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Articles

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SYMPOSIUM INTRODUCTION

WHITE-COLLAR CRIME: THE PAST, PRESENT, & FUTURE

Ellen S. Podgor[1]
The Symposium Event

The Inaugural Symposium of the *Stetson Business Law Review* focused on the topic of white-collar crime. The day-long virtual event, held on February 25, 2022, included in-depth discussions on important aspects of white-collar criminality in the business world. From a panel discussing "*Investigation and Insider Trading*"[2] to one on the "*Prosecution and Punishment of Corporate Officers*,"[3] panelists explored a variety of aspects regarding white-collar criminality by looking into its past, present, and future.

The Symposium's morning sessions were made up of scholarly presentations, with five articles in this issue as representative of the exchanges that day. The morning ended with a keynote talk from Professor Tracey Maclin who explored the *Fifth Amendment*

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1. Gary R. Trombley Family White Collar Crime Research Professor & Professor of Law, Stetson University College of Law. The author thanks Marissa Morejon and Kyle Ridgeway for making all of this possible. Special thanks also go to Gary R. Trombley for his continual support of white-collar legal projects at Stetson University College of Law.

2. The first morning panel, moderated by Stetson University College of Law Professor Joseph Morrissey, included the following panelists and topics: Professor Lucian Dervan of Belmont University College of Law talked about *International White Collar Crime: The Growth and Future of Cross-Border Investigations and Prosecutions*; Professor Katrice Bridges Copeland of Penn State Law talked about *Maintaining Privilege for Corporate Executives*; and Professor Joan Heminway of University of Tennessee College of Law spoke about *Criminal Insider Trading in Personal Networks*.

3. The second morning panel, moderated by Visiting Professor of Law at Stetson University College of Law Professor Karen Woody, included the following panelists and topics: Professor Jennifer Taub of Western New England University School of Law spoke about the *Corporate Shift in the Biden Administration*; Professor David Kwok of University of Houston Law Center spoke about *Historic Federal Criminal Enforcement Strategies of State Public Corruption*; Professors Mihailis E. Diamantis of University of Iowa College of Law and Professor W. Robert Thomas of Stephen M. Ross School of Business at the University of Michigan spoke about *Branding Corporate Criminals*; and Professor Pedro Gerson of California Western Law School spoke about *Less is More? Accountability for White-Collar Crime Offenses Through an Abolitionist Framework*.

Protections for Corporate Officers,[4] a talk that challenged the Court's "collective entity"[5] rule. He argued the rule "defies the text of the Fifth Amendment."[6]

The afternoon moved from the scholarly realm to issues faced by practitioners who are the boots on the ground in handling white-collar cases. These lawyers covered key discovery challenges such as the ramifications of the Due Process Protections Act.[7] In a panel moderated by Attorney Addy Schmitt of Miller & Chevalier,[8] speakers Simon A. Latcovich of Williams & Connolly, LLP,[9] Ian Friedman of Friedman & Nemecek, L.L.C.,[10] and Katherine Yanes of Kynes, Markman & Felman,[11] told of the issues they faced when *Brady* material[12] was not properly presented to them. From the issues faced in the Ted Stevens trial[13] to those issues uniquely raised in white-collar cases when terabytes of information[14] are

4. *See* Tracey Maclin, *Long Overdue: Fifth Amendment Protection for Corporate Officers*, 101 B.U. L. REV. 1523 (2021).

5. Because a corporation "is a creature of the state," the self-incrimination privilege normally applicable to individuals would not apply to the entity. *See* Hale v. Henkel, 201 U.S. 43 (1906). Over time, the entity exception has been expanded to include partnerships and other entities such as a labor union. *See* ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL, & NANCY J. KING, WHITE COLLAR CRIME 2D 658–60 (2018) (discussing the different range of entities that have been included or excluded under the entity exception).

6. *See* Maclin, *supra* at 4.

7. Pub. L. No. 116–182, 134 Stat. 894 (Oct. 21, 2020).

8. *See* https://www.millerchevalier.com/professional/addy-r-schmitt.

9. *See* https://www.wc.com/Attorneys/Simon-A-Latcovich.

10. *See* https://www.iannfriedman.com/attorney-profiles/ian-n-friedman-esq-/.

11. *See* https://www.kmf-law.com/attorneys/katherine-earl-yanes/.

12. *Brady* material references the constitutional due process requirement of the government to provide to the defense material evidence that is favorable to the defendant. *See* Brady v. Maryland, 373 U.S. 83 (1963).

13. The Late-Senator Theodore "Ted" Stevens, a sitting Senator at the time was initially convicted of corruption related charges. Following the trial, exculpatory evidence that had not been provided to the defense resulted in the government dismissing the conviction. The court, however, ordered an extensive review of the discovery violations, which resulted in the Schuelke Report that demonstrated the existence of these discovery violations. *See Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order dated April 7, 2009*, In re Special Proceedings, Misc. No. 09-0198 (D.D.C. Mar. 15, 2012), http://legaltimes.typepad.com/files/stevens_report.pdf (commonly known as the "Schuelke Report"); *see also* Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. OF ILL. L. REV. 463, 487–90 (2019) (discussing criminal discovery policy following the Ted Stevens disclosures).

14. *See, e.g.*, Schwarz v. United States, 828 Fed. Appx. 628 (11th Cir. 2020) (discussing a request for a continuance following the receipt of three terabytes of information in discovery in a bank fraud and interference with the administration of internal review laws).

provided in a disorganized manner,[15] the panel reflected on the need for further defense protections and compliance orders to assure discovery is properly received. They noted Orders that some courts were using that assisted the defense in not only receiving their rightful discovery, but also providing enforcement for the language in discovery orders, and discussed the Model Order proposed by the National Association of Criminal Defense Lawyers (NACDL).[16] The need for more judges to reinforce discovery practices was evident.

The second afternoon panel moderated by Attorney Ellen Brotman of Brotman Law[17] noted the rise in ethical issues in the white-collar sphere. The panelists, comprised of Hank Asbill from Buckley LLP, [18] Erik Matherney of Shutts & Bowen LLP,[19] and Amy Richardson of Harris, Wiltshire, and Grannis, LLP, [20] explained key concerns raised for attorneys in internal investigations. How should *Upjohn* warnings[21] be handled in the corporate compliance setting? Attorney Brotman began the discussion by asking the panelists what internal investigation issues keep them up at night, which led to a discussion of joint representation of witnesses,[22] understanding the scope of the investigation, and recognizing that parallel investigations may be occurring.[23] This led to a discussion on client identification as the

15. *See* Drew Findling, *Unable to Bear the Weight of the "Document Dump": A Heavy Burden on Individuals*, THE CHAMPION, Oct. 2018 at 5 (discussing the challenges when the government provides gigabytes and terabytes of discovery on defense counsel).

16. *See* NACDL Model Order Pursuant to the Due Process Protections Act of 2020, *available at* https://www.nacdl.org/getattachment/ebafb0a7-e357-4f23-96b0-4db93490204c/nacdl-model-order-pursuant-to-the-due-process-protections-act-of-2020.pdf.

17. *See* https://www.ellenbrotmanlaw.com/.

18. *See* https://buckleyfirm.com/people/henry-asbill.

19. See https://www.shutts.com/professionals-erik-r-matheney.

20. *See* https://www.hwglaw.com/team/amy-e-richardson/.

21. *Upjohn* warnings, a term emanating from the Court's decision in *Upjohn v. United States*, 449 U.S. 383 (1981), are the statements that counsel representing a corporation as part of an internal investigation makes to employees who are being question. The warnings assure that the employee is warned that the questioner is not representing them, but rather representing the entity. *See* JOHN WESLEY HALL, PROFESSIONAL RESPONSIBILITY IN CRIMINAL DEFENSE PRACTICE, *Upjohn Warnings* § 5:7.50 (2022) (providing suggested warnings that can be used by corporate counsel).

22. In white collar and other multiple defendant cases, the defendant parties will often enter in joint defense agreements. A host of issues can result such as when one of the parties to the joint defense agreement decides to cooperate with the government. *See* ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL, & NANCY J. KING, WHITE COLLAR CRIME 2D 705–10 (2018) (discussing joint defense agreements in white collar cases).

23. Parallel investigations refer to criminal investigations that also have an agency investigating the conduct for possible civil action. One sees this with the Internal Revenue

attorney conducting the investigation is representing the company and not its individual constituents.[24] Apprising the corporate constituents that the attorney conducting the internal investigation may be asking the questions, but not in fact serving as their counsel, is an important aspect that needs to be clarified from the start when questioning witnesses.[25] The existence of joint defense agreements can further muddy the waters, and the role of privilege and waivers presents unique concerns.[26]

Following the two panels, the afternoon keynote speakers Marissa Goldberg[27] and Drew Findling[28] of the Findling Law Firm brought to life some of the comments discussed earlier in the day when they talked about "*How Solo Practitioners and Small to Medium Size Firms Can Efficiently and Effectively Manage Large Document White-Collar Criminal Cases*." They noted that document dumps[29] were not new to federal cases, but how this government conduct placed unusual burdens on small firms. Unlike a large law firm, the smaller criminal defense practice may find it challenging to handle massive amounts of documents without the infrastructure found in some larger firms. They explored the technology costs in this type of defense,[30] noting other costs that were involved such as "constitutional costs."[31] But they did not just stop at expressing the problem. They also provided a list of motions that defense counsel can make to assist with these

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Service in tax investigations, the Securities Exchange Commission (SEC) in its insider trading investigations, or the Environmental Protection Agency (EPA) in environmental investigations. *See id*. at 583–609.

24. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013) (discussing issues that arise when employees do not recognize that the internal investigator is not representing them).

25. *Upjohn* warnings are used to provide the necessary protections of the corporate constituents. *See supra* note 21.

26. *See* Green and Podgor, *supra* note 24.

27. *See* https://www.linkedin.com/in/marissa-goldberg-b0469926/.

28. *See* https://www.facebook.com/FindlingLawFirm/; https://www.nacdl.org/People/DrewFindling

29. *See* Drew Findling, *Unable to Bear the Weight of the "Document Dump": A Heavy Burden on Individuals*, THE CHAMPION, Oct. 2018 at 5 (discussing the challenges when the government provides gigabytes and terabytes of discovery on defense counsel, especially to smaller firms that then need to hire firms to assist in the document review process).

30. *Id.*

31. "In fulfilling its duty to disclose documents to the defense, the government may also be unduly burdening the defense with so much paper that they are incapable of adequately responding in preparation for trial." United States v. Shaw, 113 F.Supp. 2d 152, 163 (D. Mass 2000).

discovery challenges.[32] They emphasized the need to have the government produce "meaningful discovery."[33]

THE SYMPOSIUM ISSUE

This Symposium issue represents many of the scholarly works presented in the morning session. It covers a wide array of topics within the white-collar sphere. There have always been questions of what fits within white-collar crime.[34] Does it include obstruction of justice,[35] political corruption,[36] and computer espionage?[37] The haziness of the concept is exacerbated by the constituents writing about this topic. On one hand, you have sociologists who focus on what causes write collar crime and how best to eradicate this problem.[38] In another sphere, often overlapping with the sociologists, you have criminologists who serve the interests of law enforcement in their study of crime prevention.[39] Finally, in the legal realm you find those writing laws to protect society and

32. In their PowerPoint slides they noted that defense counsel can file pretrial motions that include: "Motion for Bates Stamping, Motion for Early Disclosure of Jencks and Giglio Material, Motion for Early Disclosure of Trial Exhibits, Motion for Early Disclosure of Witnesses, Motion to Identify Brady Material, Motion for Government to Provide Documents in Searchable Form, Motion for Government to Provide Software, and Motion for Funds."

33. "Meaningful discovery" can refer to discovery that is not completely disorganized, but rather is provided in a format that would be useable by the government in their preparation for trial.

34. *See* Lucian E. Dervan & Ellen S. Podgor, *"White-Collar Crime": Still Hazy After All These Years*, 50 GEORGIA L. REV. 709 (2016) (discussing the lack of a clear definition of what is encompassed within the term "white collar crime").

35. There are many obstruction of justice statutes within the federal code, but although the crimes are used in the white collar sphere, they are also used for street crime prosecutions. *See* Ellen S. Podgor, *Obstruction of Justice: Redesigning the Shortcut*, 46 B.Y.U. L. REV. 657 (2021) (discussing the government use of obstruction crimes).

36. Many different federal crimes have been used for prosecution of corruption. For example, the mail fraud statute (18 U.S.C. § 1341), wire fraud statute (18 U.S.C. § 1343), or bribery (18 U.S.C. § 201). In some instances, the statutes may reflect both white collar corruption as well as organized crime forms of corruption. The Hobbs Act, (18 U.S.C. § 1951) is an example of a statute used by federal prosecutors for extortion involving federal and state officials, but also a statute used against those extorting money through organized criminal activity.

37. *See* 18 U.S.C. § 1030 (pertaining to different forms of computer criminality).

38. Initially when coined, the term "white collar crime" was used by sociologist Edwin Sutherland. *See* Edwin H. Sutherland, *White-Collar Criminality*, 5 *Am. Soc. Rev.* 1 (1940).

39. *See* ELLEN S. PODGOR, PETER J. HENNING, JEROLD H. ISRAEL, & NANCY J. KING, WHITE COLLAR CRIME 2D 1-3 (2018) (noting the development of the white collar crime term).

prosecutors who proceed against perpetrators of these illegal acts to correct the conduct through punishment.[40]

In looking from a legal perspective of what crimes are encompassed within the term white-collar crime, there is no easy answer. But there has never been any question that crimes of insider trading and corporate criminality are firmly entrenched as white-collar offenses and public corruption is the hot topic of the day. With a global economy, it is obvious that these issues will now exceed our borders. And how best to approach and stop this criminality presents challenges as one wants to assure solutions that do not exacerbate our carceral state. These five key topics serve as the heart of the scholarship offered in this issue.

A. Corporate Criminality

Corporate criminality existed prior to the term white-collar crime. In its early history, prosecutions against corporations were not permitted. This eventually changed to findings that corporations could be prosecuted for passive strict liability offenses.[41] It later included cases with a *mens rea* in the statute.[42] But has the prosecutorial development of corporate criminality accomplished the goal of reducing criminal activity?

Professors Robert Thomas and Mihailis E. Diamantis discuss the failure of corporate punishment to achieve the goal of reduction of the criminal activity in their article, *A Marketing Pitch for Corporate Criminal Law*.[43] They call for corporate criminality to use better marketing tools for increased accountability.[44] Transparency, such as with corporate settlements, are advocated by these professors. And although they do not advocate a specific marketing plan, they call for increased communication between marketing professionals to "finally stand a chance of achieving its moral and preventative ambitions."[45]

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40. *Id.* at 2–3.
41. *Id*. at 23.
42. The case *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909) is considered the landmark decision allowing corporate criminality for *mens rea* offenses.
43. *See infra*
44. *See infra*
45. *See infra*

B. Public Corruption

The federal government has long been a leader in prosecuting corruption cases.[46] One sees these prosecutions against federal officials, as well as prosecutions that target state and local officials.[47] David Kwok, in his Article, *Trends in Prosecution of Federal and State Public Corruption*,[48] examines these federal corruption cases and notes the increased trend of prosecutions against state and local officials. This highly empirical piece notes the Supreme Court's limiting of corruption prosecutions and dissects the prosecutorial discretion that lies at the heart of what gets charged criminally in the federal sphere.[49]

C. Insider Trading

Professor Joan MacLoad Heminway in her Article, *Criminal Insider Trading in Personal Networks*,[50] examines the crime of insider trading, but from a unique perspective – "those involving the tipping of material nonpublic information between or among friends and family or the misappropriation of material nonpublic information from a friend or family member."[51] With a sample of thirty-one tipper/tippee and misappropriation cases she analyzes the motivations for this conduct. She asks the important question of "why do they do it?" And although a definitive answer may not be forthcoming, she provides examples to flesh out the relationships and conduct that provides the basis for this criminality.

D. International

Globalization is not merely a term for manufacturing, marketing, and distribution of products. With all of these,

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46. The Public Integrity Unit of the Department of Justice is the focal point for many of the federal, state, and local prosecutions involving corruption activity. *See* Department of Justice, Public Integrity Section (PIN), *available at* https://www.justice.gov/criminal-pin.

47. *See, e.g.,* McDonnell v. United States, 579 U.S. 550 (2016) (unsuccessful government prosecution against the former Governor of Virginia), McNally v. United States, 483 U.S. 350 (1987) (unsuccessful federal prosecution of local officials).

48. *See infra*

49. *See infra*

50. *See infra*

51. *See infra*

unfortunately, also comes some criminality. As activities go beyond the United States, so does criminal conduct.[52] White-Collar criminality in the international area feeds unfortunate occurrences. One of the key components to curtailing criminality is played by businesses and corporations that strive to keep these activities from their ranks. The process of investigating these activities internally within the company is through the use of internal investigations.[53] And like the internationalization of the crimes, the investigations have also gone international. Professor Lucian Dervan in his article, *International White Collar Crime and the Globalization of Internal Investigations Ten Years Later*,[54] reexamines the use of internal investigations ten years after a prior study. He looks at the four areas of determining who should conduct the investigation, the cross-border risks, interactions with employees, and self-disclosures and settlements. He then provides his thoughts on what the next ten years will bring, noting the future risks in cross-border investigations.[55]

E. Carceral State

Pedro Gerson in his Article, *Less is More? Accountability for White-Collar Offenses Through an Abolitionist Framework*,[56] notes the failure of prosecuting and punishing white-collar offenders. He boldly states that "the current approach to white-collar crime is failing." Looking at an abolitionists approach to criminal justice, he argues that "the effects on mass incarceration and the real harms caused by imprisonment" should not be overlooked just because the crime fits the white-collar category.[57] He "suggests how non-carceral responses that may better ensure accountability for white-collar wrongdoing" should be examined.[58]

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52. *See* Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 3255 (1997) (discussing the expansion of prosecuting white collar crimes outside the United States).

53. *See* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 102–06 (2013) (discussing *United States v. Norris*, a case involving a United Kingdom corporation).

54. *See infra*

55. *See infra*

56. *See infra*

57. *See infra*

58. *See infra*

AND SO

White-collar crime is a relatively new concept and clearly not a course offered in law schools fifty years ago.[59] Its growth has taken many different dimensions and has led to many different discussions. This Symposium issue captures some of the key aspects of this subject. It remains unknown where this topic will be in fifty or one-hundred years and whether it will have new terminology, new headings, and new chapters. Will law schools move to another sphere that does not focus on corporate criminality or enlarges the reach of public corruption? All these remain unknown. But this inaugural Symposium issue of the *Stetson Business Law Review* will be there to provide a measure of where it has been at this point in time.

One would be remiss in failing to mention the individuals who made the inaugural symposium a reality. Editor-in-Chief Omar Hussein, Managing Editor Erik Banuchi, and especially Executive Editor Marisabel Morejon, who coordinated the day and speakers who were at the heart of this inaugural symposium. Kyle Ridgeway, the Editor-in-Chief for the 2022-2023 term, carried forward the work of the initial editors to bring all of us this *Stetson Business Law Review* Inaugural Symposium issue. Special thanks also go to the Stetson Law alum and emeritus Board of Overseers member Gary R. Trombley, who provided support for this Symposium on White-Collar Crime.

59. *See* Ellen S. Podgor, *Criminal Procedure: It Wasn't Always So,* 13 OHIO ST. J. CRIM L. 469 (2016) (discussing the development of criminal procedure courses in law school).

A MARKETING PITCH FOR CORPORATE CRIMINAL LAW

W. Robert Thomas & Mihailis E. Diamantis

ABSTRACT. *Corporate criminal law needs a marketing makeover. In the public relations frenzy that follows a corporate criminal investigation, authorities are outgunned and outmaneuvered. Judging by the pastiche of '90s-era design choices on the website the Department of Justice uses to announce corporate penalties, authorities are either unaware of the importance of marketing or do not care. Prosecutors aren't marketing professionals. Nor, for that matter, are most scholars writing about corporate misconduct.*

Humdrum publicity undermines corporate sanctions and dulls the edge of criminal justice. Criminal dispositions should single out truly contemptible practices from merely sharp, unproductive, or undesirable ones. In this way, criminal law gives victims the recognition they deserve and deters wrongdoers who would preserve their good name. Corporate punishment today falls far short of these communicative ambitions. It is a fleeting affair diluted by civil and administrative alternatives, PR spin, and a frenetic media environment. It can be hard even to identify after the fact who the corporate criminals are. Unsurprisingly, corporations view criminal charges as inconvenient economic uncertainties and criminal sanctions as mere costs of doing business. Public perceptions have largely followed suit.

