sup> Although street crime informants can be rewarded too, those rewards usually take the form of reduced criminal charges for persons who are themselves implicated in crime.<sup>142</sup> Monetary rewards for information about such crimes rarely involve the large sums that can be realized through, for example, a *qui tam* action in a healthcare fraud case.<sup>143</sup>

And then there is the business firm itself. The law of corporate criminal liability in the United States notionally makes a firm criminally liable—with potentially far-reaching consequences to its ability to do business—whenever a single agent commits a crime within the scope of employment and with the intent, even in small part, to benefit the firm.<sup>144</sup> In the shadow of this *de jure* regime, a *de facto* regime of corporate criminal liability has developed that says this: Corporations will be held criminally liable for the crimes of their agents unless they ferret out wrongdoers, turn them and all relevant evidence over to the government, and assist the government in the successful pursuit of criminal investigation and then conviction of those persons. If a firm does those things with sufficient zeal, it generally will be spared prosecution and offered a quasi-civil settlement in the form of a deferred prosecution or nonprosecution agreement.<sup>145</sup>

The culpable offender in the corporate context can feel not just the full power of the Justice Department coming down on her. She

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140. See, e.g., 15 U.S.C. § 78j (2012) (prohibiting securities fraud); *Basic, Inc. v. Levinson*, 485 U.S. 224, 230–31 (1988) (describing the judicially implied private right of action for securities fraud that violates 15 U.S.C. § 78j).

141. See, e.g., Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (setting forth new whistleblower incentive and protection provisions); False Claims Act, 31 U.S.C. § 3730 (providing for private actions); see also David Kocieniewski, *Get Out of Jail Free? No, It's Better*, N.Y. TIMES, Sept. 12, 2012, at A1 (describing an award to the informant in a major tax-evasion investigation involving U.S. taxpayers and Swiss banks).

142. See generally ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009).

143. See generally ROBERT FABRIKANT, PAUL E. KALB, MARK D. HOPSON & PAMELA H. BUCY, *HEALTH CARE FRAUD: ENFORCEMENT AND COMPLIANCE* § 4.01A (2013).

144. *De jure* and *de facto* regimes of corporate criminal liability, and the relationship between the two, are explained in Arlen, *supra* note 73, at 144, 144–203.

145. *Id.*

can feel that power leveraged tenfold by her own employer's ability and motivation to clear the government's path to her door. This is by design. The theory is that fewer crimes will be committed in the otherwise opaque corporate context if managers and employees go to work every day in the shadow of a powerful public-private enforcement partnership—an enforcement system that is, by the way, arguably subject to far less regulation, constitutional and otherwise, than the system that operates on the street.<sup>146</sup>

The street offender confronts lots and lots of police officers but—aside from the Drug Enforcement Agency, the Bureau of Alcohol, Tobacco, Firearms and Explosives, and Immigration and Customs Enforcement—no specialized police forces, no major considerations about how to deal with problems of parallel proceedings, including civil litigation, and (except with immigration offenses) no employer-sponsored policing program. Of course, the average street offender would be unlikely to care about civil liability. He lacks the assets, economic standing, and social position that typically make civil enforcement matter to a person. His additional problems—and they are serious and growing—come after conviction, in the form of extensive collateral consequences of a felony record—which also of course apply to convicted white collar offenders, who can face additional collateral effects such as professional or industry debarment.<sup>147</sup>

Though the street offender often faces the criminal's age-old worry about accomplices and coconspirators who might seek credit with the government by becoming informants, this dynamic hardly approximates the relationship between corporation and employee. Often a corporation's best move, after all, is to do what street criminals rarely will: tell the government about the crime before the government knows about it. A recent example is the lenient settlement that Barclays Bank earned from the government for being

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146. See generally Bruce Green & Ellen S. Podgor, *Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013) (explaining the realities behind corporate internal investigations); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007) (suggesting that the application of a civil regulatory model to criminal cases creates distortions because criminal prosecution involves individual liberty rather than mere financial sanctions).

147. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS pt. II (3d ed. 2004); see UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT prefatory note at 1–4 (Nat'l Conference of Comm'rs on Unif. State Laws 2009) (discussing the legal and social consequences of criminal convictions and the associated collateral effects).



the first firm to turn over its trove of information about who among its staff did what, and when they did it, in connection with the scandal over reporting of the London Interbank Offered Rate (known as LIBOR).<sup>148</sup> Just reading the relatively terse settlement documents in the Barclays matter makes fairly clear that individual prosecutions are forthcoming.

The white collar offender of course enjoys much greater freedom from the pervasive presence of cops on patrol who can routinely stop, search, and arrest him. In office buildings, there is no harassment through “stop and frisk” and misdemeanor arrests.<sup>149</sup> But the corporate actor pays a steeper price than one might think in terms of directing assets and attention to the problem of avoiding government actions for law violations.

It is difficult to say which situation is the one of greater exposure to prosecution, at least of the serious felony variety. Demographically, the young man who grows up in an area beset by drugs and guns (especially the young black man) is vastly more likely to end up in prison than the young man who proceeds through a university into the banking profession. It is less clear, though, that a corporate offender who sets about a major fraud or violation of a federal regulatory regime, and sustains that conduct over a period of months or years, is less likely to be discovered than a man who sells large amounts of illegal drugs for the same amount of time. Instincts and the composition of prison populations say yes. But there is, at the least, good reason to hesitate in guessing at the size of any disparity in probability.

### *B. Political Economy of Enforcement*

Conventional wisdom holds that much, if not most, of the severity with which the American criminal-justice system treats the street offender—in the proliferation and broadening of offense

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148. See Letter from Denis McNerney, Chief, Criminal Div., Fraud Section, U.S. Dep’t of Justice, to Steven R. Peikin, David H. Braff, Jeffrey T. Scott & Matthew S. Fitzwater, Sullivan & Cromwell LLP (June 26, 2012), available at <http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf> (requiring Barclays’s cooperation and acknowledgment of the facts set forth in Appendix A of the letter).