For punishment to convey its intended message, society must hear it. Some marketing savvy could help. Yet legal scholars working to improve corporate criminal justice (let alone government functionaries enacting it) rarely seek the advice of colleagues in

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marketing departments. This Article lays the groundwork for dialogue about how to market corporate criminal law better and thereby make it more effective.

"But one thing is certain even in the brand advertising context: if the ad is never delivered, there is no way it can be effective."[1]

INTRODUCTION

Can you name ten corporate criminals? Bernie Madoff, Martha Stewart, and Jeff Skilling don't count. Those are all individuals who worked for businesses, not the businesses themselves. In any case, Bernie Madoff Investment Securities L.L.C. was forced into liquidation rather than conviction;[2] Martha Stewart committed crimes on her own accounts, not for Martha Stewart Omnipedia Inc.;[3] and the Enron Corporation went bankrupt before it could be charged.[4] So, try again. How about just five? Three?

It's surprising the task should be so difficult. Corporate crime inflicts twenty times more economic damage each year than every

1. TIM HWANG, SUBPRIME ATTENTION CRISIS: ADVERTISING AND THE TIME BOMB AT THE HEART OF THE INTERNET 81 (2020).

2. *See* Adam Hayes, *Bernie Madoff: Who He Was, How His Ponzi Scheme Worked*, INVESTOPEDIA (Apr. 30, 2021), https://www.investopedia.com/terms/b/bernard-madoff.asp.

3. *See* Jonathan D. Glater, *Stewart Likely to Influence Her Company, Even from Jail*, TUSCALOOSA NEWS (July 17, 2004), tuscaloosanews.com/story/news/2004/07/17/stewart-likely-to-influence-her/27871261007/.

4. *See* Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Nov. 26, 2021), https://www.investopedia.com/updates/enron-scandal-summary/.

street crime combined.[5] While corporate criminal law is dramatically underenforced,[6] brand name corporations do find themselves on the wrong side of the criminal process every year. Their crimes aren't all boring accounting anomalies. They include all the grist of daytime TV drama: homicide, arson, sexual assault, promoting terrorism, peddling narcotics.[7] Yet most people—including most law students and even many law professors—don't even know that corporate criminal law exists.[8]

One problem, as we have discussed in earlier work, is that corporate criminal sanctions are rarely calibrated to corporate offenses.[9] Authorities—prosecutors and judges alike—default to a tired narrative in which corporate sanctions must be, first and foremost, financial. But monetary payments are more characteristic of civil damages than criminal punishment.[10] So the public's confusion is understandable. One might at least expect that corporate criminal fines would be especially large. What then are onlookers to make of the fact that the civil monetary consequences of corporate misconduct usually outstrip criminal penalties by a multiple of six?[11]

This Article draws attention to a different problem: there's no effort to market corporate criminal enforcement. The Department of Justice ("DOJ") keeps many criminal resolutions secret—only

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5. *Compare* Rodney Huff, Christian Desilets & John Kane, *The 2010 National Public Survey on White Collar Crime* NAT'L WHITE COLLAR CRIME CTR. 12 (2010), http://www.fraudaid.com/library/2010-national-public-survey-on-white-collar-crime.pdf, *with* Kathryn E. McCollister et al., *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 98 (2010), https://doi.org/10.1016/j.drugalcdep.2009.12.002.

6. *See generally* Mihailis E. Diamantis & W. Robert Thomas, *But We Haven't Got Corporate Criminal Law!*, 47 J. CORP. L. 991 (2022) (arguing that corporate criminal law is so underenforced in the United States that it is doubtful the United States could actually claim to have a functioning corporate criminal justice system).

7. *Id.* at 1000–01 (listing examples).

8. *Id.* at 993; Mihailis E. Diamantis, *Corporate Criminal Law Is Different*, Harv. L. Record (Feb. 28, 2022), https://hlrecord.org/corporate-criminal-law-is-different/.

9. W. Robert Thomas, *Incapacitating Corporate Criminals*, 72 VAND. L. REV. 905, 946–56 (2019); Mihailis E. Diamantis, *Clockwork Corporations*, 103 IOWA L. REV. 507, 516 (2018).

10. *See* Flemming v. Nestor, 363 U.S. 603, 617 (1960) (finding a statute was civil in nature in part because it imposed "[n]o affirmative disability or restraint . . . and certainly nothing approaching the 'infamous punishment' of imprisonment. . . ."); W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 413 & nn. 76–80 (2021) (collecting citations).

11. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

the prosecutors and the corporate criminals know about them.[12] Of criminal resolutions that see the light of day, a large portion never make it into the public record because prosecutors often conclude their investigations with sterilized agreements akin to civil settlements rather than trial and conviction.[13] Nearly all the remaining investigations plead out without much fanfare.[14]

Even the sliver of corporate criminal cases that go to trial rarely enjoy the media attention that accompanies high-profile prosecutions of individual offenders. Sometimes the DOJ's Office of Public Affairs issues press releases to its website, but their drab presentation and banner ads are more reminiscent of a mid-90s weblog than any modern-era publicity effort.[15] The most reliable resource for finding out about corporate crime is an academic website: the Corporate Prosecution Registry.[16] Its managers cull what information they can find from publicly available resources, doing their best in the face of the DOJ's refusal to respond to freedom-of-information requests.[17] Anyone who accesses the Registry can run search queries and download a CSV spreadsheet, alongside a dictionary of technical codes for deciphering what is first and foremost a repository of information intended for academics, statisticians, and policy wonks.

Contrast this with the glossy brochures, polished statements, and advertising blitz that characterizes a corporate target's spin on the same set of facts.[18] In an average corporation, one out of

12. Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 118 (2009) ("The DOJ's offices should adopt a consistent unified approach to enhancing transparency in this area, first, by requiring subject companies to prominently post their agreements on their company websites, and second, by requiring that all agreements be posted on the DOJ's criminal website.").

13. *See* Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 454, 458–59 (2019).

14. *See* Diamantis & Thomas, *supra* note 6, at 998–99.

15. *See, e.g.*, *Stericycle Agrees to Pay Over $84 Million in Coordinated Bribery Resolution*, U.S. DEP'T OF JUST. (Apr. 20, 2022), https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution.

16. Brandon L. Garrett & Jon Ashley, *Data & Documents*, CORP. PROSECUTION REGISTRY, http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/.

17. *See* Justin Wise, *DOJ Withholding Public Records in Violation of FOIA, Says Garrett's Collaborator in Duke-UVA Corporate Prosecution Registry*, DUKE LAW NEWS (Nov. 22, 2021), https://law.duke.edu/news/doj-withholding-public-records-violation-foia-says-garretts-collaborator-duke-uva-corporate/.

18. *E.g.*, *Wells Fargo's New CEO: "We Will Get It Done"*, WELLS FARGO (Mar. 1, 2020), https://stories.wf.com/wells-fargos-new-ceo-will-get-done; WILLIAM L. BENOIT, ACCOUNTS, EXCUSES, AND APOLOGIES: IMAGE REPAIR THEORY AND RESEARCH 50–58 (2d ed. 2014)

every ten dollars goes to marketing.[19] Last year, the DOJ's Criminal Division requested a budget of $196 million to cover all salaries and expenses.[20] In the same year, Walmart alone spent $3.9 billion (twenty times more) on marketing.[21] It's no accident that even we—two scholars who research corporate crime full time—remember more clearly that Volkswagen and Boeing initially blamed rogue employees for their crimes than why those stories eventually proved false.

Corporate criminal enforcement needs a marketing makeover. Prosecutors need better marketing chops and legal scholars working on corporate crime need to learn from marketing colleagues in business schools. After more fully characterizing the communicative failures of present-day corporate criminal enforcement (Part I), we show how these failures undermine corporate criminal justice (Part II). Victims go unacknowledged, and corporate crime goes under-deterred. We close by calling for more cross-disciplinary dialogue about how to market corporate crime better (Part III). We identify two mutually reinforcing marketing goals: building public awareness about the corporate criminal justice system generally and improving messaging about specific corporate crimes, criminals, and victims.

I. A FAILURE OF COMMUNICATION

Actions speak louder than words. Anyone interested in government messaging about crime would understandably turn first to how authorities typically treat suspected criminals. For individuals, the criminal justice response sings with loud vitriol. The average sentence for the most common federal drug trafficking offense (meth) is a brutal eight years locked in a 6'x 8' cell.[22] By

(evaluating BP's "We Will Make This Right" publicity campaign following the Deepwater Horizon spill).

19. Christine Moorman, *Marketing Budgets Vary by Industry*, WALL ST. J.: CMO TODAY BY DELOITTE (Jan. 24, 2017, 12:01 AM), https://deloitte.wsj.com/articles/who-has-the-biggest-marketing-budgets-1485234137.

20. U.S. DEP'T OF JUST., CRIM DIV., PERFORMANCE BUDGET FY 2021 CONGRESSIONAL SUBMISSION 38, https://www.justice.gov/doj/page/file/1246356/download.

21. Statista Research Department, *Wal-Mart Stores, Inc Advertising Cost Worldwide in the Fiscal Years 2004 to 2022*, STATISTA (Mar. 25, 2022), https://www.statista.com/statistics/622029/walmart-ad-spend/.

22. U.S. SENT'G COMM'N, FISCAL YEAR 2020 OVERVIEW OF FEDERAL CRIMINAL CASES (Apr. 2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/FY20_Overview_Federal_Criminal_Cases.pdf.

contrast, corporate criminal resolutions, when they speak at all, whisper with conspiratorial indifference. So, it should come as no surprise that many lay observers don't even realize the criminal law applies to corporations—after all, while corporate criminal law exists on paper, very little of it is ever seen in the real world.[23]

A. What Judges Communicate About Corporate Crime

We start with the inadequacy of corporate sentencing to make good on the expressive promise of corporate punishment. Sentencing is the most formal and publicly visible (even if vanishingly rare) resolution of corporate crime. And it is broken, all the way down. One embarrassingly enduring obstacle for advocates of robust corporate criminal enforcement has been to provide a plausible account of what it means to punish a corporation.[24] Without a vision of what corporate conviction is for, we can hardly blame prosecutors if they pursue corporate cases with less vigor and negotiate civil resolutions to one-third of corporate criminal investigations.[25] There is no consensus about what corporate punishment is for. To deter? To rehabilitate? To incapacitate? To mete out just deserts? There isn't even agreement about whether any of these goals are achievable with respect to corporations in theory or in practice.[26]

But whatever one thinks corporate punishment should do, an important mechanism through which punishment delivers on its goal is by communicating the state's condemnation of the crime.[27] A recurring theme throughout conversations of corporate criminal law is that punishment necessarily expresses something about the

23. It should go without saying—though many have bothered to say it anyway—that the corporate entity cannot itself be put into prison. *See* Thomas, *supra* note 9, at 909 (collecting citations).

24. Mihailis E Diamantis, *The Law's Missing Account of Corporate Character*, 17 GEO. J.L. & PUB. POL'Y 865, 879–81 (2019).

25. *See* Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 89 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

26. *See generally* Samuel W. Buell, *Retiring Corporate Retribution*, 83 L. & CONTEMP. PROBS. 25 (2020) (arguing against the possibility of achieving retribution against corporations); Diamantis, *supra* note 9, at 518–27 (arguing against the possibility of deterring corporations through fines).

27. *See* Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

nature of the wrongdoing, the character of the wrongdoer, and the status of the victim.[28] That expressive dimension of corporate punishment is often all that sets it apart from civil or regulatory penalties, whose monetary judgments are otherwise indistinguishable.[29] Criminal punishment, on this view, is importantly public: it conveys society's condemnation for some types of bad behavior, stigmatizes people who carry out such bad behavior, and reaffirms the value of innocent victims.

Corporate criminal law well misses its defining expressive mark. On paper, the corporate sentences judges have at hand cannot carry the full weight and stigmatic hallmarks of sanctions available in our broader criminal justice system. In practice, the sentences that federal judges impose on corporate criminals lack even the residue of condemnatory force.

Start with the corporate sanctions that judges have available to them. Nearly all corporate sentencing at the federal level reduces to one of two sanctions: a monetary fine or corporate probation.[30] Neither of these sanctions is particularly well-suited, even in principle, to carry the expressive weight that theories of punishment expect of them. Fines have long been described as at best expressively ambiguous, just as likely to be interpreted as a means of buying one's way out of the "real" sanction.[31] And probation, at least conventionally understood in the United States, signals light treatment of the sort reserved for minor, first-time infractions, celebrity criminals, and . . . well, white-collar offenders.[32]

But even if the tools of corporate punishment were good on paper, in practice corporate punishment is unbearably light. Fines imposed against criminal corporations are small both in absolute numbers and especially when compared against the corporate

28. W. Robert Thomas, *The Conventional Problem with Corporate Sentencing (and One Unconventional Solution)*, 24 NEW CRIM. L. REV. 397, 398 n.1 (2021) (collecting citations).

29. *See generally* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397 (1965) (distinguishing penalties from punishments).

30. While other sanctions exist, *see e.g.*, U.S.S.G. § 8C1.1 (divestment of all assets), they are rarely used, GARRETT, *supra* note 11, at 156–57.

31. *E.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 147 (2003); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 621 (1996); Thomas, *supra* note 28, at 412–15.

32. Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609, 618 (2006); Thomas, *supra* note 28, at 415–17.

defendants' assets and revenues.[33] The average corporate fine is just 0.04% of market capitalization.[34] And this assumes a fine was imposed; approximately 20 percent of convicted businesses receive no fine at all.[35]

While corporate probation in theory offers judges a legal hook for imposing non-monetary alternatives—the Sentencing Guidelines enumerate several conditions and give a sentencing court "almost endless" discretion to invent new conditions of probation[36]—this hook has gone mostly unused. Judges impose corporate probation even less frequently than monetary fines.[37] Despite the longstanding availability of probation as a tool for implementing governance and compliance reforms, the federal government has only recently shown any serious interest in its ability to reform corrupt organizations.[38] Most conditions of probation are simultaneously easy to satisfy and toothless. For just one example, a convicted corporation must promise not to commit any more crimes during its term of probation.[39] One might be forgiven for thinking a "promise" not to break the law is superfluous—wasn't the law itself reason enough not to break it?—and yet corporations routinely breach this condition of probation without consequence.[40] Pacific Gas & Electric ("PG&E") serves as

33. Dorothy Lund & Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, CLS BLUE SKY BLOG (Mar. 18, 2020), https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis/.

34. GARRETT, *supra* note 11, at 70.

35. U.S. SENT'G COMM'N, 2015 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/Table51.pdf.

36. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1439 (2009).

37. GARRETT, *supra* note 11, at 164 ("The guidelines have been amended to encourage probation to do more. But these new powers are not commonly used.").

38. Dylan Tokar, *Revamped DOJ Compliance Unit Takes on Greater Role in Corporate Settlements*, WALL ST. J. (June 22, 2022), https://www.wsj.com/articles/revamped-doj-compliance-unit-takes-on-greater-role-in-corporate-settlements-11655940214?mod=hp_minor_pos12.

39. 18 U.S.C. 3563(a)(1) (2008); U.S.S.G. § 8D.3(a).

40. JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 69 (Westchester Publ'g Servs., 2020); GARRETT, *supra* note 11, at 165-68. Indeed, one of the first times that a corporation suffered any consequences for breaching its agreement happened only this year, after prosecutors learned of Deutsche Bank AG's post-DPA misconduct only after reading about it in the Wall Street Journal. Patricia Kowsmann & David Michaels, *Deutsche Bank Violates DOJ Settlement, Agrees to Extend Outside Monitor*, WALL ST. J. (Mar. 11, 2022), https://www.wsj.com/articles/deutsche-bank-violates-doj-settlement-agrees-to-extend-outside-monitor-11647016959.

a case study in this trend. Earlier this year, it successfully emerged from five years of federal probation despite, in that interval, pleading guilty to 84 counts of manslaughter and facing ongoing criminal inquiries for two more major fires.[41] In short, neither the law nor the realities of corporate sentencing have shown themselves capable of delivering on the criminal law's distinctly expressive character.

As a fallback, one might be tempted to hope that a judgment of conviction, standing alone, offers enough somber condemnation to make up for what corporate punishment lacks. After all, the very fact that a corporation has been convicted of a crime—as opposed to, say, found liable of a civil breach or regulatory infraction—says something about the seriousness of the misconduct, right?[42] But while corporate convictions carry condemnatory force, they cannot, standing alone, make up for the expressive inadequacy of corporate sentencing.[43] Because first, conviction and sentencing are expressively intertwined; how the state responds to a conviction informs how seriously the rest of society should treat this determination.[44] Thus, when judges sentence corporations to pittance punishments, they undermine the gravity that conviction might otherwise afford.[45] Second, and especially relevant here, the bare fact of a legal judgment does not, cannot, speak for itself. Assuming that a conviction can bear at least some of the expressive weight of state punishment, someone needs to carry that message to the public. A legal judgment like a conviction needs to be heard to be believed.

B. What Prosecutors Communicate About Corporate Crime

There is an even more basic problem with hoping that conviction can condemn: it assumes that corporations actually get

41. *California's Embattled Utility Leaves Criminal Probation, But More Charges Loom*, ASSOCIATED PRESS (Jan. 24, 2022), https://www.npr.org/2022/01/24/1075267222/californias-embattled-utility-leaves-criminal-probation-but-more-charges-loom.

42. Thomas, *Conventional Problem*, *supra* note 10, at 420 n. 120 (collecting cites).

43. Feinberg, *supra* note 28, at 402; *see also* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U.PA. L. REV. 1503, 1567–68 (2000).

44. This is not the same as saying that conviction and sentencing are the same; these two moments in the criminal process can be understood to express very different things. *See* Mihailis E. Diamantis, *Invisible Victims*, 2022 WIS. L. REV. 1, at 25–38 (2022).

45. Thomas, *Conventional Problem*, *supra* note 10, at 420–23.

convicted for their wrongdoing. As it turns out, very few business organizations face any kind of criminal process. Corporations rarely encounter the criminal justice system, both in absolute (just .03 percent have felony convictions) and relative terms (individuals are 287 times more likely to have a felony conviction).[46] Fully one-third of "corporate criminal settlements" involve a disposition that is, ironically, not criminal at all—a civil agreement with prosecutors in exchange for a promise to *avoid* prosecution.[47] Even those unable to sidestep criminal process entirely still virtually never see a jury, pleading guilty instead of undergoing a trial and conviction (courts decide only around 2 percent of corporate criminal resolutions).[48]

Corporate convictions and prosecution agreements are inconsistently communicated, with sporadic press releases from the DOJ's Office of Public Affairs substituting for meaningful, consistent disclosure of corporate wrongdoing. Even when authorities uncover misconduct, official records of it can be hard to come by.[49] The problem is so bad that securities laws have adopted "safe harbor" provisions to protect companies that accidentally, but still illegally, enter certain deals with convicted corporations.[50]

Of course, when the agreements themselves are publicly available (sometimes the DOJ keeps them secret[51]), one doesn't necessarily have to rely on press releases. One can always read the agreements for oneself. Since corporations are very motivated to avoid trial, prosecutors have an opportunity to use the agreements' ubiquitous statement of facts (all prosecution agreements have a facts section) to shape the narrative of misconduct. What one finds instead is a heavily negotiated, sterile chronology of events, bereft of any tinge of judgment or evaluation. In most cases, even the words "guilt" and "admit" are conspicuously absent. PG&E again serves as telling example. The company recently entered into an agreement with the DOJ to avoid prosecution for two major

46. Diamantis, *supra* note 10, at 510.

47. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

48. Diamantis & Thomas, *supra* note 6, at 998–99.

49. Wise, *supra* note 17.

50. *E.g.*, 17 C.F.R. § 230.506(d)(2)(iv) (2021).

51. Boozang & Handler-Hutchinson, *supra* note 12, at 117–18.

wildfires.[52] Despite all of its prior criminal history and ongoing criminal investigations for yet other fires, PG&E's most recent prosecution agreement formally acknowledges no wrongdoing.[53]

Some commentators look at the agreements that prosecutors strike with corporations and see a kind of "game" that's expressively disconnected from the seriousness of its object.[54] William Laufer asks "Where Is the Moral Indignation over Corporate Crime?" because he cannot find it.[55] "In the absence of affective outrage, anger, disapproval, and indignation, government functionaries successfully placate stakeholders with scripted retributive text, and yet leave in place the risk-taking, innovation, and entrepreneurship associated with moving the economy forward."[56] In short, if the federal government is trying to communicate something meaningful to the public about corporate criminals and corporate misconduct, it is doing a spectacularly poor job of it.

II. BROKEN MESSAGING UNDERMINES JUSTICE

Marketing matters. Whatever truth there is to actions speaking louder than words, the fact is, the words employed in criminal law speak volumes. The language of criminal justice sets priorities, shapes values, repairs social breaches, and creates shared understanding about who/what is important. These first-order social effects can impact behavior in positive ways, but the current stock-in-trade of DOJ enforcement, i.e., corporate fines and diluted terms of supervision, repeatedly falls short. Messaging around criminal enforcement partially structures the decision space that corporations, managers, and consumers must constantly navigate.[57] Its impact is palpable and demonstrable. When authorities fail to adequately condemn corporate crime and send muddled messages about its significance, they lose a prime

52. Associated Press, *The Nation's Largest Utility Agrees To Pay More Than $55 Million for Two Wildfires*, NPR (Apr. 12, 2022), https://www.npr.org/2022/04/12/1092259419/california-wildfires-pacific-gas-electric-55-million.

53. *Id.*

54. William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71, 79–80 (2018) [hereinafter *Missing Account*].

55. William S. Laufer, *Where Is the Moral Indignation Over Corporate Crime?*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 19 (Dominik Brodowski et al eds. 2014).

56. Laufer, *Missing Account*, *supra* note 54, at 109–10.

57. *See infra* at note 128 (discussing the impact of 2021's "Monaco Memo").

opportunity to check corporate misconduct. Indeed, they may even enable it.

A. A Failure to Condemn or Validate

Criminal law enacts society's most coercive peacetime institution. Life and liberty uniquely and routinely hang in the balance. At its best, criminal law's determinations speak with singular gravitas about our deepest commitments, about what we value, and about what we do not. What criminal law say may sometimes shock us, as when it reveals a dark side of our collective psyche that we had. This power of criminal law is reflected, for better and for worse, in the word it deploys to refer to wrongdoers, about wrongs, and about the wronged.

With respect to wrongdoers, the criminal law licenses a host of deeply stigmatic epithets—"thief," "murderer," "tax cheat," "sex offender"—which function by collapsing an offender's public identity into the fact of his or her conviction. To be sure, these criminal epithets are not the state's exclusive property: these labels are leveled in society broadly, even without a conviction. Even so, their stigma derives in part from a relationship to the criminal justice system—an important reminder of the symbiotic relationship between legal and moral norms.[58] Indeed, even the more sanitized, technical labels used by the criminal justice system are inescapably condemnatory.[59] Ostensibly neutral terms like "criminal," "offender," or "felon" never remain truly neutral because the general public is meant to, and usually does, recognize that the preconditions for applying such a label—namely, a criminal conviction—are inherently stigmatizing.[60]

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58. *Cf.* David A. Skeel, *Shaming in Corporate Law*, 149 U.PA. L. REV. 1811, 1820 (2001) ("Shaming sanctions are so integrally connected to social norms that it is not entirely clear where one leaves off and the other begins."). To that point, the state recognizes some obligation to police usage of the labels it enables. For example, tort law recognizes that it is not just defamatory but defamatory *per se* to say falsely that someone is a criminal. RESTATEMENT (SECOND) OF TORTS § 570 (1977).

59. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 257 (1990) ("When the penal system . . . begins to use a particular vocabulary to describe offenders and to characterize their conduct, such conceptions and vocabularies . . . frequently enter into conventional wisdom and general circulation."). *See generally* Alice Ristroph, *Farewell to the Felonry*, 53 HARV. C.R.-C.L. L. REV. 563, 565–66 (2018) (discussing felonry's legal and pejorative meanings).

60. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1373 (2009) ("The word 'criminal' has its distinctive significance, however, because this word means blameworthy.").

But when it comes to labeling corporate criminals, that same stigmatic vocabulary is nowhere to be found. No equivalent words apply to businesses: corporations are neither "killers" when they kill nor "thieves" when they steal. At most, a firm might be called "the next Enron," suggesting that the worst names we can think of to describe bad corporations are just the names of other bad corporations.[61] The irony here is that corporations would arguably be a better target for these kinds of labels. For individual convicts, our harsh criminal epithets often overshoot the expressive mark. The stigma of conviction can become an unjust and unproductive barrier to eventual social and economic reintegration, even for one-off, out-of-character offenses.[62] By contrast, corporate criminality routinely arises in circumstances that reflect a real propensity or institutional culture of wrongdoing— in other words, "not just that somebody pursued faulty preferences, but that the group arranged itself badly."[63] Yet for corporate convicts, we don't even seem to be aiming at expressive goals.

The message of criminal justice is not limited to condemning wrongdoers for condemnation's sake. It also expresses validation of the victim who has been wronged, of the social norms that have been transgressed, and of our renewed commitment to repairing the social fabric bent by criminal misconduct.[64] The criminal justice system provides victims with a public forum to demand acknowledgment of their injury, and to reassert their status and dignity. Validation here is inextricably tied to condemnation. A victim of a crime is not similarly situated to a victim of an earthquake, tornado, or act of God; though both are harmed, only

61. *E.g.*, Ryan Browne, *'The Enron of Germany': Wirecard Scandal Casts a Shadow on Corporate Governance*, CNBC (June 29, 2020, 5:22 AM), https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html.

62. *See* Lynn S. Branham, *Eradicating the Label "Offender" from the Lexicon of Restorative Practices and Criminal Justice*, 9 WAKE FOREST L. REV. ONLINE 53, 55–56, 59 (2019); John Braithwaite, *Shame and Criminal Justice*, 42 CAN. J. CRIMINOLOGY 281, 284–91 (2000).

63. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 502 (2006).

64. Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 842 (2000) ("[T]he commission of an act the community, through its laws, deems wrong should be met with disapprobation for the sake of the victim and the sake of the community."); Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1427 (2009) ("As an expression of the community's moral judgment, there is a significant value to applying the criminal law to organizations that act through their agents. . . ."). *See generally* Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

the former was wronged.[65] A criminal trial provides the possibility of a public accounting, conviction reaffirms the community's support for victims, and sentencing makes further space for communal repair. These practices, as with so many elements of the criminal justice system, can be abused and even be abusive. Nonetheless, the importance of victim recognition in criminal law is exemplified by the recent, high-profile prosecution of Jeffrey Epstein, who unexpectedly died just before his trial could commence.[66] Ordinarily, this would have required immediate dismissal of all charges. However, the presiding judge provided first Epstein's victims an opportunity to testify in open court about their experiences. He reasoned that doing so was necessary to fulfill "the court's responsibility . . . to ensure that the victims in this case are treated fairly and with dignity."[67]

Governmental silence in the face of corporate criminality further wrongs its victims. By choosing to prosecute cases sparingly, the government invites the message that corporations are above the law—that the harms befalling victims are more akin to unfortunate acts of God than to decisions of corporate neglect, indifference, or greed.[68] These are some of the invisible victims of a criminal justice system that simultaneously punishes black and brown offenders too harshly, white-collar criminals too softly, and corporate criminals virtually not at all.[69]

Even those cases brought to some form of resolution too often undermine, rather than vindicate, victims' interests in the criminal justice system. Consider the DOJ's deferred prosecution

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65. T.M. Scanlon, *Punishment and the Rule of Law*, *in* THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 219, 231 (2003) (tying the need to "affirm a victim's sense of being wronged" to the function of punishment to "condemn the agent who inflicted the wrong"); *see also* R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 132 (2003). *See generally* Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992).

66. For discussion see Mihailis E. Diamantis, *Invisible Victims*, 2022 Wis. L. Rev. 1, 26–29.

67. Ali Watkins, *Jeffrey Epstein's Victims, Denied a Trial, Vent Their Fury: 'He Is a Coward'*, N.Y. TIMES, (Aug. 27, 2019), https://www.nytimes.com/2019/08/27/nyregion/jeffrey-epstein-hearing-victims.html.

68. Buell, *supra* note 63, at 495–96 (noting that individual employee's "crimes often *benefit* organizations and are committed for that reason"). The perception of equal treatment under the law has motivated corporate criminal liability since its inception. W. Robert Thomas, *How and Why Corporations Became (and Remain) Persons Under the Criminal Law*, 45 FLA. ST. U. L. REV. 479, 534–36 (2017).

69. Diamantis, *Invisible Victims*, *supra* note 66; Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 Hastings L.J. 1, 51 (2012); William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 155, at 191–93 (2021).

agreement with Boeing over the airline manufacturer's role in creating defective and dangerous planes, including those that caused the fatal crashes of Lion Air Flight 610 and Ethiopian Airlines Flight 302.[70] Families of the deceased lambasted the deal, which they didn't know was being negotiated. They argued that the federal government had traded a financial pittance in exchange for inoculating Boeing forever from any charges in the wrongful deaths of 346 people.[71] Humiliatingly, federal prosecutors were thereby forced to explain in open court that the families had not been consulted because, according to the DOJ's determination, the passengers killed were not victims of any federal crime.[72] Instead, the real victims were commercial airlines that bought defective Boeing planes. Whether prosecutors were accurate in their narrow assessment of federal law[73]—a contestable assumption, given the steady criticism that prosecutors have faced for being overly reluctant to pursue white-collar charges[74]—is almost beside the immediate point, which is that the current approach to corporate criminal law carries real, immediate consequences. What the criminal justice system does matters in large part because of what those actions say about society's commitment to the victims through its condemnation of the wrongdoers. When it comes to corporate crime, the criminal justice system is mostly silent.

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70. Press Release, U.S. DEP'T OF JUST., Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay Over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion.

71. Niral Chokshi, *Families of Boeing Crash Victims Say the U.S. Failed to Consult Them*, N.Y. TIMES, (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/business/boeing-crash-victim-families.html; *see* John C. Coffee, *Nosedive: Boeing and the Corruption of the Deferred Prosecution Agreement*, HARV. L. SCH. FORUM ON CORP. GOV. (May 25, 2022) https://corpgov.law.harvard.edu/2022/05/25/nosedive-boeing-and-the-corruption-of-the-deferred-prosecution-agreement/.

72. Michael Laris, *Those Killed in 737 Max Crashes Aren't 'Crime Victims," Justice Says*, WASH. POST, (May 4, 2022), https://www.washingtonpost.com/transportation/2022/05/04/boeing-737-max-crime-victims/.

73. Indeed, a federal court has ruled that it was not accurate. David Shepardson, *U.S. Judge: Passengers in Fatal Boeing 737 MAX Crashers Are 'Crime Victims'*, Reuters (Oct. 21, 2022), https://www.reuters.com/world/us/us-judge-passengers-fatal-boeing-737-max-crashes-crime-victims-2022-10-21/.

74. *See* JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Jed. S. Rakoff, *Getting Away with Murder*, N.Y. REV. (Dec. 3, 2020) (reviewing JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020)), https://www.nybooks.com/articles/2020/12/03/getting-away-murder-executive-prosecution/.

Perhaps this moralized account of criminal law reads as too rosy, too naive. After all, the content of any message that criminal punishment is understood to convey is "shaped in large part by the perceived legitimacy of the criminal justice system."[75] And recent years have begun to surface for a broader public the pervasive and systematic racial, ethnic, and class injustices that criminal justice activists and scholars have long decried as rampant within our existing criminal institutions. Criminal punishment, on this view, sends a dark, unflattering "message about who is in control and about who gets controlled."[76] But even on this view, the silence around corporate crime is deafening. What clearer message about control could be sent than by an ostensible institution of criminal law that settles one-third of its cases through private agreements between the government and companies the government resolves not to prosecute?

B. Undermining Deterrence

Hard-nosed economists may dismiss the fact that poor marketing in corporate criminal law enforcement fails to validate victims and condemn corporate wrong. These soft values may seem disconnected from the world of business and personal incentives that are supposed to drive—and are supposedly key to preventing—corporate misconduct. While we think it is morally objectionable to focus exclusively on dollars and cents in criminal justice, we agree with the broader point that prevention should be a lodestar of corporate criminal enforcement policy.

Recent advances in behavioral and organizational psychology demonstrate how short-sighted the dollars-and-cents perspective is, even from an economic perspective.[77] People (both natural and legal) are not just sophisticated, profit-maximizing totalizers. For better or worse (we think better), non-financial considerations also influence people's decisions. That vector of influence is where

75. Bernard E. Harcourt, *Joel Feinberg on Crime and Punishment: Exploring the Relationship Between The Moral Limits of the Criminal Law and The Expressive Function of Punishment*, 5 BUFF. CRIM. L. REV. 145, 169 (2001); *see also* ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 18–20 (1993).

76. Harcourt, *supra* note 75, at 168.

77. *See* Jennifer Arlen & Lewis A. Kornhauser, *Battle for our Souls: A Psychological Justification for Individual and Corporate Liability for Organizational Misconduct* (forthcoming 2023); Richard H. McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics*, *in* THE ENCYCLOPEDIA OF LAW AND ECONOMICS (Geritt de Geest, ed., 2009).

effective marketing in criminal law could shape behavior. While some have lamented "the ineffectiveness of the criminal stigma as a deterrent to corporate activities," that state of affairs is far from inevitable.[78]

The textbook economic account of how criminal sanctions are supposed to deter corporate misconduct fails on multiple fronts. It maintains that the threat of a criminal fine increases the expected costs of breaking the law, which in turn incentivizes corporations to behave.[79] The trouble is this: a fine sufficient to counteract the short-term economic gains from many corporate crimes would have to be so large that no politically savvy prosecutor could pursue it[80] and no corporation would be able to pay it.[81] To complicate matters further, the textbook economic account fails to acknowledge conflicting incentives inherent in the corporate structure.[82] While corporate shareholders ultimately bear the cost of any corporate fine, corporate managers decide how a corporation behaves.[83] So corporate fines fail to incentivize the right parties. Available empirical data seem to validate this reasoning—they show that larger corporate fines do not induce better corporate behavior.[84]

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78. John T. Byam, Comment, *The Economic Inefficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582, 602–03 (1982).

79. *See, e.g.*, Vikramaditya Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1496 (1996). ("A corporation exposed to liability internalizes the costs of harm and provides incentives for its managers to avoid harm. Because the cost of harm is internalized, the costs of production will reflect the true economic costs and the level of production will approach the optimal level."); *see also* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

80. *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 956 (2009) ("Although corporate entities are technically criminally liable for nearly all of their employees' misconduct, the government has learned not to formally prosecute these entities due to the steep collateral consequences of indictment.").

81. *See* John C. Coffee, Jr., "*No Soul to Damn and No Body to Kick*": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 390–93 (1981).

82. Miriam H. Baer, *Organizational Liability and the Tension Between Corporate and Criminal Law*, 19 J.L. & PUB. POL'Y 1, 14 (2010).

83. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1367 (2009) ("This punishment is inflicted instead on human beings whose guilt remains unproven. Innocent shareholders pay the fines, and innocent employees, creditors, customers, and communities sometimes feel the pinch too."). *But see* W. Robert Thomas, *The Ability and Responsibility of Corporate Law to Improve Criminal Fines*, 78 OHIO ST. L.J. 601, 645 (2017) ("[T]he state's blind eye towards the influence of corporate law means that it sabotages its own attempt to punish corporations with criminal fines . . .").

84. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 11, 24 (Anthony S. Barkow & Rachel E. Barkow eds.,

Despite the shortcomings of the textbook economic account, criminal enforcement *does* seem to deter corporate misconduct. As many examples bear witness—whether it is a firm like BP's chronic workplace safety violations,[85] or an industry, like those impacted by DOJ's Swiss Bank Program—criminal enforcement can influence corporate behavior for the better, even where repeated civil enforcement has fallen short. Paradoxically, criminal law has this impact even though criminal financial penalties are usually just a fraction of what total civil penalties are.

These real-world results beg the question: If not stiffer penalties, what explains criminal law's deterrent power? Modern behavior economics offers an answer that resonates well with long-standing philosophical perspectives on the nature of criminal law. The bottom line is that people care about more than money. They care about how other people see them and about how they see themselves.[86] They care about their standing in society and their good name. In an economic sense, these values may not seem meaningfully different from money: they are all sources of personal utility. But there is a sense in which values like social standing reflect a fundamental break with a dollars-and-cents perspective on the world.[87] Its accounting logic is different because social standing is, unlike money, inherently personal and nonfungible. Two people cannot ordinarily exchange social standing. Nor can one person cannot collect another's social standing and thereby have twice as much. Social standing is not commensurable with money in any meaningful sense. While money can help to influence people's perceptions, one cannot buy a good name.

Social and moral values matter for corporate behavior because they motivate the employees and managers who act for the corporation. People are inclined to make choices that help them preserve a positive image in their own and others' eyes. This observation should be uncontroversial. It's not that moral and social values always trump financial reward in rational people's

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2011) ("There is little evidence that increasing the magnitude of monetary sanctions has a deterrent effect . . . ").

85. *See generally* W. Robert Thomas, *Corporate Criminal Law Is Too Broad—Worse, It's Too Narrow*, 51 ARIZ. ST. L.J. 505 (2021) (discussing BP example throughout).

86. *See* Arlen &. Kornhauser, *supra* note 77, at 17 ("Criminal law can deter by establishing or enhancing norms because, as previously discussed, people are averse to considering themselves, and being perceived by others, as immoral.").

87. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 144 (1989).

motivational calculus. It's just that, all else equal, normally socialized people tend to avoid choices that would bring them into disrepute.[88] According to some (probably inarticulable) equation, most people would forgo some financial opportunity to preserve their good name. There are probably also some fundamental moral and social values that most of us would prioritize over any financial opportunity, no matter how lucrative.

In the corporate context, it is not only the moral and social standing of individual employees that enters the motivational calculus. The corporation's status matters too. This is because the individuals who compose the organization sympathetically identify with it.[89] They feel the organization's shame in some measure as their own and take pride in its collective successes and good name.[90] This can move individuals, and by extension the organization itself, to care about how the organization behaves.

Despite its undersized monetary penalties, criminal law may be able to influence corporate behavior because of its awesome power to shape corporate social and moral standing. Researchers established long ago that criminal law has more going for it than just the threat of sanction.[91] People largely perceive criminal law to be an authoritative and legitimate reflection of what matters most socially and morally. As a result, people tend to conform to its prescriptions beyond what a purely egotistical cost-benefit calculus would predict.[92] This empirical data fits well with leading legal theory, which identifies criminal law as being uniquely positioned (among legal institutions) to condemn wrongdoing.[93] Criminal law's public expressive force—to say who and what violates our most basic shared understandings—distinguishes it

88. Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365, 371 (1999) (noting that dispute "destroys an asset that the fine cannot destroy—the offender's reputation").

89. Buell, *supra* note 63, at 491 ("[T]he criminal process can impose a unique form of reputational sanction, the effects of which flow through to institutional members in ways that promise to deter individual wrongdoing and promote group endeavors towards compliance.").

90. BRAITHWAITE, *supra* note 87, at 126, 141–44.

91. MINN. HOUSE RSCH. DEP'T, DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE: A PRIMER 1, 2 (2019).

92. PAUL ROBINSON, INTUITIONS OF JUSTICE AND THE UTILITY OF DESERT 176, 184–186, 188 (2013) ("[T]he criminal law's moral credibility is essential to effective crime control . . . ").

93. *See* Hart, *supra* note 27, at 404 and accompanying notes.

from civil law and may explain why criminal law can deter misconduct even where civil law falls short.[94]

When prosecutors and agencies ignore basic marketing principles, they undermine the deterrent impact of the public expressive act inherent in corporate criminal enforcement. Effective messaging and value projection are core competencies of marketing professionals.[95] That is, of course, why corporations invest so heavily in their marketing departments.[96] They aim to shape a positive public corporate image. Criminal acts stand as contradictions to this positive image. But criminal acts will only affect public perception if the government effectively communicates about their incidence and moral significance. That is where marketing insights can help.

Corporations want to avoid bad press just as much as they want good press. Part of what motivates them are sales. Generally speaking, good publicity increases sales and bad publicity decreases them.[97] Other scholars have observed that the reputational impact of a criminal conviction can depress corporate share value and consumer confidence.[98] But, as discussed above, psychological, identity-based motivations of the employees and managers are a powerful, non-financial driver too. Indeed, even when it comes to positive marketing, sales can't explain the full extent of investment in public image either. Data reveals that more than 80 percent of brands over-invest in TV advertising (as

94. We regard it as a separate question whether criminal law's expressive force can deter all by itself or whether it must be supplemented by material sanctions (like fines or jail time). *Cf.* Arlen & Kornhauser, *supra* note 77, at 19. For present purposes, we only need the weaker claim—that criminal law's expressive force enhances criminal law's existing deterrent effect.

95. Lynne Golodner, *The Message Matters*, FORBES (Dec. 23, 2020, 7:40 AM), https://www.forbes.com/sites/forbesagencycouncil/2020/12/23/the-message-matters/?sh=5dcf8ef13b36.

96. As Brent Fisse long ago noted, "the very history of modern corporate public relations began when government criticism and the assaults of Upton Sinclair and other muck rakers provoked response." Brent Fisse, *The Use of Publicity as a Criminal Sanction Against Business Corporations*, 8 MELB. U.L. REV. 107, 133 (1971).