149. See Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop and Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASSOC. 813, 822 (2007) (presenting statistics indicating that there are disproportionately high stop-and-frisk rates among racial minorities in New York City); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1328–41 (2012) (noting that low profile misdemeanors, which are unlikely to be litigated, are often more heavily dictated by police action).

definitions, length of average sentences, frequency and extent of mandatory minimum penalties, force of recidivism enhancements, abolition of parole and early-release systems, heavy reliance on imprisonment as a sanction, and harshness of prison conditions—is explained by the street offender’s impotence in the political economy.<sup>150</sup> Cracking down on the street is politically profitable because it is cheap and yields high returns. It might also approach conventional wisdom to believe that the white collar offender is more politically powerful than the street offender and, therefore, that the corporate offender’s advantages in the legal system are easily explainable as natural results of the political economy of crime.<sup>151</sup>

In assessing such claims, one must again consider that the white collar offender typically operates under a giant noncriminal regulatory apparatus that does not exist in the world of the street offender. In the street offender’s political economy, legislators, enforcers, and judges (many of whom are elected) trade off the benefits of “toughness on crime” against relatively few costs—primarily budget constraints and (sometimes) internalized norms of fairness, reasonableness, restraint, and the like. The white collar offender’s political economy includes a similar toughness-versus-constraints tradeoff, but also a tradeoff, or at least large overlap, between criminal and noncriminal regulation.

This complicated political story is not fully understood. In the wake of each wave of failures in capital markets, there is strong demand for punitive action on white collar crime. That demand is tempered, at both the legislative and adjudication levels, by advocacy efforts of the defense bar and corporate-lobbying organizations that are almost nonexistent in the realm of street crime. But legislators

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150. See Stuntz, *supra* note 70, at 552–53 (discussing the relationship between breadth in substantive criminal law and the lack of interest group pressure to narrow offenses).

151. For example, the leading scholar of the political economy of federal criminal law enforcement describes in a recent essay his “deep skepticism about the possibility of a stable commitment to white collar enforcement” in the United States. Richman, *supra* note 22, at 64–65. As he acknowledges, one’s view on the desirable level of enforcement depends inevitably on empirical hunches, impossible to verify, about the prevalence of white collar offenses. *Id.* Though the accounts of the corporate bar and corporate lobbies must be taken with a grain of salt, given their incentives to make noise (and their resources to do so), they would disagree with the assertion that there has not been, at least over the last two decades, heavy enforcement of white collar offenses and related civil regulatory violations. See generally, e.g., Glen Donath, *Responding to Globalization and Stricter Enforcement in Today’s White Collar Climate*, in *MANAGING WHITE COLLAR LEGAL ISSUES: LEADING LAWYERS ON UNDERSTANDING CLIENT EXPECTATIONS, CONDUCTING INTERNAL INVESTIGATIONS, AND ANALYZING THE IMPACT OF RECENT CASES* 71 (2012).

and executive-branch officials profit politically when a Skilling or Ebberts or Madoff or Rajaratnam is sentenced to a long term of imprisonment in the wake of a financial scandal. Contemporary politicians infamously capitalize on being tough on street crime but they also like to be able to tell voters that they have been tough on corporate criminals. A myriad of evidence for this point exists, from the public statements of officials, to the repeated moves by Congress to increase statutory penalties in response to market crises, to the success of white collar prosecutors in ascending through state and federal political office.<sup>152</sup>

One might even argue that the symbiosis working against the criminal offender can be more powerful in the case of the corporate violator. It is not just mutually beneficial to legislators and executive-branch officials to be tough on corporate crime. It benefits firms too, because the focus on ex post punishment directs discussion about responses and remedies away from ex ante regulation.<sup>153</sup> Accounts focused on bad apples and wrongdoers crowd out ones about systemic failure. Tough prosecution of individual miscreants strengthens the argument for leniency against firms themselves and their many “innocent” stakeholders. These approaches benefit large private institutions determined to hold down costs of doing business. And the perception of toughness benefits legislators, and executive-branch rulemakers and enforcers, who prefer to avoid blame for failing to prevent wrongdoing through regulation. It should not be surprising that the Bush administration from 2001 to 2009 had a record of both hostility to business regulation and aggressiveness in criminal prosecution of senior executives of large corporations.<sup>154</sup>

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152. Rudolph Giuliani, former mayor of New York City and candidate for president, who led a prosecutorial assault on insider trading in the 1980s, is the most prominent example. Former New York Attorney General and Governor Eliot Spitzer, though following a more checkered path, comes more recently to mind. Conservative Senator Charles Grassley of Iowa has been perhaps the most notable example of an antiregulation member of Congress to urge vigorous prosecution of corporate fraud. *See, e.g.*, Letter from Senator Charles E. Grassley, Ranking Member, Comm. on the Judiciary, to Eric H. Holder, Jr., Attorney Gen., U.S. Dep’t of Justice (Dec. 13, 2012), *available at* <http://www.grassley.senate.gov/judiciary/upload/HSBC-12-13-12-letter-to-Holder-no-criminal-prosecutions.pdf>. For accounts of congressional efforts to increase criminal penalties for fraud, see *supra* note 22.

153. *See* Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH U. L.Q. 95, 115–17 (2004) (discussing the lower level of opposition by firms to harsher criminal penalties).

154. *Bush and Enron’s Collapse*, ECONOMIST (Jan. 11, 2002), <http://www.economist.com/node/938154>; Mark Gongloff, *Bush Seeks New Business Ethic: In Speech on Wall Street*,

Another constituency—the bar—benefits from corporate crime enforcement. The corporate lawyer's interests bear emphasis. Professor Charles Weisselberg and co-author Su Li have rigorously documented important facts that practitioners and students of corporate criminal enforcement have known anecdotally for some time: the size and profitability of corporate white collar defense practices have exploded in the last twenty years at the largest national law firms.<sup>155</sup> Former prosecutors and government lawyers now dominate these practices. Big Law lawyers get a lot more work than they used to defending firms and their executives in government investigations and prosecutions. That work can be very lucrative.<sup>156</sup> The corporate defense bar is often in league with the corporate lobby in arguing for reforms that would restrain prosecutorial and enforcement practices. For example, these groups campaigned successfully to limit the pressuring of firms to waive attorney-client privilege in criminal investigations.<sup>157</sup> But rarely have these groups organized efforts to repeal serious criminal offenses or curtail enforcement in particular areas.