97. At least, this is true for established brands. For unknown brands, negative publicity may sometimes increase sales by boosting public awareness. Jonah Berger, et al., *Positive Effects of Negative Publicity: When Negative Reviews Increase Sales*, 29 MKTG. SCI. 815 (2010). The cited study focused on the impact of positive and negative critic reviews; it's no clear whether the counterintuitive result generalizes to the bad publicity inherent in criminal conviction.

98. Khanna, *supra* note 79, at 1500–08.

measured by return on investment).[99] Even when it comes to more cutting-edge online advertising, there is "surprisingly ambiguous empirical evidence that these ads do anything at all."[100] So, firms' behavior reveals a concern over positive publicity that outstrips purely sales-based considerations. It stands to reason the same concern extends to negative publicity of the sort inherent in criminal convictions. In the hands of the public entities charged with investigating and judging corporate crime, marketing could be a powerful tool for tapping into this concern and influencing corporate behavior.

The time is ripe for courts and prosecutors to act. In the coming years, marketing principles will likely become even more effective tools for corporate deterrence. The oldest members of Gen Z turn twenty-five this year. They are beginning to discover their purchasing power, choose employers, and decide where to invest. Corporate values matter to Gen Z at each juncture. As consumers, "the core of Gen Z is the idea of manifesting individual identity. Consumption . . . [is] a means of self-expression."[101] Consequently, Gen Z consumers seek out corporations that they perceive to be an ideological fit. They "increasingly expect brands to 'take a stand.' . . . About 80 percent refuse to buy goods from companies involved in scandals."[102] As employees, Gen Z care about integrity.[103] They want to work for firms that share their ideological aspirations, even when doing so means taking a lower wage. As investors, every indication is that Gen Z will double-down on the present movement toward ESG-informed allocations of capital.[104] In a near future, where corporate values and identity

99. Bradley Shapiro, et al., *TV Advertising Effectiveness and Profitability: Generalizable Results from 288 Brands*, 89 ECONOMETRICA 1855 (2021).

100. HWANG, *supra* note 1, at 79.

101. Tracy Francis & Fernanda Hoefel, *'True Gen': Generation Z and Its Implications for Companies,* MCKINSEY & COMPANY (Nov. 12, 2018), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies.

102. *Id.*

103. Ashley Stahl, *How Gen-Z is Bringing a Fresh Perspective to the World of Work*, FORBES (May 4, 2021, 9:00 AM), https://www.forbes.com/sites/ashleystahl/2021/05/04/how-gen-z-is-bringing-a-fresh-perspective-to-the-world-of-work/ ("Gen-Z's expectations in the workplace are values-driven and aligned with their personal morals.").

104. *Majority of Generation Z Investors Identify Green and Sustainable Investing as the Biggest Trend of 2021*, BLOOMBERG (Feb. 3, 2021), https://www.bloomberg.com/company/press/majority-of-generation-z-investors-identify-green-and-sustainable-investing-as-the-biggest-trend-of-2021/ ("For the majority of Generation Z students polled, 'companies with a purpose' is a key driver for their investment decisions and many are investing 'for a better tomorrow'."); David Webber et

are expected to shape every major aspect of corporate operations—from sales, to hiring, to funding—the expressive power of criminal law would be a powerful deterrent, if only corporate enforcers would seize it.

III. A MARKETING 101 PLAN FOR CORPORATE CRIMINAL LAW

As we've shown, corporate enforcement has a marketing problem. Its many failures of communication undermine the most basic moral and preventive aspirations of corporate criminal law. This is an unforced error that some creative thinking and attention to marketing basics could begin to remedy, without even requiring much additional expense. In closing, we spell out a skeletal plan for the DOJ to consider—Marketing 101 for corporate criminal law, if you will.

The obvious place to start is the fundamental four pillars of marketing: product, price, place, and promotion. These "4Ps," referred to collectively as the "marketing mix," provide a conceptual framework that has had a dominating influence on marketing theory and practice since being coined in the 1960s.[105] Closer attention to each suggests, if not an answer for how to improve the status quo, then at least a roadmap for future exploration and integration with existing best practices.

Product. "The product variable of the marketing mix deals with researching customers' needs and wants and designing a product [or service, or idea] that satisfies them."[106] Courts and prosecutors need to think more creatively about the product on offer—namely, corporate sanctions. At present, the criminal

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al.*, Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1250 (2020) ("To win the millennial generation, index funds have turned their attention not simply to share price—the conventional marker of shareholder value—but to the social issues that millennial investors care about: shareholder values.").

105. *See* Efthymios Constantinides, *The Marketing Mix Revisited: Towards the 21st Century Marketing*, 22 J. MKTG. MGMT. 407, 407–09 (2006) (tracing the marketing mix's historical development); *see also* Chai Lee Goi, *A Review of Marketing Mix: 4Ps or More?*, 1 INT'L J. MKTG. STUD. 2, 2–3 (2009) (collecting citations). Of course, many scholars have argued that "the traditional 'marketing mix' concept and the notion of the '4 Ps' of marketing . . . may not fully describe modern marketing programs." KEVIN LANER KELLER, STRATEGIC BRAND MANAGEMENT 187 (3rd ed. 2008). But our point is that the federal government needs to start somewhere.

106. WILLIAM M. PRIDE & O.C. FERRELL, FOUNDATIONS OF MARKETING §1-2a (9th ed. 2022).

penalties that corporations face are indistinguishable from civil remedies available to regulators, civil enforcers, and private plaintiffs. Some scholars see promise in this approach,[107] while others see the potential for abuse.[108] We see a body of law that offers a familiar product in an already saturated market.

Criminal law is an opportunity for public authorities to offer a novel product that caters to an as-yet unserved social and economic need. Criminal justice occupies a unique social and legal position. It speaks with singular authority and licenses otherwise forbidden government responses. Applied to individuals, criminal law offers a unique suite of sanctions that reflect and augment the social and moral significance of conviction. Prosecutors and judges should consider the demand that only corporate criminal law can fill, and to tailor corporate sanctions to cater to it. In so doing, they would hopefully uncover corporate criminal law's distinctive communicative power and develop marketing-inspired punishments to amplify it. Corporate criminal law should look, sound, and feel more like *criminal* law.

Price. "The price charged for a product helps establish its value."[109] Of the 4Ps, price may seem an awkward fit for strategizing about how to improve corporate criminal law. While there isn't a capitalistic market of exchange for corporate sanctions in any familiar sense,[110] corporate sanctions do require public funding. The more the government pays, the more corporate misconduct it can detect, investigate, prosecute, and punish. Like pricing in a capitalist market, expenditures on enforcement send a signal about the value authorities place on corporate justice.

By this measure of value, we have long known that the government has a long way to go. Prosecutors pursue just the smallest fraction of corporate misconduct,[111] yet the effort strains their relatively meager resources. The fact is, the DOJ's inflation-

107. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 953 (2007).

108. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reform*, *in* PROSECUTORS IN THE BOARDROOM 62, 65 (Anthony S. Barkow & Rachel E. Barkow, eds., 2011).

109. WILLIAM M. PRIDE & O.C. FERRELL, FOUNDATIONS OF MARKETING §1-2b (9th ed. 2022).

110. Market exchanges aren't entirely unfamiliar to discussions of corporate crime. In the context of, Andrew Jennings has introduced the concept of a market for corporate criminals. Andrew Jennings, *The Market for Corporate Criminals*, 40 YALE J. REGUL. (forthcoming 2023).

111. Diamantis & Laufer, *supra* note 13, at 454.

adjusted discretionary budget has been *declining* for years.[112] Even when serious violations come to light, authorities find themselves hobbled.[113] Because they don't have the manpower to look into the crime themselves, they ask corporate suspects to investigate themselves.[114] Prosecutors can't dedicate the time for trial, so they resolve cases through civil diversion.[115] They can't afford to sanction corporations properly either. Rather than force criminal corporations to reform, prosecutors have them hire their own private overseers.[116] Even the task of collecting fines sometimes seems a step beyond what the DOJ can manage.[117]

Clearly, allocating additional public dollars to corporate enforcement would improve things, but the most important initial public investment wouldn't be financial at all. Indeed, as John Braithwaite has argued, purely economic thinking can be counterproductive for corporate criminal law.[118] Legislators may be to blame for underfunding, but prosecutors have only themselves to blame for their apparent unwillingness to invest their own moral capital. Corporate resolutions have become transactional affairs communicated in careful, sterilized language.[119] Contrast this with the indignation and full-throated condemnation that often accompanies enforcement against individual offenders. Until prosecutors are willing to publicly put

112. U.S. DEP'T OF JUST., FY 2022 BUDGET SUMMARY (2022), https://www.justice.gov/jmd/page/file/1398931/download.

113. The picture is complex. Lack of funding is actually just one of many reasons DOJ seems unwilling to meaningfully pursue cases against corporations.

114. This is a long-standing trend. Alec Koch, *Internal Corporate Investigations: The Waiver of Attorney-Client Privilege and Work-Product Protection Through Voluntary Disclosures to the Government*, 34 AM. CRIM. L. REV. 347, 349 (1997) ("[C]orporate self-investigation has become the norm.").

115. Editorial Board, *The Case of the Missing White-Collar Criminal*, BLOOMBERG VIEW (June 22, 2014), https://www.bloomberg.com/view/articles/2014-06-22/the-case-of-the-missing-white-collar-criminal [https://perma.cc/9QP4-B7F6] ("Prosecutors with limited resources, no matter how dedicated to justice they may be, can't ignore the attractions of such negotiated settlements.").

116. *See* Mihailis E. Diamantis, *Monitorships: An Academic Perspective*, *in* GLOBAL INVESTIGATIONS REVIEW – GUIDE TO MONITORSHIPS 91, 101–02 (Anthony S. Barkow et al. eds., 3d ed. 2019).

117. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 454 (2011) ("[T]he available data shows a massive gap between penalties imposed 'on the books' and penalties collected in reality.").

118. BRAITHWAITE, *supra* note 87, at 141–42 (1989) (arguing that an adopting "overly economically rational conception of the corporation" is self-defeating with respect to designing corporate punishment).

119. *See generally* Laufer, *Missing Account*, *supra* note 54.

their moral authority behind their pursuit of corporate criminals, the whole corporate criminal justice system will remain underpriced and undervalued.

Place. Place refers primarily to the channels through "which firms distribute their products to consumers."[120] Private firms have the option to distribute their products and services through direct channels—that is, directly from the firm itself to the market—or alternatively through indirect channels provided by intermediaries. Punishment, by contrast, cannot be similarly outsourced; when it comes to criminal punishment, only the state can deliver the goods. What should the government do instead? For starters, both judges and the DOJ should take better advantage of the channels they control. Even the limited channels available to the government today could be better used.

Most fundamentally, the courtroom itself is the clearest channel through which the state publicizes and promotes its judgments. As decades of TV dramas have made apparent, the judicial bench can be a source of solemn drama. Even if the role of courts is currently limited in the status quo, courts should take seriously the dignified power of their courtroom to draw attention to corporate wrongdoing.[121] One notable recent example occurred when PG&E pleaded guilty in California state court to 84 counts of manslaughter for causing the 2017 Camp Fire.[122] In accepting this pre-negotiated plea deal, the presiding judge required that PG&E's CEO attend and participate in the plea colloquy by admitting the company's guilt individually to each of the 84 manslaughter charges, during which the court read out each victim's name.[123] This solemnizing process brought weight and traction to a process that today too often resembles a bureaucratic signing of forms. To the extent that plea agreements remain common currency within corporate sentencing, judges should

120. KELLER, *supra* note 105, at 219; *see also* PHILIP KOTLER & KEVIN LANE KELLER, MARKETING MANAGEMENT 794 (15th ed. 2016) (defining a marketing channel as "a set of interdependent organizations involved in the process of making a product of service available for use of consumption").

121. Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959, 961–63 (1998).

122. Michael Liedtke, *PG&E Confesses to Killing 84 People in 2018 California Fire*, ASSOCIATED PRESS (June 16, 2020), https://apnews.com/article/bill-johnson-fires-us-news-courts-paradise-67810cb4d9b6b90e451415b76215d6c9.

123. *Id.* While PG&E was a state criminal case, a similar power already exists in the Sentencing Guidelines. U.S. SENT'G GUIDELINES MANUAL § 8C2.5 cmt. 15 (U.S. SENT'G COMM'N 2021). *See generally* Barnard, *supra* note 121.

recognize and take seriously the performative dimension of their position.

With respect to the executive branch, and as noted in Part II, the DOJ's Office of Public Affairs only sporadically publicizes criminal resolutions on a website that appears to have missed the late-90s Internet revolution. Long ago, John Coffee complained that the federal government "has trouble being persuasive; rarely is it pithy; never can it speak in the catchy slogans with which Madison Avenue mesmerizes us."[124] But the problem is not purely about presentation; it is also about message. Prosecutors should not be content to issue—or have issued in their name—sanitized expressions of gratitude towards corporate offenders at the end of a corporate prosecution.

At the very least, corporate criminal settlements should not be kept a secret. Federal judges, former prosecutors, and scholars of all stripes have all raised concerns about the DOJ's use of prosecution agreements. Even Congress has recently entered the fray, ordering the DOJ to provide an annual report on recent prosecution agreements.[125] Despite its growing reliance on prosecution agreements as an alternative to criminal prosecution, the DOJ continues to provide halting, incomplete information about its practices. Organizations like the Corporate Prosecution Registry provide a laudable service by trying to fill this information gap.[126] But it should not be the responsibility of a handful of private citizens to pester the government into providing basic, complete, and accurate information about the ways in which the DOJ prosecutes—or, more to the point, excuses from prosecution—crime in corporate America. If the DOJ is committed to strengthening its response to corporate misconduct, an important first step would be to shine more light on the use of prosecution agreements. As a starting point, the DOJ should release detailed information about its existing agreements. Going forward, it should commit to making this information available, in a timely manner, without insisting on lengthy petition processes

124. Coffee, *supra* note 81, at 425.

125. Elkan Abramowitz & Jonathan Sack, *Congress Requires DOJ to Report on Deferred Prosecution Agreements*, N.Y. L.J. (July 8, 2021), https://www.law.com/newyorklawjournal/2021/07/08/congress-requires-doj-to-report-on-deferred-prosecution-agreements/.

126. Brandon L. Garrett & Jon Ashley, *Data & Documents, Corp. Prosecution Registry,* http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/.

and litigations. And as to the legislative branch, Congress should insist that any reports the DOJ prepares on prosecution agreements are comprehensive, expeditious, and publicly available. These commitments to transparency would represent an important, and long-overdue, step in strengthening the federal government's response to corporate crime.

Promotion. The final category is the most flexible and comprehensive, bringing together all that has been discussed in this Article. Promotion, or marketing communications generally, concerns how the government "attempt[s] to inform, persuade and remind consumers—directly or indirectly—about" the product being offered.[127] As the prior sections make clear, the federal government's marketing communications are intermittent, outdated, and generally unimpressive. Much of our complaint with the current state of corporate punishment goes deeper than just merely lackluster public relations; part of the failure here is that the government is not taking seriously its obligation to impose sanctions that rise to the level of the misconduct being sanctioned. That said, even taken at face value the sanctions already in place, the federal government could be doing significantly more with the sanctions already in place to move the needle.

Government speech doesn't necessarily have to be flashy in order to be effective; sometimes, what matters most is just that the government has decided to speak in the first place. Worth at least qualified praise in this respect are recent efforts by key leaders in the DOJ—first Deputy Attorney General Lisa Monaco, later Attorney General Merrick Garland[128]—to signal publicly intentions to pursue corporate wrongdoing more aggressively than the prior administration.[129] These comments made national news, and have since been promulgated and amplified by legal and compliance professionals who have a vested interest in keeping

127. KELLER, *supra* note 105, at 218; *accord* WILLIAM M. PRIDE & O.C. FERRELL, FOUNDATIONS OF MARKETING §1-2d (9th ed. 2022) ("The promotion variable relates to activities used to inform and persuade to create a desired response. Promotion can increase public awareness of the organization and of new or existing products.").

128. Lisa O. Monaco, Deputy Att'y Gen., Keynote Address at American Bar Association's 36th National Institute on White Collar Crime (Oct. 28, 2021); Merrick B. Garland, Att'y Gen., Delivers Remarks to the American Bar Association Institute on White Collar Crime (Mar. 3, 2022).

129. Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 153–55 (2020) (cataloguing a steep decline in enforcement during the Trump Administration).

their corporate clients apprised of pending risks.[130] And most importantly, there are preliminary, if tepid, indications that the DOJ is taking action to back up its words.[131]

John Coffee may have been correct that public officials struggle to match the rhetorical talents of marketing professionals.[132] While there is certainly low-hanging fruit to be gathered, the government will always be outgunned in this respect when it comes to resources and talent. But why try to beat them, when you can join them—or rather, they can join you? In the same way that courts and prosecutors have increasingly employed compliance and governance experts to assist in evaluating, monitoring, and implementing said reforms, it is time to look to marketing professionals to assist in marking corporate criminal enforcement.

IV. CONCLUSION

Main Justice is not Madison Avenue, and it shouldn't be. All the same, the government should not squander its limited opportunity for attention by neglecting as an afterthought the publicity of successful criminal resolutions. The proposals here are gestural. Executing any of them would require much more careful consideration of institutional landscapes and consultation with stakeholders. Some may confront insurmountable structural barriers or resource constraints. Our goal is not to prescribe any particular course of action (at least not yet). Rather, we hope to open channels of communication between corporate enforcers and marketing professionals, between corporate scholars and marketing departments. A more effectively marketed corporate criminal law—one that informs the public of its presence, openly

130. *E.g.*, Chris Prentice, *U.S. Justice Dept. Toughens on Corporate Crime, Will Pursue More Individuals*, REUTERS (Oct. 28, 2021, 1:32 PM) https://www.reuters.com/world/us/us-justice-dept-toughens-policies-toward-white-collar-crime-2021-10-28/; Stephanie Yonekura & Rupinder Garcha, *DOJ Enforcement in 2020: What the Monaco Memo and US Anti-Corruption Strategy Forecast for the Year Ahead*, CORP. COMPLIANCE INSIGHTS (Jan. 20, 2022), https://www.corporatecomplianceinsights.com/doj-enforcement-2022-monaco-memo-anti-corruption/.

131. William Burck et al., *Predictions That the Biden Administration Would Increase Enforcement and Regulatory Actions Proven Accurate; More to Come*, JD SUPRA (July 14, 2022), https://www.jdsupra.com/legalnews/predictions-that-the-biden-1587836/.

132. *See, e.g.*, Olivier Serrat, *Marketing in the Public Sector*, KNOWLEDGE SOLS. (Asian Dev. Bank), Jan. 2010, at 4 (discussing challenges in using marketing in the public sector).

affirms victims, and publicly condemns corporate malefactors—may finally stand a chance of achieving its moral and preventive ambitions.

TRENDS IN PROSECUTION OF FEDERAL AND STATE PUBLIC CORRUPTION

David Kwok*

Over the past thirty years, the Supreme Court has repeatedly sided with state criminal corruption defendants, suggesting concern with federal prosecutor decision-making. Analyzing aggregate national data from 1986 to 2020, this Article explores the Court's criticism by utilizing federal corruption defendants as a reference. This Article reveals increased prosecutorial emphasis of state and local corruption defendants in comparison to federal defendants, suggesting a justification for the Court's scrutiny of state and local defendant cases. This broader trend also encompasses significant jurisdictional variation; this Article identifies jurisdictions that are outliers in their comparative approaches. Besides implications for federal prosecutorial strategy, these distinct approaches also suggest caution for researchers relying on corruption convictions as a proxy for regional corruption writ large.

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I. INTRODUCTION

Over the past forty years, the Supreme Court has been steadily limiting the power of federal prosecutors over corrupt state officials.[1] Consider the recent case, *Kelly v. United States*, in which the Court overturned the federal wire fraud convictions of two New Jersey public officials.[2] In *Kelly*, the defendant officials created a fictitious traffic study that realigned toll lanes leading to the George Washington Bridge in an effort to punish a nearby mayor for failing to support the New Jersey governor's election bid.[3] Their effort was successful in that traffic from the mayor's town ground to a halt.[4] The defendants lost their jobs after their scheme was discovered, and federal prosecutors brought wire fraud

1. *See* 140 S. Ct. 1565, 1574 (2020); *see, e.g.*, McNally v. United States, 483 U.S. 350, 360 (1987); Cleveland v. United States, 531 U.S. 12, 14 (2000); McDonnell v. United States, 579 U.S. 550, 576 (2016). *See also* Skilling v. United States, 561 U.S. 358, 409 (2010) (rejecting undisclosed self-dealing by public officials as a basis for federal wire fraud conviction).

2. *Kelly*, 140 S. Ct. at 1568.

3. *Id.*

4. *Id.* at 1570.

charges against them.[5] The Court highlighted federalism as a primary motivating concern in striking down the convictions, emphasizing the need for state and local discretion in policymaking.[6] It noted that "federal fraud law leaves much public corruption to the States (or their electorates) to rectify," citing the relevant New Jersey statutes that might prohibit the public officials' fictious traffic study.[7] Lacking more precise guidance from Congress, the Court gave states room to establish their distinct principles of good governance.[8]

As the *Kelly* decision suggests, the Supreme Court weighs federal criminal enforcement of state public corruption against alternatives such as state law enforcement and voters. Some commentators have interpreted these decisions as an embrace of agonist politics and voter primacy.[9] There is significant evidence suggesting limited state prosecution of public corruption.[10] Are federal prosecutors pursuing cases better left to state or local actors? If we read from this line of cases a normative perspective that federal criminal prosecution is disfavored by the Court, voters may be the primary check on corrupt officials in light of state prosecutorial inaction.

While the Court's decisions restrain federal prosecutors, they also have been decided primarily on statutory interpretation grounds by arguing that Congress intended to limit federal prosecutorial power.[11] The Court in *McNally v. United States* expressly discussed an interest in increased Congressional specificity: the Court is uncertain as to the proper balance of federal, state, and voter power in these state corruption cases and is trying to make space for improved decision-making.[12] The Court is not outrightly prohibiting such federal interference under the

5. *Id.* at 1571.
6. *Id.* at 1574.
7. *Id.* at 1571.
8. *Id.* at 1574; *see also* McNally v. United States, 483 U.S. 350, 360 (1987).
9. *See* Jacob Eisler, *McDonnell and Anti-Corruption's Last Stand*, 50 U.C. DAVIS L. REV. 1619, 1652 (2017). *Cf.* Joshua S. Sellers, Contributions, Bribes, and the Convergence of Political and Criminal Corruption, 45 FLA. ST. U. L. REV. 657, 662 (2018); George D. Brown, *The Federal Anti-Corruption Enterprise After Mcdonnell-Lessons from the Symposium*, 121 PENN ST. L. REV. 989, 1006 (2017).
10. *See* Adriana Cordis & Jeffrey Milyo, *Measuring Public Corruption in the United States: Evidence from Administrative Records of Federal Prosecutions*, 18 PUB. INTEGRITY 127 (2016).
11. *See McNally*, 483 U.S. at 360.
12. *Id.*

Constitution, so there remains room for dialogue between the branches of government. If legislative intent is unclear, should courts be concerned when federal prosecutors take corruption cases in lieu of waiting for state prosecutors or voters?

This Article suggests viewing cases against federal defendants as a reference point: how do federal prosecutors exercise their power against state officials in comparison to federal officials? These cases can help our understanding of the Supreme Court's concerns regarding improper exercise of federal prosecutorial power.

Utilizing data from TRACFED as categorized by the Department of Justice ("DOJ"), this Article considers trends in the federal prosecution of public corruption cases from 1986 to 2020. First, prosecution of state and local corruption cases have risen disproportionately in comparison to federal corruption cases.[13] This lends some support to the Supreme Court's emphasis on state corruption cases. It is possible that underlying rates of state and local corruption have been on the rise and federal corruption on the decline, but the comparative shift in federal prosecutorial efforts merits attention.

Second, penalties in the state and local corruption cases appear to be more severe than in federal cases. The resulting inference is less clear without a comparison of the particular facts of each prosecuted corruption case. This might be evidence of excessive punishment in state and local cases, but it could also suggest prosecutorial selection of the most severe cases of state and local corruption.

Third, there is significant jurisdictional variation as to the relative proportions of state and local corruption cases.[14] Certain geographically connected jurisdictions, such as the Eastern and the Western Districts of Michigan, contrast starkly in the proportions of federal and state/local corruption cases.[15]

These observations suggest distinct federal prosecutorial approaches towards federal vs. state/local corruption cases. If so, the Court may improve its guidance to lower courts by pursuing cases that directly address the unique circumstances of state and

13. *Official Corruption Prosecutions for June 2021*, TRAC REPORTS, https://trac.syr.edu/tracreports/bulletins/corruption/monthlyjun21/fil/ (last visited Sept. 14, 2022).

14. *Id.*

15. *Id.*

local corruption, such as their approach in *Cleveland v. United States*.[16] For social scientists estimating the prevalence of public corruption, cases based on state and local defendants as distinct from federal defendants may be better proxies in light of observations from Pavlik's work.

II. CORRUPTION BACKGROUND

There is debate as to the appropriateness of federal prosecution of state or local corruption.[17] One common starting point is evaluating federal criminal prosecution in the light of state or local prosecution. As a practical matter, federal prosecution is much more frequent than state or local prosecution.[18] Less clear is the normative question: is the predominance of federal prosecution over state prosecution desirable?

The Supreme Court has highlighted three related problems in its concern regarding such prosecutions.[19] One issue is federalism: is the federal government appropriately situated to address alleged wrongdoing within the states?[20] Allowing variation within each state of permissible government behavior is part of the country's Constitutional design.[21] Such variation may help the country better understand which government strategies perform better than others. A related argument is overbreadth. An overbreadth argument suggests that federal criminal charges are inappropriate when used against behavior that may be justified.[22]

16. 531 U.S. 12, 16–17 (2000).

17. *See* Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 81 (2003) (supporting federal prosecutions); Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 GEO. L.J. 1171 (1977); Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1982); Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and A Proposal*, 51 HASTINGS L.J. 699, 717 (2000).

18. *See* Cordis & Milyo, *supra* note 10.

19. *U.S. Supreme Court Shuts the Door on Bridgegate Prosecutions*, HOLLAND AND KNIGHT, https://www.hklaw.com/en/insights/publications/2020/05/us-supreme-court-shuts-the-door-on-bridgegate-prosecutions. (May 21, 2020).

20. *See* Kelly v. United States, 140 S. Ct. 1565, 1574 (2020) 1574 (citing McNally v. United States, 483 U.S. 360 (1987)) (decrying use of federal criminal fraud statutes to set "standards of disclosure and good government for local and state officials.").

21. *Id.*

22. *See* McDonnell v. United States, 579 U.S. at 574–75 (noting that prosecutor's expansive interpretation might prevent "conscientious public officials" from meeting with constituents).

Without such experimentation by the states, society may find it difficult to determine which policies and actions are actually justified. The third argument is vagueness: the argument that federal standards are insufficiently specific to put state and local officials on notice.[23]

These federal corruption prosecution concerns reflect broader criticism of excessive prosecutorial power. Prosecutors may be using broad laws to expand their power, punishing behavior that is not expressly prohibited by Congress or legislatures.[24] Excessive prosecutorial discretion may be displacing the proper role of courts and legislatures in the criminal justice system.[25] For these critics, courts have some threshold role in uncovering the truth regarding criminal defendants, and excessive prosecutorial power crowds out the judicial role. Such critics often focus on the behavior of prosecutors in plea bargaining. If prosecutors can consistently induce defendants to plead guilty, courts play a minimal role in determining whether justice has been done. Similarly, excessive prosecutorial power may crowd out the legitimate role of legislatures in defining offenses and penalties.[26] These problems may be compounded by the lack of a generally accepted definition as to the goal of "doing justice" by prosecutors.[27]

All of these concerns deal with the exercise of excessive power and discretion on the part of federal prosecutors. The Supreme Court often phrases these concerns using their interpretation of legislative supremacy: it does not believe that Congress intended to punish such a broad swath of questionable state and local

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23. *See id.* at 576 (highlighting importance of "sufficient definiteness that ordinary people can understand what conduct is prohibited"); Julie Rose O'Sullivan, *The Federal Criminal "Code": Return of Overfederalization*, 37 HARV. J.L. & PUB. POL'Y 57, 63 (2014) (describing honest services fraud as the "poster child for the problems that attend vague statutes."); Randall D. Eliason, *Surgery with A Meat Axe: Using Honest Services Fraud to Prosecute Federal Corruption*, 99 J. CRIM. L. & CRIMINOLOGY 929 (2009). *See also* David Kwok, *Is Vagueness Choking the White Collar Statute?*, 53 GA. L. REV. 495, 504–05 (2019) (discussing distinction between overbreadth and vagueness concerns).

24. *See* Beale, *supra* note 17, at 718.

25. *See* Julie R. O'Sullivan, *The Federal Criminal "Code" Is A Disgrace: Obstruction Statutes as* a *Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 674 (2006) (expressing concern that prosecutors utilize plea bargaining and expansive statutes to avoid formal adjudication that would lead to just results).

26. *See, e.g.,* Yates v. United States, 574 U.S. 528, 570 (2015) (labeling 18 U.S.C. §1519 as a bad law because it is "too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion.").

27. Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1204 (2020).

behavior.[28] We can read this as antipathy towards federal prosecution, but we might also read this as uncertainty as to the proper balance of federal and state powers.

A. The Federal Crimes of Corruption

Judicial uncertainty seems reasonable given that philosophers recognize a broad and contentious spectrum of behavior that might be considered corrupt.[29] Similarly, there is a broad range of federal statutes that might address public corruption. Nonetheless, federal prosecutors emphasize a relatively small number of federal statues in pursuing criminal corruption cases against both state and federal defendants. These statutes have significant overlap. The broadest statutes are the federal mail and wire fraud laws, which cover nearly all of the behavior addressed below. Federal prosecution of corruption generally concerns one of two major fact patterns. One is the effective theft of government property, and the other is bribery.

1. Theft

One form of corruption is the theft or embezzlement of government property, for example, an employee transferring public funds into a private account.[30] 18 U.S.C. § 666 is a specific federal statute targeting state and local officials: it prohibits, among other things, embezzlement or theft in connection with a program receiving federal funds.[31] Such theft may also be related to extortionate behavior.[32]

This is not to say that other public officials can steal without repercussion. The federal mail and wire fraud statutes are considered to be some of the most expansive federal criminal tools

28. *Democratic Shame: Supreme Court Wrong on Corruption*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/our-work/analysis-opinion/democratic-shame-supreme-court-wrong-corruption (Aug. 9, 2011).

29. *See, e.g.*, Sellers, *supra* note 9, at 662; Joseph LaPalombara, *Structural and Institutional Aspects of Corruption*, 61 SOC. RSCH. 325, 331 (1994); Dennis F. Thompson, *Theories of Institutional Corruption*, 21 ANN. REV. POL. SCI. 495 (2018).

30. *See, e.g.*, United States v. Doran, 854 F.3d 1312, 1314 (11th Cir. 2017) (discussing whether victimized entity received federal funds to satisfy 18 U.S.C. § 666).

31. United States v. Powell, 576 F.3d 482, 487 (7th Cir. 2009).

32. *See* 18 U.S.C. § 666(a).

available to prosecutors.[33] The statutes address fraud that is similar to theft: collecting money from state government without providing contracted services.[34] Similarly, the mail and wire fraud statutes would address individuals who take government money for personal real estate purchases.[35]

2. Bribery

Two main statutes expressly prohibit both the payment and receipt of bribes involving public officials. 18 U.S.C. § 201 prohibits bribery of public officials.[36] It also prohibits the acceptance and provision of illegal gratuities.[37] As described under 18 U.S.C. § 201(a), this generally refers to federal officials, but also includes persons "acting for or on behalf of the Unites States."[38] The parallel statute specifically addressing state and local officials is again 18 U.S.C. § 666.

A close cousin of bribery is extortion, although the term extortion in other contexts frequently implies nonconsensual participation in a transaction. The Hobbs Act prohibits extortion under color of official right. Although extortion may seem to imply a power imbalance with a public official making demands from another party, the Supreme Court has endorsed "passive acceptance" of payment to public officials as a basis for a Hobbs Act violation.[39] As a result, there is little distinction between bribery, as covered under the other statutes here, and extortion under the Hobbs Act.[40]

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33. CONG. RSCH. SERV., R41931, MAIL AND WIRE FRAUD: AN ABBREVIATED OVERVIEW OF FEDERAL CRIMINAL LAW (2019), https://sgp.fas.org/crs/misc/R41931.pdf.

34. *See, e.g.*, United States v. Turner, 551 F.3d 657, 659 (7th Cir. 2008) (describing state janitors' fraudulent scheme to bill the State of Illinois for hours not worked as "straightforward money or property fraud"); United States v. Lack, 129 F.3d 403, 406 (7th Cir. 1997); United States v. Stephens, 421 F.3d 503, 508 (7th Cir. 2005).

35. *Turner*, 551 F.3d at 659.

36. *See* 18 U.S.C. § 201.

37. *Id.*

38. *See* 18 U.S.C. § 201(a).

39. *See* Evans v. United States, 504 U.S. 255, 258 (1992) ("passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The official need not take any specific action to induce the offering of the benefit.").

40. *See, e.g.*, Silver v. United States, 592 U.S. 656, 656 (2021) *cert. denied*, (Gorsuch, J., dissenting); *Evans*, 504 U.S. at 278 (Thomas, J., dissenting); Ocasio v. United States, 578 U. S. 282, 300–01 (2016) (Breyer, J., concurring).

The broad mail and wire fraud statutes similarly overlap and address the aforementioned behavior. The mail and wire fraud statutes cover extortion by public officials.[41] Under the banner of honest services fraud, the Supreme Court has affirmed that the mail and wire fraud statutes address official bribery and kickbacks.[42] As discussed in *McNally* below, bribery may be related to theft depending on the source of the funds and attendant losses.[43]

B. The Supreme Court Decisions Restraining Federal Prosecution of State Corruption

The Supreme Court's efforts to limit federal prosecutorial power against state corruption have been most evident in the recurring context of "honest services" as a theory under the mail and wire fraud statutes.[44] The Supreme Court has worked to limit the scope of other statutes, such as the Hobbs Act[45] and the federal bribery statutes,[46] and at times the Court has narrowed multiple statutes simultaneously.[47]

1. Pre-McNally

Today there are federal statutes expressly criminalizing bribery of state public officials,[48] but before such statutes, federal prosecutors relied upon the mail and fraud statutes to address state corruption.[49] There were two distinct paths by which prosecutors could frame an accusation of bribery under the general language of the mail and wire fraud statutes. The central question was whether prosecutors had to prove that the government lost "money or property" as a result of the bribery.

The mail and wire fraud statutes contain initial textual ambiguity, as they punish people "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or

41. United States v. Brown, 540 F.2d 364 (8th Cir. 1976).
42. Skilling v. United States, 561 U.S. 358, 408–09 (2010).
43. *See* Part II.B.2.
44. *See, e.g.*, 18 U.S.C. § 1341.
45. *See, e.g.*, McCormick v. United States, 500 U.S. 257, 272–74 (1991) (limiting scope of Hobbs Act in case against state legislator).
46. *See, e.g.*, United States v. Sun-Diamond, 526 U.S. 398 (1999).
47. *See* McDonnell v. United States, 579 U.S. 550, 573–74 (2016).
48. *See, e.g.*, 18 U.S.C. § 666 (first passed in 1984).
49. *See, e.g.*, 18 U.S.C. § 1341.

property by means of false or fraudulent pretense."[50] Courts confronted the relationship between the "scheme or artifice to defraud" clause and the "obtaining money or property by means of false or fraudulent pretenses" clause.[51] The scheme or artifice to defraud might be independent, thus suggesting that Congress intended to punish a wider variety of frauds via the first clause. Alternatively, the obtaining money or property clause might be a clarification of the first clause: Congress intended to punish only frauds for which the goal was obtaining money or property.

Prior to 1987, federal courts oversaw an expansion of the use of the federal mail and wire fraud statutes to address public corruption by developing a theory of deprivation of honest services under the first clause.[52] Citizens might be defrauded of their right to honest services, in contrast to money or property under the second clause. This right to honest services is also known as an intangible right.[53]

Thus, there were two ways federal prosecutors might charge a state official accepting a bribe under the mail and wire fraud statutes. One method would be to prove that the citizens suffered a concrete loss: a public official took a bribe and selected an inferior good or service. An alternative method would be under the theory of honest services: citizens have a right to honest services, and the act of accepting a bribe would deprive citizens of that right.

By the time of *McNally*, Congress had passed a variety of other federal statutes that covered corruption. 18 U.S.C. § 201 prohibited illegal bribes and gratuities for federal officials, and 18

50. *Id.*

51. *See* McNally v. United States, 483 U.S. 350, 356–59 (1987) (discussing Durland v. United States, 161 U.S. 306 (1896) as the first Supreme Court case addressing these clauses).

52. *See, e.g.*, United States v. Mandel, 591 F.2d 1347, 1357–58 (4th Cir. 1979) (affirming theory of honest services fraud against officials including governor of Maryland), *on reh'g*, 602 F.2d 653 (4th Cir. 1979).

53. *See McNally*, 483 U.S. at 400 (crediting Shushan v. United States, 117 F.2d 110 (5th Cir. 1941) as the originator of intangible rights theory). There have been other intangible rights besides the right to honest services. *See* United States v. Girdner, 754 F.2d 877, 880 (10th Cir. 1985) (affirming mail fraud conviction based on deprivation of "intangible political rights" through absentee ballot fraud scheme); United States v. Louderman, 576 F.2d 1383, 1387–88 (9th Cir. 1978) (affirming wire fraud conviction where scheme to defraud sought to obtain confidential telephone subscriber information, causing "a loss to the subscribers of their right to privacy").

U.S.C. § 666 prohibited theft and bribes for state officials. Other criminal statutes prohibited federal conflicts of interest.[54]

2. McNally

McNally concerned Kentucky public officials who selected insurance for the state and personally received profits for commissions from those insurance sales.[55] The defendants had been convicted on a theory of deprivation of honest services: the defendants had deceived the citizens of Kentucky into thinking they had honest public officials and deprived them of their right to honest services from those officials.[56] The Supreme Court in *McNally* struck down the theory of honest services, noting that the statute itself did not incorporate any express language referring to intangible rights of honest services.[57] It recognized a potential vagueness concern, noting the "ambiguous" outer boundaries of the intangible right to honest services.[58] It also recognized a federalism concern, that a decision affirming the right to honest services would involve "the Federal Government in setting standards of disclosure and good government for local and state officials."[59] Combining these principles together, it struck down the theory of honest services, stating that, "If Congress desires to go further [than property rights], it must speak more clearly than it has."[60]

The Court in *McNally* then analyzed the facts to determine whether Kentucky had suffered deprivation of money or property rights. The Court found various deficiencies.[61] The Court noted that the jury had not found that "in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance."[62] Additionally, the Court noted that while the officials received commissions, "those commissions were not the Commonwealth's money."[63]

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54. *See, e.g.*, 18 U.S.C. § 203 (limiting compensation for services by members of Congress).
55. *See McNally*, 483 U.S. at 360.
56. *Id.* at 355.
57. *Id.* at 356.
58. *Id.* at 360 (citing Fasulo v. United States, 272 U.S. 620, 629 (1926)).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

3. Post-McNally: Honest Services Fraud

The primary holding of *McNally*, the rejection of the honest services fraud, was promptly overturned by Congress via legislation.[64] Congress adopted 18 U.S.C. §1346, providing a statutory basis for honest services fraud as a theory of loss. Congress added little detail as to the substance of the offense, though, leaving further explanation to the judicial branch.

The Supreme Court was happy to oblige and continued its suspicion of an expansive approach towards honest services fraud. In 2010, the Supreme Court established that honest services fraud only consisted of illegal bribery and kickbacks due to a "vagueness shoal."[65] In *Skilling v. United States*, the Court rejected undisclosed self-dealing as another theory of honest services fraud.[66] Thus, a public official's failure to disclose that she is steering government contracts to companies in which she secretly holds an interest does not qualify for honest services fraud; prosecutors must prove actual loss.

The Court has also limited the scope of federal criminal bribery itself. In *McDonnell v. United States*, the Supreme Court limited the scope of federal criminal bribery prosecution by narrowing the definition of an "official act."[67] Although Governor McDonnell received $175,000 worth of gifts and benefits in exchange for setting up a meeting on behalf of a local businessman, the Supreme Court held that setting up a meeting alone did not constitute an "official act" for purposes of the federal statutes; McDonnell had to do more than setting up a meeting to be found guilty.[68] The Court rejected the government's more expansive definition of an official act citing federalism concerns.[69]

4. Post-McNally: Loss of Money & Property Rights

The Supreme Court seems most comfortable when defendants obtain the state's money or property. As discussed, concerning *McNally* above, the Court wants to see proof of loss: the state overpaid for services, the state received subpar services, or the

64. Skilling v. United States, 561 U.S. 358, 402 (2010).
65. *Id. at* 368.
66. *Id.* at 409.
67. 579 U.S. 550, 573–74 (2016).
68. *Id.*
69. *Id.* at 576–77.

defendants directly took the state's money or property. After *McNally*, there were several Supreme Court cases that limited the application of the mail and wire fraud statutes to public state corruption.