The entrenchment of this field of practice is evidence of how much potential criminal exposure now hangs over large firms. The effect of white collar practice growth is also dynamic. Lawyers working on both sides of these cases—and typically changing employment from one side to the other—have incentives to generate more cases as time goes on. To think that revolving-door effects in the field of corporate criminal law would lead to the squelching of meritorious prosecutions is simplistic. Without genuine prosecution experience, there is little for the departing government lawyer to sell to a private firm. Without prosecutions, there is nothing for the

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*President Wants Longer Jail Terms, Tougher Laws To Curb Corporate Abuses*, CNNMONEY (July 9, 2002, 4:52 PM), <http://money.cnn.com/2002/07/09/news/bush>.

155. See Weisselberg & Li, *supra* note 13, at 1291–92. Strikingly, the authors find a close correlation between a firm's ranking in the "Am Law 100" and the percentage of its partners who hold themselves out as working in the area of white collar corporate defense. *Id.* at 1252–53.

156. The Weisselberg and Li study has the industry-wide details, *id.* at 1263–72, but sometimes a single case nearly makes the point. In 2008, when the Siemens Corporation settled a massive criminal case involving Foreign Corrupt Practices Act violations, the company represented that, so far, it had paid over 500 million Euros in fees combined to one law firm and one auditing firm for responding to the investigation and prosecution. Press Release, Siemens Aktiengesellschaft, Investigation and Summary of Findings with Respect to the Proceedings in Munich and the US 8 (Dec. 15, 2008), available at <http://www.siemens.com/press/pool/de/events/2008-12-PK/summary-e.pdf>.

157. O'Sullivan, *supra* note 113, at 1241–43.

defense bar to sell to its clients. The economics and sociology of the corporate crime bar are much more complex and merit a great deal more study. But even on a simple and fairly cynical analysis, public officials would lack motivation to shield corporate offenders from prosecution.

Even less persuasive is the claim that enforcement bureaucracies would protect corporate criminals because those individuals are large donors to election campaigns. This claim rests on two assumptions that are implausible to a reasonable observer, much less to anyone who has worked in a significant executive-branch position: First, that the value of any one person's fundraising largesse would outweigh the value of satisfying public demand for harsh punishment of high-level corporate wrongdoers. And second, that it is the habit of presidential political advisers to direct Justice Department officials about whom to prosecute and the habit of department officials to respond to such direction.

There is scant empirical evidence for such claims. President George W. Bush's political operation was far more successful than President Barack Obama's in raising money from the corporate sector, whereas the Justice Department under Bush brought more high-profile prosecutions of senior corporate executives than it has under Obama.<sup>158</sup> (Remember Ken Lay, the big contributor to Bush's campaigns?) One ought to be careful about asserting that the white collar offender is plainly monitored, investigated, and prosecuted at much lower probability or frequency than the street offender.<sup>159</sup> At the least, serious obstacles exist to comparing the expected sanction of the two types of offender, especially at the level of reliable data.

One might approach the question of privilege in enforcement from the angle of a thought experiment. What would things look like if corporate actors faced a substantially higher chance of apprehension and prosecution than at present? It would have to be a state of affairs in which the government not only did more policing than it does at present, through all of its elaborate regulatory apparatuses, but in which the government treated the corporate actor

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158. See *supra* notes 1, 3–4, 154 and accompanying text.

159. The authors of a treatise for practitioners in the field of corporate crime recently concluded that there is "little doubt that we have reached a high water mark for government investigations in which the risk of becoming swept up in such an investigation is greater than ever before." Daniel J. Fetterman & Mark P. Goodman, *White Collar Landscape: Regulators, Targets and Priorities*, in DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS, *supra* note 112, § 1:9.

like it handles the drug dealer, alien smuggler, gunrunner, or loan shark. To do this, corporate criminal enforcement would need to rely on two staples of policing that account for a lot of volume in street cases, especially federal ones, but that would seriously shake up the business world.

First, a heavy and reliable flow of accomplice witnesses would have to be produced through determined campaigns to arrest and prosecute lots of people for lower-level offenses and offer them sentencing relief in exchange for testimony. To be sure, many important cases of corporate crime have been built through charges that have led to guilty pleas of cooperating witnesses. But that is the standard, work-up-the-ladder tactic in most criminal investigations. In other realms of criminal activity, particularly organized crime and drug trafficking, enforcers cast a much wider net, hauling in lots of fish with the knowledge that a certain number will know something significant about larger fish—even if the government often does not know what.

How would that strategy work in, for example, the investment banking world, in which the routine activities of traders are not exactly the equivalent of hand-to-hand cocaine sales on a street corner? It would not work, of course, short of a radical redefinition of the legality of banking practices in the United States or, as a few have proposed, a campaign to arrest all the drug users and prostitution clients who happen to hold down jobs in the financial industry.

Second, the government would need to engage in the kind of real-time monitoring of criminal activity that it deploys in sophisticated organized crime, drug, and terrorism investigations. Given the size and complexity of global financial markets, this would require vastly larger regulatory systems employing thousands more investigators, as well as funding public salaries that could seriously compete with the private sector for top-echelon talent and expertise. Even if such practical problems could be solved, Fourth Amendment rights and other legal protections would often require the government to have some evidence of criminal conduct in hand before it could raid corporate office buildings and surveil email, telephone, and other communications not already subject to regulatory monitoring requirements.

The need for such evidence turns one back to the problem of how to generate large numbers of informants and accomplice witnesses in corporate cases. Criminal investigations that are covert and contemporaneous with criminal activity are not unheard of in

white collar crime. (The recent spate of Wall Street insider-trading prosecutions provide examples.) But such cases remain exceptional. They are difficult to envision in areas like accounting fraud or deception in the trading of novel banking products—in which it is very hard to know that a crime is afoot until things go sour and unwind, and in which it is rare for the government to hear someone blow the whistle without the press and everyone else hearing it at the same time.

Recall the discussion of substantive crime definition in Part II. By nature, sophisticated white collar offenses do not lend themselves to proof through the kind of forensic evidence and stranger eyewitness common with street crimes. Such prosecutions, even those that include the rare smoking gun document, require witnesses who are in a position to testify to facts that clearly establish the state of mind of other persons.

At bottom, to argue that the corporate actor is privileged over the street offender because law enforcement is less pervasive and resourceful in her realm is, as with substantive crime definition, to call into question matters of basic ordering that are prior to particular disputes about enforcement bureaucracies and their strategies and activities. When the corporate actor engages in crime, she does so in a social setting in which she is embedded in activities that society has chosen, at the basic level of capitalist economic structures, to treat as not only legitimate but desirable. To make her conduct subject to omnipresent policing would require profound redesign of the relationship between the state and business firms. Such redesign would need to go far beyond hiring larger staffs at the SEC and other regulatory agencies.

One can argue that such change would, on balance, enhance social welfare. But the argument should be recognized for what it is, and not taken as a contention merely about skew in the priorities of legislators and executive-branch officials explained by plain old capture and inertia. Proponents of such positions should further be prepared to answer an objection. Modern America's tendency to criminalize problems it finds hard to solve through other means has provoked a rising chorus of critics.<sup>160</sup> They say, first, that criminal law is being hijacked from its proper social mission and, second, that mass criminalization imposes crippling material and moral costs. The

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160. See *supra* note 2.

advocate for renovation of corporate crime enforcement has the burden to either rebut this genre of argument or show it to be inapposite to the field of business conduct.

## V. DEFENSE RESOURCES

One could fairly answer this Article's question by saying that of course the corporate offender is privileged: she is richer and has more social capital than the typical individual charged with a street crime. True as that statement may be, it is a demographic point that does not speak directly to arrangements in law and legal institutions. Maybe the question could be reframed this way: Does the corporate offender's wealth advantage cash out to better treatment by the law and institutions of criminal enforcement? Even this question is a bit too simple. No one could dispute that a defendant who has millions to spend on an attorney is better off, on average and all else equal, than one who has to rely on a minimalist, state-funded defense.

Even in street crime cases of the highest stakes, the pattern of seriously below-standard performance by appointed defense counsel (and, less often, public defenders) is notorious and demoralizing.<sup>161</sup> Further troubling is a fact lost on many who do not study crime in the

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161. See James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes 17–19 (2011) (unpublished manuscript), available at [http://www.rand.org/content/dam/rand/pubs/working\\_papers/2011/RAND\\_WR870.pdf](http://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf) (finding, in an empirical study of random attorney assignment for indigent defendants in Philadelphia, that representation by a professionalized public defender office versus a low-paid court-appointed counsel made conviction 19 percent less likely, life sentence 62 percent less likely, and prison term 24 percent shorter); see also David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1167–69 (2007) (finding that, when controlling for several important variables, years of experience of an assigned public defender correlated with lower sentence outcomes for defendants); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835–39 (1994) (describing incompetence by appointed attorneys in death penalty cases, including a case in which a woman received the death penalty for arranging to have her abusive, adulterous husband killed after counsel failed to submit basic evidence and arrived at court drunk); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 407–12 (1991) (concluding from a review of many studies that the category of defense counsel does not matter to outcome, but observing that there is wide variation in quality of counsel within categories and that wealthy defendants are likely to enjoy better outcomes); Talia Nye-Keif, *“Capital” Punishment or “Lack-of-Capital” Punishment? Indigent Death Penalty Defendants Are Penalized by a Procedurally Flawed Counsel Appointment Process*, 10 SCHOLAR 211, 214–16 (2008) (describing several horror stories of incompetent-attorney representation leading to death penalty convictions, including use of passages of argument copied and pasted from previous cases).



corporate sector. It is not just that the poor or working-class defendant in many jurisdictions has no access to a good lawyer because she lacks the savings to pay for one. Many employees of large firms who violate the law on the job have something most Americans can only dream of: legal insurance. It is standard practice—and in many instances statutorily or contractually guaranteed—for firms to indemnify employees for legal-defense costs, or at least to advance those costs, after which “clawback” efforts are rarely pursued in the event of criminal conviction.<sup>162</sup> A federal appellate court has even ruled that a corporate employee’s access to such funding enjoys, in some circumstances, constitutional protection under the Sixth Amendment.<sup>163</sup>

Moving beyond the plain fact of resource disparity, the question of interest to this Article can be put more precisely: How exactly might the corporate offender leverage her wealth advantage into a better chance of escaping criminal sanction, and how might one estimate the quantity of advantage she enjoys at that point of leverage? The answers lie in a place that is surprising but also natural: bargaining over charging and pleas.

#### A. Trial

Start with trial, the place casual observers think of as the point of maximum wealth advantage. The popular image is the contrast between the overworked, woefully compensated appointed lawyer in the rural South and the Darrow-like wizard of cross-examination who is the most expensive hired gun in a big city jurisdiction. Anyone who follows notable cases in the media can conjure without effort many recent prosecutions that supply this imagery.

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162. See TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 42–76 (2010) (describing the scope, extent, and pervasiveness of corporations’ insurance coverage of directors and officers for liability and defense costs associated with law violations on the job); Buell, *Criminal Procedure*, *supra* note 15, at 1650–55, 1658 (discussing how corporate insurance and indemnification cover individual legal-defense costs); Peter Lattman, *Stuck with a Defense Tab, and Awaiting a Payback*, N.Y. TIMES, June 19, 2012, at B1 (reporting that Goldman Sachs was legally required to advance the estimated \$30 million in costs of the criminal defense of a former member of its board of directors convicted of insider trading for leaking proprietary information about board discussions, and that the company could not even begin to seek repayment until after resolution of the appeal of conviction); Gretchen Morgenson, *Legal Fees Mount at Fannie and Freddie*, N.Y. TIMES, Feb. 22, 2012, at B1 (reporting that almost \$50 million had been advanced over a three-year period to defend executives of troubled mortgage giants in regulatory actions and lawsuits).