The first important case concerning money or property rights was *Cleveland*. *Cleveland* did not center cleanly on public corruption. Rather, it addressed private parties who deceived the state of Louisiana.[70] In *Cleveland*, the Court overturned the mail fraud conviction of a defendant attorney who had obtained a Louisiana gambling license via deception.[71] The Court started with a combined federalism/statutory intent argument, describing Louisiana's gambling licensure regime as regulatory in nature.[72] Although the defendants clearly gained money as a result of improperly obtaining licenses, the Court required an analysis of whether the victim suffered a loss of money or property.[73] The Court held that the gaming license itself was not property in the hands of the state, even though it might be considered property once obtained by the defendants.[74] The Court rejected the argument that the license was government property due to the upfront processing fee paid by applicants, which they considered to be too minimal of an entitlement.[75] The majority of the money associated with the license came after issuance of the license.[76] The Court noted that the defendants paid Louisiana its proper share of revenue, and thus the state suffered no economic loss.[77] The Court also rejected a deprivation of Louisiana's "right to control" argument: that Louisiana lost control over the issuance, renewal, and revocation of gaming licenses, noting that such control is regulatory in nature.[78] The Court, while not ruling out the power of Congress to apply criminal penalties to the defendants'

70. Cleveland v. United States, 531 U.S. 12, 16–17 (2000).
71. *Id.*
72. *Id.* at 20–21.
73. *Id.* at 21–22, 25.
74. *Id.*
75. *Id.* at 22. The Court focused on whether the government could treat the license as property because the state received an upfront fee associated with the license. The Court did not, however, address the question as to whether the state's processing costs associated with the license could constitute property for purposes of mail and wire fraud.
76. *Id.*
77. *Id.* at 22.
78. *Id.* at 23.

behavior, required a "clear" statement from Congress to expand federal criminal penalties to this domain of state regulation.[79]

Although state gaming licenses may not constitute property in the hands of the state, state fines may constitute government property rights that can be the basis for federal mail and wire fraud charges.[80] A variety of government taxes also constitute property rights that can satisfy the federal mail and wire fraud statutes.[81]

This brings us to *Kelly,* the most recent Supreme Court decision on state corruption.[82] In *Kelly*, the defendant officials created a fictitious traffic study to punish a nearby mayor for failing to support the New Jersey governor's election bid.[83] The *Kelly* facts do not incorporate bribery or kickbacks, so any mail or wire fraud prosecution must rest on deprivation of money or property. The prosecutors in *Kelly* emphasized how the Port Authority would have paid less money in the absence of the scheme: the overpayment argument from *McNally*.[84] The Port Authority would not have conducted the unnecessary and unjustified traffic study had it not been for the defendants' duplicity.

The Court overturned the defendants' fraud convictions, noting that the defendants' behavior is likely illegal under New Jersey law and that it is up "to the States (or their electorates) to rectify."[85] The Court described the *Kelly* defendants' behavior as regulatory in nature.[86]

As a doctrinal matter, however, the Court emphasized mens rea. The Court applied a challenging legal distinction: knowingly

79. *Id.* at 25 ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes.") (quoting Jones v. United States, 529 U.S. 848, 858 (2000)).

80. *See* United States v. Hird, 913 F.3d 332, 345 (3d Cir.), *cert. denied*, Alfano v. United States, 140 S. Ct. 657 (2019) (mem).

81. *See* Pasquantino v. United States, 544 U.S. 349, 355 (2005); United States v. Hoffman, 901 F.3d 523, 537 (5th Cir. 2018); Fountain v. United States, 357 F.3d 250, 260 (2d Cir. 2004) (deeming taxes owed to states and the federal government property within the meaning of the mail and wire fraud statutes); *see also* United States v. Louper-Morris, 672 F.3d 539, 557 (8th Cir. 2012); United States v. Frederick, 422 F. App'x 404, 405 (6th Cir. 2011).

82. Kelly v. United States, 140 S. Ct. 1565, 1565 (2020).

83. *Id.* at 1567.

84. *Id.* at 1571.

85. *Id.*

86. *Id.* at 1572.

as opposed to purposely causing loss.[87] In overturning the federal convictions, the Court relied upon the mens rea of fraud: the defendants must have *intended* to cause monetary or property loss to the government through their deception.[88]

In rejecting the overpayment argument, the *Kelly* decision established the importance of mens rea in the overpayment argument: a state official must desire the state to overpay, and not simply know the state will overpay as a result of the official's fraudulent scheme.[89] Similarly, the Court recognized and rejected an unmade transfer argument: the *Kelly* defendants "did not hope to obtain the data that the traffic engineers spent their time collecting."[90]

The Court in *Kelly* did acknowledge certain lower court cases as being sufficient to establish such intent for the government to suffer loss. It cited *United States v. Pabey*, a case in which a mayor uses deception to get "on-the-clock city workers" to renovate his daughter's new home,[91] and *United States v. Delano*, a case in which a city's parks commissioner induces his employees into gardening work for political contributors.[92]

The cited *Delano* example is of interest. In *Delano*, the theory of loss to the government is theft of labor of Parks Department employees.[93] The defendant required employees to give up "lunch breaks, weekends, or personal leave days" to service the defendant's friends and personal political supporters.[94] The government employees themselves suffered loss of their lunch breaks and weekends, but it is less clear that the government as an entity suffered monetary loss through this scheme.

By emphasizing the importance of personal political supporters, we could reframe *Delano* to follow the *Kelly* fact pattern. *Delano* involves a rogue government official who redirects employee labor for political gain. Just as government employees in New Jersey should not be conducting fake traffic studies,

87. *Id.* at 1573.
88. *Id.* at 1574.
89. *Id.*
90. *Id.*
91. *Id.* at 1573 (citing United States v. Pabey, 664 F. 3d 1084, 1089 (CA7 2011).
92. *Id.* (citing United States v. Delano, 55 F. 3d 720, 723 (CA2 1995).
93. *Delano*, 55 F. 3d at 723.
94. *Id.* at 723. The court goes on to note that the government employees "received little for their efforts, although occasionally Delano would reward them with 'no-show overtime' or overtime pay that the employees did not actually have to earn."

government employees in New York should not be mowing the lawns of the Park Commissioner's political supporters.

There are two notable observations about the Supreme Court's decisions with respect to honest services. First, the decisions are similar in that they rely primarily on statutory interpretation. Even though the Court raises concerns regarding federalism and vagueness, the decisions do not leverage the full power of the Constitution in prohibiting Congressional action. Rather, the Court arguably leaves room for Congress to be more specific, if it wishes, to regulate state actors more aggressively.

Second, the Court takes two distinct approaches towards the problem of federal prosecution of state corruption. One approach, as seen in *Cleveland*, directly addresses state governance. The Court establishes a rule that applies specifically to state government: a license in government hands is not property under the mail and wire fraud statutes.[95] The other approach can be seen in *Kelly*, in which the Court relies upon a doctrinal rule that emphasizes mens rea, which could be applied to both federal and state corruption cases.[96]

C. Empirical Studies of Federal Corruption Prosecution

While the aforementioned description of Supreme Court jurisprudence regarding federal prosecution of state corruption may seem critical, it is important to acknowledge the lack of academic consensus as to proper definitions of corruption.[97] Uncertainty from the Supreme Court is thus not surprising.

To refine the analysis, consider the background of the Supreme Court's case selection process. One reason we might observe the Court's trend in restraining federal prosecutors' power against state officials is that federal prosecutors may make problematic choices in pursuing state officials. This Article views various studies examining federal prosecutors' choices in state corruption cases.

Beginning with the Supreme Court's concerns regarding state criminal prosecution, Cordis & Milyo (2016) affirm the

95. *See Cleveland*, 531 U.S. at 21–22, 25.

96. *See Kelly*, 140 S. Ct. at 1573.

97. *See* FABIO MONTEDURO, ALESSANDRO HINNA, & SONIA MOI, GOVERNANCE AND CORRUPTION IN THE PUBLIC SECTOR: AN EXTENDED LITERATURE REVIEW, 31–51 (Hinna, Luca, Gnan, & Monteduro eds., 2016).

preeminence of federal criminal prosecution of state corruption in comparison with state criminal prosecution.[98] Using media reports, they find little evidence of state criminal corruption prosecution.[99]

Alt & Lassen (2012) estimate the impact of prosecutorial resources on corruption convictions, finding that an increase in prosecutorial resources generally results in increased corruption convictions.[100] Their finding could support a marginal efficiency argument: federal prosecutors are not wasteful and do more work given more resources.

Artello & Albanese (2019) interview former federal prosecutors to examine the factors behind their decision to prosecute state corruption cases.[101] These factors include fairness in light of broad criminal laws, strength of evidence, and the career and resource costs of pursuing such cases.[102] They use these interview results to explain the comparatively higher declination rates and lower conviction rates of public corruption cases in contrast with white-collar crimes.[103]

Although not an express concern from the Court, there are numerous studies examining the impact of politics on corruption prosecution.[104] Relying on TRACFED data, Pavlik (2017) finds a correlation between federal corruption prosecutions and the political importance of a state in national elections.[105] Federal prosecutors convict more individuals of federal corruption crimes in politically important states.[106] The effect appears to be limited to convictions categorized as "federal corruption" in TRACFED; corruption convictions categorized as state, local, or other corruption do not show a statistically significant correlation.[107]

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98. *See* Cordis & Milyo, *supra* note 10.

99. *Id.*

100. *See* James E. Alt & David Dreyer Lassen, *Enforcement and Public Corruption: Evidence from US States,* 30 J.L. ECON. ORG. 306, 306–38 (2012).

101. *See* Kristine Artello & Jay Albanese, *The Calculus of Public Corruption Cases: Hidden in Investigations and Prosecutions,* 3 J. CRIM. JUST. L. 22, 22–37 (2019).

102. *Id.* at 34.

103. *Id.* at 27 (referencing TRACFED data).

104. *See* Jamie Bologna Pavlik, *Political Importance and Its Relation to the Federal Prosecution of Public Corruption*, 28 CONST. POL. ECON. 346, 346 (2017); Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 AM POL. SCI. REV. 534, 534–54 (2009).

105. Pavlik, *supra* note 104, at 362–63, 370.

106. *Id.* at 364.

107. *Id.* at 366–67.

Gordon (2009) finds evidence that federal prosecutors were more willing to file weaker cases against state political opponents than allies.[108] Gordon compares the length of corruption sentences for partisan public officials; he finds that sentences, on average, are lower when the public employee is from a political party that differs from the U.S. president's party.[109] Nyhan & Rehavi (2018) similarly find influence in the timing of federal political corruption filings: political opponents are more likely to face charges immediately before an election rather than after an election.[110]

Finally, there is one study that is closest to this current project. Albanese, Artello, and Nguyen (2019) note differences in the proportion of corruption charges leveled at the federal, state, and local levels.[111] For example, they highlight that federal officials are most likely to be charged with bribery, while state and local officials are most likely to be charged with extortion.[112]

D. Empirical Studies Measuring Corruption

Federal convictions of corrupt state officials form the basis for many studies of corruption.[113] These studies use federal convictions as a proxy for the level of corruption within a particular state; the corruption frequency is typically normalized against the state's population. Glaeser & Saks (2006) find, for example, correlations between federal corruption convictions and state median household income, average educational attainment, and levels of public employment.[114]

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108. Gordon, *supra* note 104, at 535.

109. *Id.* at 543.

110. *See* Brendan Nyhan & M. Marit Rehavi, *Tipping the Scales? Testing for Political Influence on Public Corruption Prosecutions* (2018), https://wwws.law.northwestern.edu/research-faculty/events/colloquium/law-economics/documents/fall18rehavi2.pdf.

111. *See* Jay S. Albanese, Kristine Artello, & Linh Thi Nguyen, *Distinguishing Corruption in Law and Practice: Empirically Separating Conviction Charges from Underlying Behaviors*, 21 PUB. INTEGRITY 22 (2019).

112. *Id.* at 30–31.

113. *See, e.g.*, Oguzhan C. Dincer, Christopher J. Ellis, & Glen R. Waddell, *Corruption, Decentralization And Yardstick Competition*, ECON. GOV., 11, 269–94 (2010); Alt & Lassen, *supra* note 100, at 306 (finding that increased prosecutorial resources increase corruption convictions utilizing PIN data but also explaining rationale over TRACFED data); Peter T. Leeson & Russell S. Sobel, *Weathering Corruption*, 51 J.L. & ECON. 667 (2008) (demonstrating correlation between PIN data and FEMA disaster relief); Edward L. Glaeser & Raven E. Saks, *Corruption in America*, 90 J. PUB. ECON. 1053 (2006).

114. Glaeser & Saks, *supra* note 113, at 1059.

As the above studies suggest, the quality of federal corruption convictions as a proxy for general state corruption can be debated and improved. Simultaneously, these generalized studies of corruption can also be interpreted in view of prosecutorial incentives. For example, Leeson & Sobel (2008) observe an increase in corruption convictions after the influx of FEMA disaster relief; they interpret this result as an affirmative answer to the question "Is bad weather responsible for U.S. corruption?"[115] An influx of federal money, however, might also lead to greater attention from prosecutors, rather than an increased level of corruption. Broadly speaking, the evidence from these studies have salience regarding prosecutorial behavior.

III. FEDERAL CORRUPTION PROSECUTION AS A BASELINE

This Article highlights the use of federal prosecution of federal public officials as a baseline for evaluating federal prosecution of state officials. This most directly complements Albanese, Artello, and Nguyen's (2019) work, which emphasizes the difference in the mix of charges and behavior against federal versus state defendants. A look at the aggregate statistics regarding prosecution can lay the groundwork for a better understanding of these corruption cases.

A. Data Source

This Article utilizes the TRACFED data, isolating their general criminal public corruption cases for a broad timeframe. The TRACFED data set relies upon DOJ and the respective U.S. Attorneys to properly categorize cases. DOJ initiated the use of such categories, including the "official corruption" category, in the early 1980s, which limits the timeframe of available data.[116] Thus, only considered is TRACFED data under the broad program category of "official corruption."[117] "Official corruption" can be

115. Leeson & Sobel, *supra* note 113, at 677–78.

116. *See* TRAC, *About the Data Federal Prosecutor Database*, https://trac.syr.edu/data/jus/eousaDataHistorical.html [hereinafter TRAC, *About the Data*].

117. I ran statistics for 18 U.S.C.§ 666, 18 U.S.C. § 201, 18 U.S.C. § 1341, 18 U.S.C. § 1343, and 18 U.S.C. § 1346 as lead charges without the public corruption limitation; all return data starting in 1986, which is the earliest year provided.

separated into distinct detailed program categories; four federal, one state, and one local category of public corruption. Only federal criminal cases are captured in this system.

We can compare TRACFED as a data source with data from the DOJ's Public Integrity Section ("PIN"). The DOJ regularly publishes a "Report to Congress on the Activities and Operations of the Public Integrity Section," providing what is commonly referred to as the PIN report or PIN data. The PIN data aggregates the number of prosecutions and convictions for officials; a commonly referenced table below:

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Totals
Federal Officials																					
Charged	615	803	624	627	571	527	456	459	442	480	441	502	478	479	424	445	463	426	518	425	10205
Convicted	583	665	532	595	488	438	459	392	414	460	422	414	429	421	381	390	407	405	458	426	9179
Awaiting Trial as of 12/31	103	149	139	133	124	120	64	83	85	101	92	131	119	129	98	118	112	116	117	107	2240
State Officials																					
Charged	96	115	81	113	99	61	109	51	91	115	92	95	110	94	111	96	101	128	144	93	1995
Convicted	79	77	92	133	97	61	83	49	58	80	91	61	132	87	81	94	116	85	123	102	1781
Awaiting Trial as of 12/31	28	42	24	39	17	23	40	20	37	44	37	75	50	38	48	51	38	65	61	57	834
Local Officials																					
Charged	257	242	232	309	248	236	219	255	277	237	211	224	299	259	268	309	291	284	287	270	5214
Convicted	225	180	211	272	202	191	190	169	264	219	183	184	262	119	252	232	241	275	246	257	4374
Awaiting Trial as of 12/31	98	88	91	132	96	89	60	118	90	95	89	110	118	106	105	148	141	127	127	148	2176

The PIN data contain only aggregate summaries of total charges and convictions by jurisdiction and year; they do not specify the actual charges. The use of PIN data as a proxy for corruption levels has led to a debate as to the legitimacy of PIN data as a proxy for corruption.[118]

There are also concerns about generating the PIN data via retrospective annual surveys of prosecutors rather than directly from administrative records.[119] While the Public Integrity Section's own data tracking might be comparatively reliable, it only directly handles roughly four percent of convictions; the various U.S. Attorneys' district offices annually report the vast majority of cases relying on their own classification and retrospective reports.[120] Thus, there is significant uncertainty as to the precise content of each corruption conviction in the aggregate PIN data.

118. Cordis & Milyo, *supra* note 10, at 127.
119. *Id.* at 128–31.
120. *Id.* at 132–33.

In comparison, the Transactional Records Access Clearinghouse ("TRAC") is a nonprofit group dedicated to collecting such data. TRACFED provides greater granularity in comparison to the PIN data aggregates, but there are limitations due to the anonymization process. TRACFED includes a "lead charge" label, allowing identification of at least one statutory basis for the corruption conviction.[121] The TRACFED data set, although not dating back as far as PIN data, contains comparatively more detailed information and is arguably more reliable.[122] DOJ data may similarly be accessed via the National Caseload Data release.[123]

Of note is that the TRAC data set relies upon the U.S. Attorneys' offices to properly code cases.[124] Such coding may be done by administrative staff. As described in the LIONS ("Legal Information Office Network System") manuals, public corruption or official corruption is the "criminal prosecution of public employees or misconduct, or, misuse of, office, including attempts by private citizens to bribe or otherwise corrupt public employees."[125] Thus, cases may involve defendants who are not government employees and do not necessarily include any wrongdoing by government officials.

There are four detailed federal categories. First is "Federal Corruption – Procurement", which is "corruption of any federal employee relating to the procurement of goods and services (may involve violations of 18 U.S.C. sections 201, 203, 371, 872, 1001, 1962 and other statutes)." Second is "Federal Corruption – Program", which is "corruption of any federal employee relating to federal programs, including grants, loans, subsidies, employment and other benefit programs (may involve violations of 18 U.S.C. sections 201, 286, 287, 371, 641, 648, 1001, 1962, as well as program-specific statutes)." Third is "Federal Corruption — Law Enforcement," which is "corruption of any employee relating to law enforcement, including investigators, prosecutors, judges, court officials, prison officials (may involve violations of 18 U.S.C.

121. *Id.* at 138.
122. *Id.* at 130; *see also* Gordon, *supra* note 104.
123. *National Caseload Data*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/resources/foia-library/national-caseload-data. (Last visited Oct. 7, 2022).
124. TRAC, *About the Data*, *supra* note 116.
125. *Official Corruption*, TRAC REPORTS (July 7, 2014), https://trac.syr.edu/tracreports/crim/358/include/side_1.html.

sections 201, 872, 1001, 1503, 1505, 1510, 1621, 1962 and others)." Fourth is "Federal Corruption – Other," which is "corruption of any federal employee not covered by [the other program categories], including embezzlement by a 'low level' federal employee, such as a postal clerk, but only if charged with a violation of 18 U.S.C. sections 641, 1709, or 1711."

"State Corruption" is "corruption of any state government employee (may involve violations of 18 U.S.C. sections 1511, 1951, 1962 and others)."[126]

"Local Corruption" is "corruption of any local government employee (may involve the same statutes listed in the state corruption category)."[127]

"Other Public Corruption" instructions indicate usage "ONLY if one of the [other] specific codes does not apply."[128]

This Article also considers the lead charges brought against defendants. Selection of the lead charge is also at the discretion of the DOJ; its purpose is to indicate "the substantive statute that is the primary basis for the referral using the U.S. code."[129] The lead charge may be updated after initial case filing; it is not necessarily the charge in the first count, nor is it necessarily the charge with the greatest potential sentence.[130]

B. Descriptive Data

The TRACFED system does not incorporate direct statistical tests of significance.

1. Corruption Convictions Over Time

Figure 1 shows the number of corruption convictions over time separated by types of defendants. Convictions categorized as federal peak around 1998 and show a downward trend afterwards. Convictions categorized as state or local are consistently lower in frequency and trend upwards until 2008. By 2008, both federal and state cases follow similar rates trending downward.

126. *Id.*
127. *Id.*
128. LIONS, appendix A, A–70.
129. Case Management Staff, EXEC. OFF. FOR U.S. ATT'YS, *Legal Information Office Network System User's Manual,* (Aug. 2016), https://www.justice.gov/usao/file/835096/download.
130. *Id.* at 126–27.