163. *United States v. Stein*, 541 F.3d 130, 157 (2d Cir. 2008).

But one should hesitate before concluding that such stereotypes represent the typical experience of the criminal defendant in a corporate case. There are abundant contrasting examples. The defense of Jeffrey Skilling, the former CEO of Enron, which was reported to have cost over \$70 million in defense funds,<sup>164</sup> resulted in a sentence of nearly twenty years in prison, which was ultimately reduced to fourteen years under an agreement to forgo collateral attack.<sup>165</sup> Raj Rajaratnam, the former hedge fund chief convicted in a historically large insider-trading case, may have spent over \$40 million for a sentence of eleven years in prison.<sup>166</sup> Allen Stanford, who ran a large bank that turned out to include a massive Ponzi scheme, churned through multiple teams of attorneys, private and appointed, who spent several years litigating an elaborate and multifaceted defense that nevertheless resulted in a sentence of 110 years in prison.<sup>167</sup>

Then there is the overall data. In 2010 for example, the acquittal rate in federal trials of securities fraud, bank fraud, and mail fraud

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164. Christopher Palmeri, *The Sky-High Cost of Skilling's Defense*, BLOOMBERG BUSINESSWEEK (Oct. 19, 2006), <http://www.businessweek.com/stories/2006-10-19/the-sky-high-cost-of-skilling-defensebusinessweek-business-news-stock-market-and-financial-advice> (noting that Ken Lay and Jeffrey Skilling spent almost \$70 million on their defenses).

165. Tom Fowler, *Former Enron CEO Sentence Cut to 14 Years*, WALL ST. J., June 22, 2013, at A3.

166. Michael Rothfeld & Chad Bray, *Loss Raises Question over Defense Strategy*, WALL ST. J. (May 12, 2011, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748704681904576319673566636108>. The defense team for Rajat Gupta, a Goldman Sachs board member charged for supplying tips to Rajaratnam, reportedly cost \$30 million, with most of that bill being advanced by Goldman Sachs. Lattman, *supra* note 162. Other examples of very high defense bills for white collar defendants include Sanjay Kumar of Computer Associates (\$14.9 million), Dennis Kozlowski of Tyco (\$17.7 million and \$8 million for each of two trials), Kirk Shelton of Cendant (\$24 million), the Rigases of Adelphia (\$25 million), and Richard Scrushy of HealthSouth (\$32 million). Peter Lattman, *Happy Anniversary DOJ! Love, Judge Kaplan*, WALL ST. J. L. BLOG (July 17, 2007, 1:38 PM), <http://blogs.wsj.com/law/2007/07/17/happy-anniversary-love-judge-kaplan>.

167. See Laurel Brubaker Calkins & Andrew M. Harris, *Allen Stanford Loses Bid for \$100 Million of Lloyd's Director's Insurance*, BLOOMBERG (Oct. 14, 2010, 12:01 AM), <http://www.bloomberg.com/news/2010-10-13/allen-stanford-loses-bid-for-100-million-of-lloyd-s-directors-insurance.html> (reporting that Allen Stanford lost access to legal insurance after a judge found that he had violated terms of the insurance contract); Amir Efrati, *How Many Lawyers Does It Take To Defend Allen Stanford?*, WALL ST. J. L. BLOG (June 7, 2010, 8:36 AM), <http://blogs.wsj.com/law/2010/06/07/how-many-lawyers-does-it-take-to-defend-allen-stanford> (noting that 120 lawyers, paralegals and clerks from 10 different law firms worked as part of Stanford's defense team); see also Mary Flood, *Pay the Lawyers, Judge Says*, HOUS. CHRON., Jan. 26, 2010, at D1 (describing litigation over whether Lloyd's was required under an insurance policy to pay defense fees for Stanford); Clifford Krauss, *Financier Is Sentenced to 110 Years for Fraud*, N.Y. TIMES, June 15, 2012, at B1 (discussing reactions to the sentencing of Stanford).

was nearly the same as it was for all federal criminal trials combined, a category dominated by immigration and drug prosecutions.<sup>168</sup> This has been true of the data for many years.<sup>169</sup> In the cases that go to trial in federal court, juries are not more likely to acquit the defendants with the hired-gun lawyers (assuming, as seems more than reasonable, that a significantly higher percentage of white collar defendants than street crime offenders are represented by retained counsel). Moreover, criminal trials are notoriously rare in federal court as a general matter.<sup>170</sup>

### B. Plea Bargaining

To find the point of leverage from advantage in funding of counsel, one therefore must consider selection effects. If expensive lawyers do not produce significantly higher rates of acquittal, perhaps they make it less likely that a client will be charged with a crime. Or maybe they make it more likely that a client will be offered a favorable plea bargain that will make trial a less attractive alternative than it tends to be for the street crime defendant. In other words, maybe white collar cases that go to trial produce roughly the same

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168. In 2010, the overall nonconviction rate was 6.5 percent and the nonconviction rate for white collar cases was 8.9 percent. ADMIN. OFFICE, STATISTICAL TABLES 2010, *supra* note 121, at 83 tbl.D-4.

169. In 2009, the overall nonconviction rate was 9.0 percent and the white collar nonconviction rate was 7.5 percent. ADMIN. OFFICE, STATISTICAL TABLES 2009, *supra* note 121, at 82 tbl.D-4. In 2008, the overall nonconviction rate was 9.8 percent and the white collar nonconviction rate was 8.8 percent. ADMIN. OFFICE, STATISTICAL TABLES 2008, *supra* note 121, at 82 tbl.D-4; In 2007, the overall nonconviction rate was 10.3 percent and the white collar nonconviction rate was 8.6 percent. ADMIN. OFFICE, STATISTICAL TABLES 2007, *supra* note 121, at 81 tbl.D-4. In 2006, the overall nonconviction rate was 9.7 percent and the white collar nonconviction rate was 8.2 percent. ADMIN. OFFICE, STATISTICAL TABLES 2006, *supra* note 121, at 81 tbl.D-4. In 2005, the overall nonconviction rate was 9.6 percent and the white collar nonconviction rate was 7.6 percent. ADMIN. OFFICE, STATISTICAL TABLES 2005, *supra* note 121, at 81 tbl.D-4.

170. See generally Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the Federal Criminal Trial Lawyer*, 156 U. PA. L. REV. PENNUMBRA 226 (2007) (collecting and discussing sources and data showing the decline in trial rates across the board in federal criminal cases during the 1990s and early 2000s). Federal criminal trials decreased during the 1990s from a high of 8,947 trials in 1990 to 6,746 trials in 2000. *Judicial Facts and Figures 2005: Table 6.4*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2005/Table604.pdf>. Between 2000 and 2005, the number of federal criminal trials modestly rose to 7,477. *Id.* Between 2005 and 2010, the number continued to rise and by 2010 had nearly reached the 1990 trial rate, with 8,445 federal criminal trials completed in the twelve-month period ending June 30, 2010. *Judicial Facts and Figures 2010: Table 6.4*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table604.pdf>.

acquittal rate not because lawyers in those cases are no more effective with juries but because more rigorous pretrial screening of weaker cases offsets the effects of superior trial advocacy.

No empirical study has tested this hypothesis. It will be difficult to test, given the obstacles to empirical study of prosecutorial decisionmaking. The hypothesis is plausible in view of what is known about how the criminal-justice system operates. Recently the Supreme Court bracingly declared that plea bargaining “*is the criminal justice system.*”<sup>171</sup> The empiricist John Pfaff has produced a potentially groundbreaking study finding that the source of soaring incarceration rates in the United States has not been more arrests or longer sentences but an increase in the number and frequency per defendant of prosecutors lodging felony charges.<sup>172</sup>

Criminal law scholars are in near complete agreement that prosecutorial discretion now dominates the path that a particular case follows in the criminal system, for several reasons.<sup>173</sup> Chief among those reasons are the huge overhang of substantive criminal law on the books beyond any reasonable picture of what could be enforced; the paucity of constitutional and statutory regulation of prosecutors’ decisions about whom and what to charge, and how to engage in plea bargaining; and the severity and frequently mandatory nature of sentencing law—coupled with the ability prosecutors typically have to induce or even compel courts to enforce sentencing rules or relax them.<sup>174</sup>

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171. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (quotation mark omitted).

172. John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* 37–39 (Jan. 23, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=1990508>.

173. See, e.g., Barkow, *supra* note 129, at 876–77 (“[A] prosecutor’s decision about what charges to bring and what plea to accept amounts to a final adjudication in most criminal cases.”); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923–31 (2006) (describing how decisions of prosecutors drive sentencing results); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 400–15 (2001) (“The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521–23 (1981) (“The fate of most of those accused of crime is determined by prosecutors, but typically this determination takes place out of public view . . . .”); see also Mark L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 125–28 (2008) (citing extensive scholarship concerned with prosecutorial power).

174. See George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 1038–43 (2000) (explaining that plea bargaining took control of criminal justice because it enhanced the power of prosecutors and judges to dictate sentences and process cases); William J. Stuntz, *Plea*

These dynamics have the potential to operate with no less force in corporate crime than in street crime. As discussed in Parts I and II, federal substantive law is broad and deep in the field of corporate crime, and the Federal Sentencing Guidelines have the potential to be steeply punitive in such cases. Criminal procedure is trans-substantive. Prosecutors have the same freedom in charging and bargaining in corporate cases as in all criminal cases. And the Justice Department does not place particularly stronger restraints on its ground-level prosecutors' decisions in the business realm than in other areas.

One can see, however, how discretionary dynamics might operate differently in cases with defense advocacy that is more vigorous and intervenes earlier. Corporate criminal practice is characterized by a kind and degree of defense lawyering at the precharge stage that is virtually nonexistent in street crime cases. White collar investigations are usually overt and typically lean toward cooperative forms of evidence gathering, such as subpoenas and interviews, as opposed to, for example, early morning raids with search warrants and surprise arrests of potential accomplice witnesses. There is no legal restriction on one's ability to spend funds on a criminal defense prior to charging, even though there is no constitutional right at that stage to a lawyer's help.<sup>175</sup> Especially if

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*Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2551–58 (2004) (arguing that the structure and scope of substantive criminal law enables prosecutors to dictate pleas, which are no longer bargains struck meaningfully in the shadow of legal rights and liabilities). The tide may be turning in judicial attitudes toward regulation of plea bargaining, despite the longstanding doctrine that controls the process only lightly. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138–42 (2011) (discussing how, now that plea bargaining has become the norm in criminal prosecutions, it “needs tailored regulation in its own right, not simply a series of waivers of trial rights”). Compare *Frye*, 132 S. Ct. at 1405–08 (holding that the Sixth Amendment right to effective counsel extends to consideration of plea agreements), *Lafler v. Cooper*, 132 S. Ct. 1376, 1383–88 (2012) (same), and *Padilla v. Kentucky*, 559 U.S. 356, 359–74 (2010) (holding that the Sixth Amendment right to effective counsel extends to informing the defendant of the risk of deportation), with *Bordenkircher v. Hayes*, 434 U.S. 357, 372–73 (1978) (reaffirming broad prosecutorial discretion in plea bargaining), and *Brady v. United States*, 397 U.S. 742, 756–57 (1970) (holding that plea bargaining is not coercive in violation of the due process clause even if a life sentence is offered as an alternative to the possibility of being executed).

175. See *United States v. Stein*, 435 F. Supp. 2d 330, 373 (2006) (“Actions by the government that affected only the payment of legal fees and defense costs for services rendered prior to the indictment . . . do not implicate the Sixth Amendment.”); see also *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 626 (1989) (“A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice.”).

joint defense agreements are in use, the corporate actor and her counsel may have near full access to the flow of documents and statements that the government receives, and thereby an ability to know or at least predict what the government is doing with its investigation, and sometimes what it is likely to do next.<sup>176</sup> (The comfort with this kind of system may explain, in part, the sense of unfairness expressed around Wall Street when the government recently deployed wiretaps in insider-trading cases.<sup>177</sup>)

As discussed in Part IV, it is difficult to assess clearly the net position of the white collar offender in criminal investigations. On the one hand, the evidence against her generally consists of documents and the statements of others, which she has little ability to prevent from landing in the state's possession and even less ability to exclude from the universe of trial proof. The practice of using the threat of firm-level criminal liability to persuade corporations to gather evidence of their own employees' wrongdoing and provide it to the government dramatically reduces the corporate offender's ability to prevent the government from building a case against her.<sup>178</sup> And doing defense lawyers' work in big, complex corporate crime cases involving hundreds of witnesses and millions of documents consumes resources at a rate not often encountered in street crime defense.