Figure 1

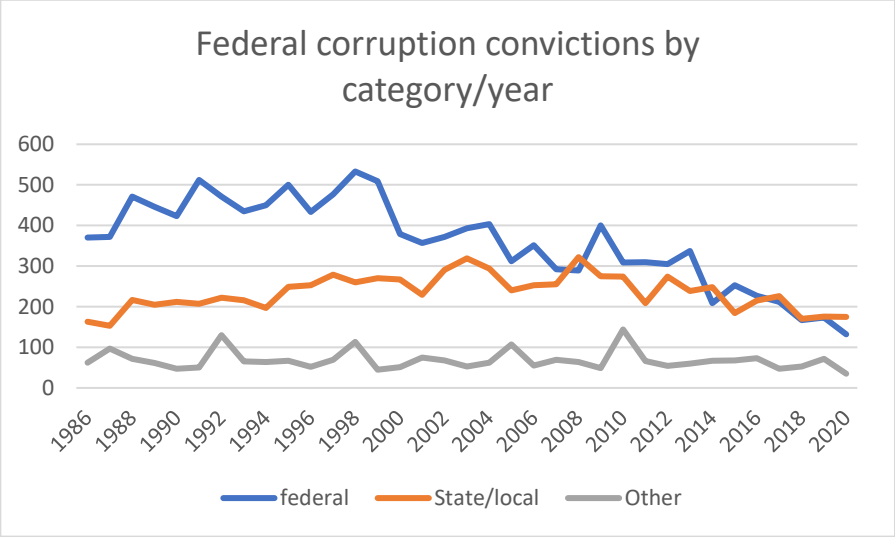
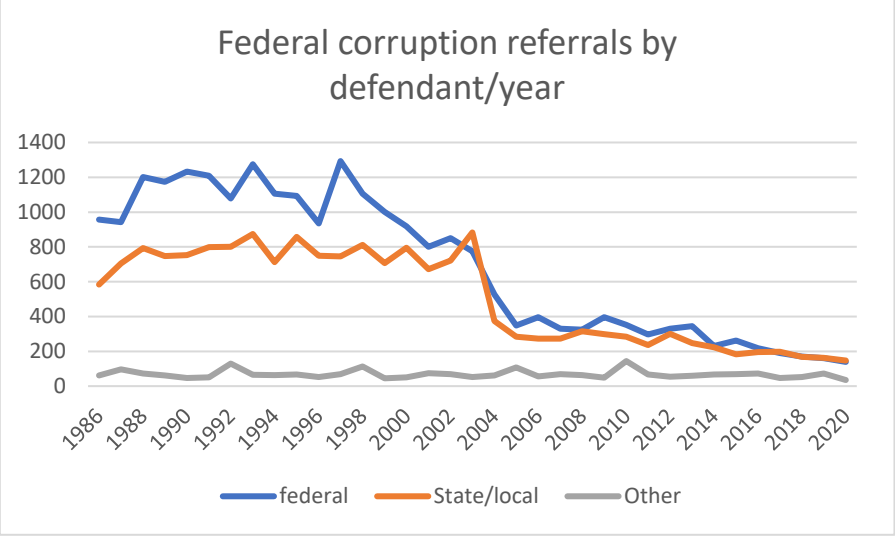


Figure 2 charts referrals by the same defendant categories. Both federal and state/local referrals encounter a significant drop-off around 2004. Federal referrals hit their peak in 1997 and then decline.

Figure 2



2. Convictions & Penalties

Table 1 shows convictions by category over the entire timeframe from 1986 to 2020. Column 3, % prosecuted, is relatively less reliable because it depends on accurate & prompt categorization of referrals in the LIONS system. As noted via TRACFED, DOJ has been withholding certain types of referral data since 1999. Nonetheless, it is unclear if there is systematic bias across categories for referral tracking. Column 4, % prison, is the percentage of convictions that result in any prison time. Columns 5 and 6 are the median prison term and mean prison terms, respectively, for all convictions (including no prison time) expressed in months.

Table 1: Convictions & prison terms by category

Corruption Category	Convictions	% Prosecuted	% Prison	Median Prison Sentence (months)	Average Prison Sentence (months)
Fed Law Enforcement	1,604	38	54	6	20
Fed Procurement	1,897	37	41	0	17
Fed Program	2,763	43	34	0	11
Fed Other	3,928	48	29	0	7
Local	4,871	33	58	12	26
State	1,925	34	61	12	28
Other	1,873	35	49	5	20

Although system limitations prevent statistical analysis, the percentage of cases prosecuted is lower for state and local case categories in comparison with the federal case categories. The percentage of state & local convictions receiving prison sentences is higher than all of the federal categories. Median and mean prison terms are longer for state and local cases.

To evaluate whether such differences across categories may be due to differences in statutory regimes, Table 2 breaks down the Table 1 data by lead charge. The listed statutes are some of the most frequent lead charges, although the Article presently does not include 18 U.S.C. § 371 (conspiracy). The Article includes 18 U.S.C. § 1346 as it is tightly related to the mail and wire fraud statutes (18 U.S.C. §§ 1341 & 1346).

Table 2: Convictions & prison terms by lead charge (all corruption)

Statute	Convictions	% Prosecuted	% Prison	Median Prison Sentence (months)	Average Prison Sentence (months)
18 U.S.C. § 201 – Bribery of public officials and witnesses	2,528	38	45	4	17
18 U.S.C. § 1341 – Mail Fraud	1,077	33	51	6	20
18 U.S.C. § 1343 – Wire fraud	384	37	65	12	19
18 U.S.C. § 1346 – Honest Services	82	16	79	21	29
18 U.S.C. §	2,192	34	65	12	19

666 – Theft or bribery in programs receiving Fed					
18 U.S.C. § 1951 –c Hobbs Act	1,810	26	62	18	40

We can compare Table 2 with Tables 3 & 4. Table 3 looks only at cases categorized as state corruption; Table 4 does the same for local corruption. The differences among these tables appear to be minimal.

Table 3: Convictions & prison terms by lead charge (state corruption only)

Statute	Convictions	% Prosecuted	% Prison	Median Prison Sentence (months)	Average Prison Sentence (months)
18 U.S.C. § 201 – Bribery of public officials and witnesses	42	21	67	4	10
18 U.S.C. § 1341 – Mail Fraud	214	30	64	12	28
18	66	34	65	10	18

U.S.C. § 1343 – Wire Fraud					
18 U.S.C. §1346 – Honest Services	22	19	91	38	49
18 U.S.C. § 666– Theft or bribery in programs receiving Fed funds	311	33	68	12	23
18 U.S.C. §1951 – Hobbs Act	489	28	68	18	40

Table 4: Convictions & prison terms by lead charge (local corruption only)

Statute	Convictions	% Prosecuted	% Sentenced to Prison	Median Prison Sentence (months)	Average Prison Sentence (months)
18 U.S.C. § 201 – Bribery of public officials and	163	20	54	6	18

witnesses					
18 U.S.C. § 1341 – Mail Fraud	504	33	50	6	16
18 U.S.C. § 1343 – Wire Fraud	139	37	70	16	22
18 U.S.C. § 1346 – Honest Services	37	13	81	15	23
18 U.S.C. § 666 – Theft or bribery in programs receiving Fed funds	1,212	34	67	12	21
18 U.S.C. § 1951 – Hobbs Act	939	26	61	16	43

3. Jurisdictional Differences

Table 5 sorts the federal judicial districts by ratio of federal to state & local corruption convictions. The District of the Northern Mariana Islands has the lowest ratio of federal to state & local

corruption convictions, while the District of Utah has the highest ratio. These ratios are not normalized against referrals due to potential unreliability with the referral counting. The Article also does not normalize against population since the ratio calculation would remove the salience of population (both federal and state/local convictions would be adjusted by the same amount).

Table 5: Judicial districts, sorted by ratio of federal to state/local convictions

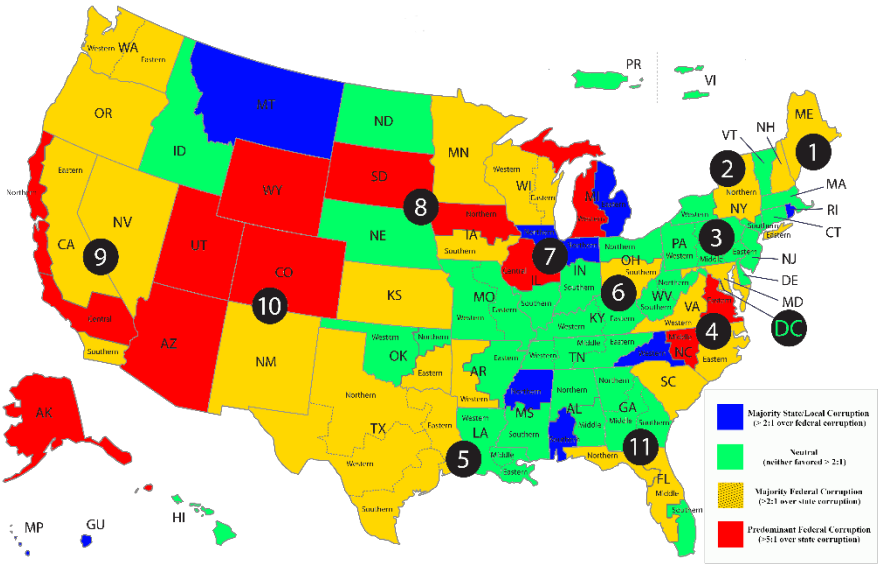
Judicial District	Federal Convictions	State/Local Convictions	Fed to State/Local Ratio
N Mar Is	5	24	0.208333
Miss, N	22	105	0.209524
Ind, N	31	138	0.224638
R. I.	12	40	0.3
Ala, S	11	32	0.34375
N Car, W	24	66	0.363636
Guam	20	55	0.363636
Mich, E	83	223	0.372197
Ill, N	131	297	0.441077
Montana	51	114	0.447368
W Virg, S	29	58	0.5
N. J.	311	568	0.547535
Ill, S	30	52	0.576923
Puer Rico	90	147	0.612245
Penn, E	209	322	0.649068
Virgin Is	25	38	0.657895
Ohio, N	156	237	0.658228
La, E	84	126	0.666667
La, M	41	60	0.683333
Penn, W	26	38	0.684211
Miss, S	96	122	0.786885
Mo, E	84	105	0.8
N Dakota	39	48	0.8125
Ark, E	55	66	0.833333
Ga, S	33	38	0.868421

Ken, E	99	110	0.9
Idaho	10	11	0.909091
Ala, N	83	89	0.932584
Tenn, E	59	62	0.951613
N. Y., W	62	63	0.984127
Ga, N	190	193	0.984456
Ken, W	30	30	1
Ind, S	32	31	1.032258
La, W	51	48	1.0625
Conn	82	75	1.093333
Nebraska	49	44	1.113636
Ala, M	28	25	1.12
Penn, M	105	90	1.166667
Fla, S	239	201	1.189055
Hawaii	60	48	1.25
W Virg, N	10	8	1.25
Tenn, W	92	71	1.295775
Ga, M	68	52	1.307692
Mass	270	194	1.391753
N. Y., S	446	284	1.570423
Mo, W	102	63	1.619048
D. C.	306	178	1.719101
Delaware	38	22	1.727273
Okla, W	68	39	1.74359
Tenn, M	88	48	1.833333
Okla, N	37	20	1.85
Vermont	19	10	1.9
N. Y., E	508	236	2.152542
Ark, W	22	10	2.2
Texas, E	78	34	2.294118
S Car	171	72	2.375
Nevada	50	21	2.380952
Ohio, S	124	52	2.384615
Okla, E	25	10	2.5
Fla, M	234	92	2.543478

N Car, E	97	38	2.552632
Virg, W	64	25	2.56
N. Y., N	80	30	2.666667
Maryland	244	90	2.711111
Texas, S	309	111	2.783784
Wisc, E	57	20	2.85
Wash, E	12	4	3
Wisc, W	21	7	3
Kansas	67	22	3.045455
Minnesota	114	37	3.081081
Fla, N	82	26	3.153846
Wash, W	70	21	3.333333
Iowa, S	14	4	3.5
N Mexico	84	24	3.5
Texas, N	255	71	3.591549
Maine	47	13	3.615385
Texas, W	176	46	3.826087
New Hamp	8	2	4
Cal, E	494	122	4.04918
Cal, S	183	43	4.255814
Oregon	74	16	4.625
Wyoming	26	5	5.2
Iowa, N	21	4	5.25
Arizona	238	45	5.288889
Alaska	66	12	5.5
Cal, N	166	30	5.533333
Ill, C	58	9	6.444444
Cal, C	566	79	7.164557
Virg, E	485	58	8.362069
N Car, M	35	4	8.75
S Dakota	36	4	9
Mich, W	138	11	12.54545
Colorado	107	5	21.4
Utah	65	3	21.66667

Table 5 suggests there is a wide range of differences in corruption conviction ratios; there are trivial amounts of state & local corruption convictions in the Districts of Utah and Colorado, for example, despite significant federal corruption convictions. These results are in graphical form in Figure 3.

Figure 3



Appendix A provides greater detail regarding select jurisdictions at opposite ends of the ratio spectrum. The appendix surveys five jurisdictions at each end of the spectrum that have at least 100 convictions in either category. Here are some jurisdictions with distinctive characteristics.

Consider the Districts of Eastern and Western Michigan, Tables 6 and 7 below.

Table 6: W. Michigan

W. Mich								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Sentence (of convicted)	Median Prison Sentence (months)	Average Prison Sentence (months)
Fed Law Enforcement	5	0	0	0	-	-	-	-
Fed Procurement	9	2	3	17	75	0	0	0
Fed Program	33	11	8	25	67	50	5	13
Fed Other	111	123	127	85	90	18	0	3
Local	30	9	9	18	75	89	30	24
State	19	4	2	18	67	100	39	39
Other	11	5	5	26	100	60	13	16

Table 7: E. Michigan

E. Mich								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Sentence (of convicted)	Median Prison Sentence (months)	Average Prison Sentence (months)
Fed Law Enforcement	79	24	17	20	68	53	2	10
Fed Procurement	60	25	14	36	64	7	0	1
Fed Program	123	42	28	27	78	25	0	3
Fed Other	97	33	24	27	73	25	0	5
Local	436	256	201	38	81	78	15	24
State	107	31	22	23	59	50	88	102
Other	123	54	45	39	87	58	9	24

E. Michigan dramatically emphasizes local corruption convictions, while W. Michigan emphasizes federal corruption convictions. Despite this, however, prison sentences in both jurisdictions tend to be limited for federal corruption, and the state and local corruption cases face comparatively higher penalties.

Table 8: Colorado

Colorado								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Sentence (of convicted)	Median Prison Sentence (months)	Average Prison Sentence (months)
Fed Law Enforcement	37	22	19	39	90	21	0	4
Fed Procurement	52	22	14	30	64	50	18	20
Fed Program	89	29	24	26	86	21	0	8
Fed Other	110	59	50	50	93	10	0	2
Local	60	6	2	8	50	50	72	72
State	36	5	3	13	60	67	9	9
Other	37	15	15	27	100	60	14	12

Another jurisdiction of interest is the District of Colorado, with figures reproduced in Table 8 above. Colorado's federal convictions greatly outweigh state and local convictions. Setting aside the local conviction figures, which, as they number only two, may be anomalous due to a single defendant's 12-year sentence, federal procurement corruption appears to receive some of the

most serious penalties. The "other" federal corruption category constitutes the most convictions, but the penalties appear rather low for the category.

C. Analysis

1. Relative Importance of State & Local Corruption

The Supreme Court appears justified in paying increased attention to federal prosecution of state and local corruption. The general frequency data suggests that state and local corruption has become a point of comparative emphasis over the emphasis on federal corruption in the 1980s and 1990s. Similar to other research focusing on convictions and prosecutions of corruption, this Article does not have information as to the underlying levels of corruption nor the quality of the declined cases, so it is difficult to infer causality. It is possible that state and local levels of corruption have comparatively increased while federal levels of corruption have decreased. Similarly, it is possible that wrongdoers focusing on federal corruption have become more skilled at covering their tracks, and prosecutors following the evidence have found state and local corruption cases easier to address.

2. Severity of Penalties

Gordon uses penalty severity to detect political partisanship in prosecution of corruption.[131] He finds lower penalties for defendants whose political party affiliation differs from that of the sitting U.S. President, and he interprets this as evidence that prosecutors are more likely to pursue comparatively weaker cases of corruption against dissimilar political party defendants.[132] In contrast, for cases of serious corruption, prosecutors ostensibly feel obliged to pursue those cases regardless of political party affiliation. The resulting differential is that defendants of the same political party as the executive branch will suffer higher penalties in aggregate.[133]

131. Gordon, *supra* note 104, at 543–44.
132. *Id.*
133. *Id.*

Nyhan & Rehavi express concerns with this approach; part of their concern mirrors the unobserved underlying corruption level previously discussed.[134] Another aspect of their concern is whether there are sufficient controls to attribute sentence disparities to prosecutors as opposed to other actors such as judges.[135] Judge-level controls may be difficult, however, in that individual judges may not handle sufficient numbers of public corruption cases to make statistical analysis feasible.

My aim here is not to resolve the methodological and inferential dispute. As an observational matter, there are disparities in the punishment for federal corruption as opposed to state and local corruption. Combined with data regarding the prosecution and referral rates, the aggregate data may, following Gordon's model, hint that federal prosecutors prioritize serious cases of state and local corruption in contrast to being generally concerned about federal corruption.

This inference may reduce alarm from the Supreme Court; it suggests that prosecutors are relatively cautious in pursuing state and local corruption cases. Even though the comparative rate of federal corruption cases has fallen, prosecutors may still be pursuing a wider variety of federal corruption cases.

3. Jurisdictional Variation

Variation in jurisdictional statistics invites further research as to the correlates and causes of those differences. For now, note that jurisdiction-level controls (something that Gordon utilizes[136]) makes analysis difficult due to limited frequency of cases within a jurisdiction, particularly if researchers emphasize specific statutes within the jurisdiction. One solution is to utilize regional controls, such as Glaeser & Saks South/Northeast/Midwest separation.[137] The evidence of remarkably different approaches in the Districts of Eastern and Western Michigan, however, hints at problems with regional aggregation. Sorting by federal versus state/local conviction ratios or other related correlates may improve future analysis. As Pavlik has noted, political influences appear to have an impact on federal prosecution of federal corruption; she does not

134. *See* Nyhan & Rehavi, *supra* note 110, at 1–2.
135. *Id.* at 2–3.
136. Gordon, *supra* note 104, at 546–47.
137. Glaeser & Saks, *supra* note 113, at 1059.

find a similar impact on state and local corruption. Given the differences observed in this piece, reliance upon measures of federal prosecution of state and local corruption may be helpful in obtaining more consistent and unbiased estimates of corruption.

IV. CONCLUSION AND FUTURE WORK

Although the volume of federal public corruption convictions has declined in the past decade, the proportion of federal convictions of state and local corruption has increased during the same timeframe. This suggests that the Supreme Court's seeming focus on state and local corruption cases may be justified on a proportionality basis: increased relative frequency of cases drives the Court's attention.

The more difficult question is measuring federal prosecutors' choices in selecting corruption cases. Has the Supreme Court focused upon outlier cases that are not representative of the typical federal prosecutor, or does the Court's selection of cases reflect problematic trends of prosecutorial decision-making? Evidence from this Article suggests that there may be significant differences in prosecutorial strategy when considering federal corruption defendants in contrast to state and local defendants.

Additional work is important in understanding these initial results. Do these observed differences simply reflect existing differences in the volume and types of corruption that exist? In jurisdictions that have relatively high levels of federal defendants, for example, future work should consider the presence of large federal facilities such as federal prisons, which might explain an otherwise disproportionate level of federal referrals. Similarly, there may be interactions with the prevalence of private sector wrongdoing that drive these results: rather than federal prosecutors targeting particular public officials, for example, private criminal behavior may be attracting prosecutorial attention, and public officials may be simply caught up as a byproduct of private sector crime.