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176. An important dimension of this question is the possibly ambiguous relationship between the position of the offending employee of a corporation and the explosion in the role of the corporate criminal defense lawyer which Weisselberg and Li document. *See generally* Weisselberg & Li, *supra* note 13. On the one hand, the prevalence of the modern corporate investigation has compelled large firms to purchase insurance covering defense costs and to bring more lawyers on the scene when law violations may be afoot, to do so as early as possible, and to supply representation for employees, including those who may have been involved in wrongdoing. *Id.* at 1268–72. On the other hand, the employee in the corporate case may find her range of options restricted in ways that are particular to corporate criminal cases: she may find herself unable meaningfully to rely on her Fifth Amendment privilege and her attorney, funded by the firm and often party to a joint defense agreement, may not provide the utmost independent judgment that might come with a private lawyer chosen by the employee. *See* Griffin, *supra* note 146, at 333–40 (discussing the additional risks to employees as individuals); N. Richard Janis, *Ensuring Employee Rights in Internal Investigations*, 36 HUM. RTS., Spring 2009, at 10, 10 (discussing the representation of employees in internal investigations).

177. *See* Dennis Berman, *Galleon's Legacy: Wiretapping Insider Crime*, WALL ST. J., May 12, 2011, at C1 (noting that wiretapping “just wasn’t the way things were done” with Wall Street cases); *see also* Peter J. Henning, *The Pitfalls of Wiretaps in White Collar Crime Cases*, N.Y. TIMES DEALBOOK (Mar. 25, 2011, 3:08 PM), <http://dealbook.nytimes.com/2011/03/25/the-pitfalls-of-wiretaps-in-white-collar-crime-cases> (noting the problems with using wiretaps in white collar cases including increased privacy concerns).

178. *See* Arlen, *supra* note 73, at 144, 167–72.

On the other hand, the practice (as opposed to the law) of criminal investigation in the white collar arena affords the subject of a corporate criminal investigation considerable informational advantages. The bare existence of counsel at the investigation stage can restrict the government's ability to engage in some kinds of surprise interrogations and other common tactics for gathering evidence in street crime investigations.<sup>179</sup>

These informational advantages may cash out more in negotiation than in litigation. As legal scholars Kenneth Mann and, later, Gerard Lynch famously documented, white collar criminal practice includes an entire phase of quasi procedure that is virtually nonexistent in the prosecution of street crime.<sup>180</sup> The charging decision in corporate cases usually follows a kind of negotiation or litigation that involves pitches from defense lawyers to prosecutors—under circumstances in which the defense has knowledge of much of the prosecutor's evidence. This process can include extensive meetings in which the parties discuss the facts, the history and characteristics of the defendant, and the nature of the offense and comparable prosecutions—all the same things likely to influence decisionmakers such as judges, jurors, and probation officers in an actual criminal prosecution. The process even includes informal levels of appeal, as defense attorneys work their way up the hierarchy in the prosecutor's office. (I have heard members of the corporate criminal defense bar say that their practice primarily involves “conference room litigation.”) This system of precharge procedure amounts to an additional bite at the apple—though it comes first—to which street offenders almost never have access.

Couple these considerations with the prosecutor's likely calculation—accurate or not—that trial of a corporate crime case will encounter better defense advocacy, more complexity, and more

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179. This advantage for the corporate offender is explained lucidly in John G. Douglass, *Jimmy Hoffa's Revenge: White Collar Rights Under the McDade Amendment*, 11 WM. & MARY BILL RTS. J. 123, 129–39 (2002).

180. The seminal study of the strikingly different role of the white collar defense lawyer from the street crime lawyer in criminal investigations is KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985). Mann, basing his findings on an interview study involving the New York bar, documented at length the special role of the white collar defense lawyer in gaining and controlling information. *Id.* at 6–8; *see also* WEISBURD ET AL., *supra* note 9, at 99 (discussing the early involvement of counsel and the importance of early skilled counsel in negotiating and staving off or reducing charges); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125–29 (1998) (describing the process of precharge quasi adjudication by federal prosecutors).

difficulty with a jury than the ordinary criminal case. One can see why prosecutors might be more apt to decline to charge in the corporate case, or more likely to offer an irresistible discount in plea bargaining.

The revolving door provides further support for the hypothesis that superior defense resources produce selection effects. If one thinks that federal prosecutors are self-maximizing and that their utility functions include a strong desire for lucrative private sector work following public employment, then one might predict that they would manage their cases in order to produce two things: verifiable experience in conducting high-level, complex corporate investigations and prosecutions; and a perception of wisdom and balance among a bar that includes those who make hiring decisions and refer client work. The object would be to both prosecute big cases and dispose of cases “reasonably” in the eyes of the defense bar.

The data again complicate matters. White collar cases, it turns out, plead out at essentially the same rate as all others.<sup>181</sup> Once the prosecutor has decided to level charges, the white collar offender appears to be just as overborne by the government’s power in plea bargaining as anyone else—maybe more so if one thinks the corporate defendant would tend, for a variety of reasons, to be more risk averse toward imprisonment than the street offender.

### C. Charging Decisions

Selection effects may still loom large. If some potential charges and penalties are whittled away in the precharging phase, then the white collar offender will face less pressure at the formal stage of pretrial proceedings or trial. The rate of guilty pleas may be unaffected, but the outcomes may be more favorable relative to

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181. Between 2005 and 2011, about 88 percent of all federal criminal cases resulted in a guilty plea. White collar cases pled out at approximately the same rate, with embezzlement, fraud, and forgery cases pleading out at an average rate of 89 percent. *See* ADMIN. OFFICE, STATISTICAL TABLES 2005, *supra* note 121, at 81 tbl.D-4; ADMIN. OFFICE, STATISTICAL TABLES 2006, *supra* note 121, at 81 tbl.D-4; ADMIN. OFFICE, STATISTICAL TABLES 2007, *supra* note 121, at 81 tbl.D-4; ADMIN. OFFICE, STATISTICAL TABLES 2008, *supra* note 121, at 82 tbl.D-4; ADMIN. OFFICE, STATISTICAL TABLES 2009, *supra* note 121, at 82 tbl.D-4; ADMIN. OFFICE, STATISTICAL TABLES 2010, *supra* note 121, at 83 tbl.D-4; ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2011, at 69 tbl.D-4 (2012), available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2011/Dec-11/D04Dec11.pdf>; *see also* Stephanos Bibas, *White Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 723–32 (2005) (describing the heavy increases in sentences and prosecutorial leverage in white collar cases from the 1990s into the 2000s, and speculating about a possible decrease in such leverage following the Supreme Court’s ruling that the Federal Sentencing Guidelines are not binding).



worst-case scenarios. The empirical difficulty is that decisions not to pursue cases by prosecutors who operate in the exceedingly discretionary arena of corporate crime enforcement are not measurable or even observable. All I can say is that I have heard defense lawyers celebrate over nonprosecution decisions for individual clients to such a degree that the event would seem to be uncommon, at least once a criminal investigation gets going in earnest. And of course there is the familiar complaint—particularly strong in the debate over the virtues and vices of independent counsels—that prosecutors feel compelled to level some sort of charge and get some sort of conviction once they have been tasked with a major investigation.<sup>182</sup>

A tentative answer to the question about privilege in defense resources might be as follows. The most likely point of resource leverage for the corporate offender is at the stage of informal negotiation and litigation over charging decisions and, perhaps to a lesser extent, plea bargains. The degree of that leverage relative to the street offender is difficult to quantify. From one viewpoint, the leverage is enormous because the street defendant typically enjoys no assistance at all in the process by which prosecutors investigate crime and choose whether and what to charge. From another perspective, the white collar defense bar would contend that advocacy at the point of prosecutorial discretion is essential in white collar cases.<sup>183</sup> The fuzzy boundaries in the business realm between crimes and merely civil violations, the bar would say, often mean that the difference between imprisonment and freedom is the idiosyncratic judgment of one or a few executive-branch officials about whether something is “really” a crime.

Once again, those who perceive an unfair advantage to corporate criminals are raising more fundamental questions than they may realize. As a descriptive matter, corporate crime just *is* different than street crime in American society. As a result of both political

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182. See, e.g., *Morrison v. Olson*, 487 U.S. 654, 727–32 (1988) (Scalia, J., dissenting) (discussing the dangers inherent in broad prosecutorial discretion); Jerry Ross, *Avoiding Captain Ahab: Lessons from the Office of the Independent Counsel*, 35 ADMIN. & SOC. 334, 334–37 (2003) (noting that social and psychological factors incentivize prosecutors to close cases for the least cost).

183. See generally Lev L. Dassin & Guy Petrillo, *Making Presentations to the United States Attorney's Office and the Department of Justice*, in DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS, *supra* note 112, § 5 (discussing the multitude of factors that clients must consider when confronting potential criminal charges).

disagreement and genuine conceptual challenges, there is far less consensus in the field of economic activities than elsewhere about what "oughta be a crime." That dissensus is evident in, among other places, ambivalence about whether the business crime defendant needs a special kind of legal defense, or rather does not deserve different treatment at all.

The thought experiment might again be revealing: What would the criminal-justice system look like if one set about to remove any advantage the corporate criminal defendant enjoys from greater defense resources? Three alternatives spring to mind. One could massively increase funding for indigent defense. Given the costs presently incurred in defending corporate cases, one would have to break the public fisc to produce level funding. One could limit the amount of spending on private defense, directly or perhaps through a tax that would help fund indigent defense. But that would require amending the Constitution. Or one could try to legislate a revolution in the practice of white collar criminal defense by requiring the government to investigate such crimes behind a wall that closes off the defense bar from the government's evidence and the prosecutor's decisions about charging and plea offers. For maximizing information relevant to important decisions, that would seem to cut off the system's nose to spite its face.

#### CONCLUSION

Justifying existing arrangements in the field of corporate crime enforcement has not been the purpose of the preceding discussion. The object has been to place in clear view the nature of any plausible claim that the American criminal-justice system privileges the individual corporate offender. This clarity can be produced by familiarity with the particulars of corporate criminal law and its current practice, examination of available data, and consideration of the forms of change that would be required to reorder the relative positions of corporate and street offenders.

Sentencing law and practice no longer privilege the individual corporate defendant. Substantive criminal law, if anything, is less favorable to white collar offenders than others. Trans-substantive doctrines of procedure and evidence do not themselves contain features that white collar defendants can particularly exploit. Enforcement institutions, as constructed and operated, privilege the corporate offender only if one holds the belief that the present

capitalist economic system could coexist with the kind of intrusive policing techniques routinely applied to violent and other street crimes. A great advantage in defense resources is available to the corporate employee subject to the criminal process. That resource advantage likely produces some discretionary amelioration of charges and plea offers that is not quantifiable. But it is hard to see how one could level criminal cases on the dimension of defense resources without radically changing the American conception of rights to representation.

The argument that corporate criminals are privileged, it turns out, originates in an external point of view on law and legal institutions. Critics of present treatment of corporate crime are implicitly advocating more fundamental and consequential changes than they generally acknowledge or perhaps realize. A viable argument about privilege would bid Americans to adopt new perspectives on what to call a crime, how to police economic activity with enforcement institutions, and how to contest suspicions and accusations of serious wrongdoing.

Such contentions deserve serious responses. They have reform implications more profound than one would think from observing the recent skirmishing over corporate crime in the public square. And they thrust the subject of corporate crime into the fray of debate over America's impulse to ask criminal law to relieve its frustrations with intractable regulatory problems. The foregoing discussion should help structure and clarify such important normative debates.

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