* * *

V. APPENDIX A

Top five jurisdictions with lowest federal to state/local ratios, minimum 100 state/local convictions

N. Miss								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	11	3	3	20	100	33	8	8
Fed Procurement	12	4	4	27	100	50	3	7
Fed Program	31	9	7	24	70	29	0	17
Fed Other	22	8	8	31	100	50	3	6
Local	313	108	91	28	77	35	12	28

State	51	15	14	22	82	71	16	23
Other	46	4	4	8	100	50	28	21
N. Ind								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	10	3	3	16	100	33	8	8
Fed Procurement	13	5	5	33	100	0	0	0
Fed Program	30	10	10	29	100	20	0	5

Fed Other	27	15	13	47	87	15	0	0
Local	269	141	127	39	90	51	12	27
State	28	18	11	42	65	45	0	6
Other	73	30	35	29	88	23	1	18
E. Mich								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	79	24	17	20	68	53	2	10

Fed Procurement	60	25	14	36	64	7	0	1
Fed Program	123	42	28	27	78	25	0	3
Fed Other	97	33	24	27	73	25	0	5
Local	436	256	201	38	81	78	15	24
State	107	31	22	23	59	50	88	102
Other	123	54	45	39	87	58	9	24
N. Ill								

Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	30	11	12	37	100	33	0	15
Fed Procurement	37	34	28	54	100	39	12	12
Fed Program	169	81	75	45	93	35	3	10
Fed Other	46	19	16	39	94	56	5	9
Local	411	246	203	56	87	65	18	55
State	139	107	94	67	90	69	12	25
Other	42	29	14	31	70	43	12	22

Montana								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	13	8	3	38	50	33	0	6
Fed Procurement	22	14	13	44	100	69	21	43
Fed Program	44	42	18	69	44	61	18	21
Fed Other	34	18	17	44	85	53	1	7
Local	135	135	106	75	79	46	0	10

State	21	9	8	35	100	75	25	36
Other	59	62	51	73	82	57	6	14

Top five jurisdictions with highest federal to state/local ratios, minimum 100 federal convictions

Colorado								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	37	22	19	39	90	21	0	4
Fed Procurement	52	22	14	30	64	50	18	20
Fed Program	89	29	24	26	86	21	0	8

Fed Other	110	59	50	50	93	10	0	2
Local	60	6	2	8	50	50	72	72
State	36	5	3	13	60	67	9	9
Other	37	15	15	27	100	60	14	12
W. Mich								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	5	0	0	0	-	-	-	-

Fed Procurement	9	2	3	17	75	0	0	0
Fed Program	33	11	8	25	67	50	5	13
Fed Other	111	123	127	85	90	18	0	3
Local	30	9	9	18	75	89	30	24
State	19	4	2	18	67	100	39	39
Other	11	5	5	26	100	60	13	16
E. Virg								

Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	87	73	61	59	88	43	6	18
Fed Procurement	361	171	160	34	89	48	2	37
Fed Program	250	92	86	36	90	30	1	7
Fed Other	307	195	178	49	91	47	0	12
Local	71	26	21	19	91	90	12	30
State	59	39	37	38	100	81	13	22
Other	40	24	21	39	95	38	0	21

C. Cal								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	149	69	54	42	90	57	0	13
Fed Procurement	240	84	65	32	78	35	0	6
Fed Program	495	364	260	68	82	53	6	24
Fed Other	411	280	187	56	89	53	1	18
Local	178	72	49	27	82	78	15	32

State	66	23	30	31	97	73	6	19
Other	69	55	40	31	87	33	0	7
N. Cal								
Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	71	30	20	33	71	20	0	7
Fed Procurement	118	58	37	46	77	27	0	6
Fed Program	201	104	66	46	83	17	0	5

Fed Other	108	58	43	40	83	7	0	1
Local	95	43	24	21	86	58	12	19
State	29	16	6	26	100	67	13	15
Other	90	23	13	25	72	46	12	11

Top five highest & lowest jurisdictions (as above) with population normalized figures

N. Miss						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.29	0.39	0.31	0.08	0.08	0.03
Fed Procurement	0.31	0.39	0.29	0.1	0.1	0.05
Fed Program	0.81	1.02	0.76	0.24	0.18	0.05
Fed Other	0.58	0.68	0.47	0.21	0.21	0.1
Local	8.21	10.51	7.42	2.83	2.39	0.84

State	1.34	1.84	1.39	0.39	0.37	0.26
Other	1.21	1.26	1.15	0.1	0.1	0.05
N. Ind						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.11	0.21	0.18	0.03	0.03	0.01
Fed Procurement	0.15	0.17	0.11	0.06	0.06	0
Fed Program	0.34	0.4	0.28	0.11	0.11	0.02
Fed Other	0.3	0.36	0.19	0.17	0.15	0.02
Local	3.04	4.13	2.54	1.59	1.43	0.73
State	0.32	0.47	0.28	0.2	0.12	0.06
Other	0.82	1.29	0.84	0.34	0.4	0.09
E. Mich						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.34	0.53	0.42	0.1	0.07	0.04

Fed Procurement	0.26	0.28	0.19	0.11	0.06	0
Fed Program	0.53	0.65	0.49	0.18	0.12	0.03
Fed Other	0.41	0.52	0.38	0.14	0.1	0.03
Local	1.87	2.84	1.78	1.1	0.86	0.67
State	0.46	0.6	0.44	0.13	0.09	0.05
Other	0.53	0.59	0.36	0.23	0.19	0.11
N. Ill						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.09	0.1	0.06	0.03	0.04	0.01
Fed Procurement	0.12	0.18	0.09	0.11	0.09	0.03
Fed Program	0.53	0.56	0.31	0.25	0.24	0.08
Fed Other	0.14	0.15	0.09	0.06	0.05	0.03
Local	1.29	1.34	0.61	0.77	0.64	0.41
State	0.44	0.5	0.17	0.34	0.29	0.2
Other	0.13	0.27	0.21	0.09	0.04	0.02
Montana						
Program Category	Referrals per Million	Disposals per Million	Declinations per Million	Prosecutions per Million	Convictions per Million	Prison Sentences

	n Population	n Population	Population	Population	n Population	per Million Population
Fed Law Enforcement	0.39	0.57	0.39	0.24	0.09	0.03
Fed Procurement	0.66	0.93	0.54	0.42	0.39	0.27
Fed Program	1.31	1.79	0.57	1.25	0.54	0.33
Fed Other	1.02	1.28	0.69	0.54	0.51	0.27
Local	4.03	5.37	1.37	4.03	3.17	1.46
State	0.63	0.75	0.51	0.27	0.24	0.18
Other	1.76	2.54	0.69	1.85	1.52	0.87
Colorado						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.23	0.35	0.22	0.14	0.12	0.02
Fed Procurement	0.32	0.46	0.32	0.14	0.09	0.04
Fed Program	0.55	0.69	0.52	0.18	0.15	0.03
Fed Other	0.68	0.7	0.37	0.36	0.31	0.03
Local	0.37	0.46	0.43	0.04	0.01	0.01

State	0.22	0.24	0.21	0.03	0.02	0.01
Other	0.23	0.34	0.25	0.09	0.09	0.06
W. Mich						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.04	0.04	0.04	0	0	0
Fed Procurement	0.08	0.12	0.08	0.02	0.03	0
Fed Program	0.28	0.38	0.28	0.09	0.07	0.03
Fed Other	0.93	1.37	0.19	1.04	1.07	0.19
Local	0.25	0.45	0.35	0.08	0.08	0.07
State	0.16	0.18	0.15	0.03	0.02	0.02
Other	0.09	0.16	0.12	0.04	0.04	0.03
E. Virg						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.45	0.63	0.27	0.38	0.32	0.14

Fed Procurement	1.89	2.65	1.71	0.89	0.84	0.4
Fed Program	1.31	1.36	0.86	0.48	0.45	0.14
Fed Other	1.6	2.06	1.05	1.02	0.93	0.44
Local	0.37	0.69	0.57	0.14	0.11	0.1
State	0.31	0.52	0.33	0.2	0.19	0.16
Other	0.21	0.31	0.2	0.13	0.11	0.04
C. Cal						
Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.24	0.25	0.15	0.11	0.09	0.05
Fed Procurement	0.38	0.42	0.29	0.13	0.1	0.04
Fed Program	0.79	0.78	0.28	0.58	0.42	0.22
Fed Other	0.66	0.68	0.35	0.45	0.3	0.16
Local	0.28	0.41	0.31	0.12	0.08	0.06
State	0.11	0.13	0.08	0.04	0.05	0.04
Other	0.11	0.27	0.19	0.09	0.06	0.02
N. Cal						
Program Category	Referrals per Million	Disposals per Million	Declinations per Million	Prosecutions per Million	Convictions per Million	Prison Sentences

	n Population	n Population	Population	Population	n Population	per Million Population
Fed Law Enforcement	0.27	0.33	0.22	0.11	0.07	0.01
Fed Procurement	0.44	0.43	0.25	0.22	0.14	0.04
Fed Program	0.75	0.75	0.46	0.39	0.25	0.04
Fed Other	0.4	0.52	0.32	0.22	0.16	0.01
Local	0.35	0.71	0.6	0.16	0.09	0.05
State	0.11	0.19	0.17	0.06	0.02	0.01
Other	0.34	0.33	0.26	0.09	0.05	0.02

For comparison purposes, across all jurisdictions, values normalized by population

Program Category	Referrals per Million Population	Disposals per Million Population	Declinations per Million Population	Prosecutions per Million Population	Convictions per Million Population	Prison Sentences per Million Population
Fed Law Enforcement	0.38	0.5	0.31	0.19	0.15	0.08
Fed Procurement	0.49	0.6	0.38	0.23	0.18	0.08
Fed Program	0.66	0.78	0.45	0.34	0.27	0.09
Fed Other	0.78	0.93	0.49	0.46	0.38	0.11

Local	1.23	1.69	1.13	0.57	0.47	0.27
State	0.49	0.66	0.44	0.23	0.19	0.11
Other	0.49	0.66	0.43	0.23	0.18	0.09

All jurisdictions

Program Category	Referrals Received	Prosecutions Filed	Convictions	Percent Prosecuted	Percent Convicted (of prosecuted)	Percent Prison Term (of convicted)	Median Prison Term (months)	Average Prison Term (months)
Fed Law Enforcement	3,959	1,967	1,604	38	84	54	6	20
Fed Procurement	5,051	2,342	1,897	37	83	41	0	17
Fed Program	6,849	3,513	2,763	43	82	34	0	11
Fed Other	8,095	4,762	3,928	48	86	29	0	7
Local	12,750	5,901	4,871	33	85	58	12	26
State	5,118	2,337	1,925	34	84	61	12	28
Other	5,063	2,386	1,873	35	81	49	5	20

CRIMINAL INSIDER TRADING IN PERSONAL NETWORKS

Joan MacLeod Heminway[1]

Frequently, we associate white-collar crime with business, power, status, money, and greed.[2] Standard definitions of white-collar crime are consistent with this common understanding, although definitions have shifted over time.[3] Over 70 years ago, sociologist Edwin Sutherland defined white-collar crime as "crime committed by a person of respectability and high social status in the course of his occupation."[4] According to the U.S. Federal Bureau of Investigation, "white-collar crime is now synonymous with the full range of frauds committed by business and government professionals. . . . The motivation behind these crimes is financial—to obtain or avoid losing money, property, or services or to secure a personal or business advantage."[5] Other widely

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1. Rick Rose Distinguished Professor of Law and Interim Director of the Institute for Professional Leadership, The University of Tennessee College of Law. New York University School of Law, J.D. 1985; Brown University, A.B. 1982. The skilled and integral research assistance of Duncan Bryant (The University of Tennessee College of Law, J.D. 2020), Tyler Corcoran (The University of Tennessee College of Law, J.D. 2020), Erika Holmes (The University of Tennessee College of Law, J.D. expected 2023), Kendall Jones (The University of Tennessee College of Law, J.D. expected 2023), Tyler Ring (The University of Tennessee College of Law, J.D. 2022), and D. Andrew York (The University of Tennessee College of Law, J.D. 2022) is gratefully acknowledged. Summer research funding from The University of Tennessee College of Law and the secretarial assistance of Sean Gunter also have been instrumental to the research underlying the project of which this Article is a part and the writing of this Article. Finally, Professor Ellen Podgor's support for this work and my overall research and writing on insider trading regulation is deeply appreciated.

2. *See*, *e.g.*, JOHN P. ANDERSON, INSIDER TRADING: LAW, ETHICS, AND REFORM 222 (2018) (identifying and providing examples of common perceptions of insider trading as a crime involving privilege and greed).

3. *See*, *e.g.*, Lucian E. Dervan & Ellen S. Podgor, *"White-Collar Crime": Still Hazy After All These Years*, 50 GA. L. REV. 709 (2016) (assessing historical and contextual definitions of white-collar crime); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2004) (identifying and interrogating the many definitions of white-collar crime).

4. Edwin H. Sutherland, *White Collar Crime*, 59 YALE L. J. 581, 581 (1949).

5. White-Collar Crime, FBI, https://web.archive.org/web/20220302190107/https://www.fbi.gov/investigate/white-collar-crime (last visited Oct. 10, 2022).

available definitions, including the definition of white-collar crime offered on the Corporate Finance Institute's website, also focus on the position of the actor and the financial nature of the activity.[6]

Yet, there is a more personal side of white-collar crime. This aspect of white-collar crime becomes apparent through an analysis of a little-studied, yet significant, subset of insider trading cases—those involving the tipping of material nonpublic information between or among friends and family, or the misappropriation of material nonpublic information from a friend or family member.[7] One might wonder why a person would put a friendship or family relationship at risk—put others in that type of relationship at risk—by engaging in that kind of conduct. It may all be about business, power, status, money, and greed. Perhaps, however, something more is involved.

With those issues in mind, this Article describes and comments on criminal insider trading prosecutions brought over an eleven-year period. The core common element among these cases is that they all involve alleged tipper/tippee insider trading or misappropriation insider trading implicating information transfers between or among friends or family members (rather than merely business connections). The ultimate objectives of the Article are to explain and comment on the nature of the criminal friends-and-family insider trading cases that are prosecuted and to posit reasons why friends and family become involved in criminal tipping and misappropriation.

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6. What is a White-Collar Crime?, CORP. FIN. INST., https://corporatefinanceinstitute.com/ resources/knowledge/finance/white-collar-crime/ (last visited Sept. 17, 2022) ("White-collar crime is a non-violent crime where the primary motive is typically financial in nature. White-collar criminals usually occupy a professional position of power and/or prestige, and one that commands well above average compensation.").

7. Two recently published large-sample studies of insider trading enforcement actions validate the importance of studying insider trading involving personal relationships in both the civil and criminal enforcement contexts. *See* Kenneth R. Ahern, *Information Networks: Evidence from Illegal Insider Trading Tips*, 125 J. FIN. ECON. 26, 28 (2017); Michael A. Perino, *Real Insider Trading*, 77 WASH. & LEE L. REV. 1647 (2020). Professor Ahern's study of public insider trading tipping cases filed between 2009 and 2013 reveals that "[o]f the 461 pairs of tippers and tippees in the sample, 23% are family members, 35% are friends, and 35% are business associates, including pairs that have both family and business links." Ahern, *supra*, at 28. In Professor Perino's study of 465 insider trading enforcement actions brought in SEC fiscal years 2011 to 2015, friends and family constitute the largest single group of defendants in his sample—44.6%—and constitute over 28% of the criminal defendants included in the sample. *See* Perino, *supra*, at 1683.

To achieve these objectives, the Article proceeds in three additional substantive parts. First, the Article undertakes a brief review of U.S. insider trading regulation in the tipper/tippee and misappropriation contexts. Then, the Article describes a group of thirty-six friends-and-family tipper/tippee and misappropriation cases prosecuted by the U.S. Department of Justice between 2008 and 2018, noting general comments and questions about the conduct underlying the alleged criminal friends-and-family insider trading represented by those cases. Finally, before concluding, the Article offers observations about the possible motivations for that conduct based on a variety of literatures analyzing human behavior, especially in circumstances involving criminal activity.

I. U.S. INSIDER TRADING REGULATION IN THE TIPPER/TIPPEE AND MISAPPROPRIATION CONTEXTS

The federal regulation of insider trading in the United States has roots in congressional action, regulatory rules and pronouncements, and criminal and civil decisional law. The foundational statutory and regulatory rules that govern insider trading in the United States are the general antifraud provisions relating to purchases and sales of securities codified in Section 10(b) of Rule 10b-5 under the Securities Exchange Act of 1934, as amended.[8] The U.S. Securities and Exchange Commission has promulgated two additional rules governing insider trading more specifically: Rules 10b5-1 and 10b5-2.[9] Criminal enforcement of Section 10(b) may be sought for willful violations.[10]

Unlawful insider trading under Section 10(b) and Rule 10b-5 is frequently classified into one of three categories: classical, tipper/tippee, and misappropriation.[11] This Article focuses

8. 15 U.S.C. § 78j(b) (2018); 17 C.F.R. § 240.10b-5 (2022).

9. 17 C.F.R. §§ 240.10b5-1 & 240.10b5-2.

10. *See* 15 U.S.C. § 78ff(a) (2018) (providing for criminal enforcement against "[a]ny person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter. . . .").

11. *See*, *e.g.*, Joan Macleod Heminway, *Save Martha Stewart? Observations About Equal Justice in U.S. Insider Trading Regulation*, 12 TEX. J. WOMEN & L. 247, 257 (2003) [hereinafter *Save Martha*] ("A number of key legal rules have emerged, resulting in three basic types of insider trading which may be actionable under Rule 10b-5: "classic," tipper/tippee, and misappropriation."); Zachary T. Knepper, *Examining the Merits of Dual Regulation for Single-Stock Futures: How the Divergent Insider Trading Regimes for Federal Futures and Securities Markets Demonstrate the Necessity for (and Virtual Inevitability of) Dual CFTC-SEC Regulation For Single-Stock Futures*, 3 PIERCE L.

attention on the latter two types of insider trading, tipper/tippee and misappropriation. Both types of insider trading involve the transmission of material nonpublic information from one person to another.[12]

In tipper/tippee settings, the transmission of material nonpublic information is intentional (and perhaps even purposeful). Archetypal tipper/tippee liability is based on a securities trade made by the tippee. Specifically, if a person who owes a duty of trust and confidence to a business firm (or other information source) transmits material nonpublic information improperly (i.e., in violation of that duty) to another person and the person to whom the information is conveyed then engages in a related securities transaction, we classify the resulting unlawful insider trading as a tipper/tippee violation.[13] Improper transmission of the information occurs "when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should now that there has been a breach."[14] The tipper may be liable for the tip (if they acted with the requisite state of mind), and the tippee may be

REV. 33, 42 (2004) (noting that "insider trading cases can be categorized into at least three groups" and describing each); Menesh S. Patel, *Does Insider Trading Law Change Behavior? An Empirical Analysis*, 53 U.C. DAVIS L. REV. 447, 454–55 (2019) (describing classical, misappropriation and tipping liability under U.S. securities law); Andrew Carl Spacone, *The Second Circuit's Curious Journey Through the Law of Tippee Liability for Insider Trading:* Newman *to* Martoma, 24 ROGER WILLIAMS U. L. REV. 1, 5–6 (2019) (stating that "[t]he Supreme Court has adopted three theories of insider trading" and describing each).

12. Nonpublic information is material if it is (1) substantially likely to be important to the reasonable investor or (2) substantially likely to significantly affect the total mix of available information, as seen through the eyes of the reasonable investor. *See* Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting for use under Section 10(b) and Rule 10b-5 the two alternative standards earlier approved by the Court for assessing materiality in the proxy fraud context in TSC Industries, Inc. v. Northway, Inc.*,* 426 U. S. 438, 448–49 (1976)).

13. *See* Dirks v. S.E.C., 463 U.S. 646, 659–64 (1983).

14. *Id.* at 660.

liable for the trade (if they knew of the tipper's breach of duty).[15] Tippers and their tippees may be friends or family members.[16]

In misappropriation cases, the transmission of material nonpublic information may occur inadvertently (even involuntarily) or in a confidential personal context (for example, between friends, spouses, or other family members in the coordination or organization of their personal activities or affairs). In general, misappropriation liability under U.S. insider trading law may lie when an individual who possesses material nonpublic information engages in a securities trading transaction in breach of a duty of trust and confidence owed to the source of that material nonpublic information.[17]

> Under this theory, a fiduciary's undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information. In lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information.[18]

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15. *See id.*; *see also* Salman v. United States, 137 S. Ct. 420, 427–28 (2016). The *Dirks* Court succinctly described U.S. insider trading proscriptions on tippers: "insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage . . . may not give such information to an outsider for the . . . improper purpose of exploiting the information for their personal gain." *Dirks*, 463 U.S. at 659 (citation omitted). The *Dirks* Court also described the rationale for the insider trading liability of tippees under U.S. law, stating that "the transactions of those who knowingly participate with the fiduciary in such a breach are 'as forbidden' as transactions 'on behalf of the trustee himself.'" *Id.* (citations omitted).

16. *See*, *e.g.*, *Salman*, 137 S. Ct. at 421 ("Petitioner Salman was indicted for federal securities-fraud crimes for trading on inside information he received from a friend and relative-by-marriage, Michael Kara, who, in turn, received the information from his brother, Maher Kara, a former investment banker at Citigroup."); *Dirks*, 463 U.S. at 664 (noting that "[t]he elements of fiduciary duty and exploitation of nonpublic information . . . exist when an insider makes a gift of confidential information to a trading relative or friend.").

17. *See* United States v. O'Hagan, 521 U.S. 642, 653 (1997). Liability also may result if the individual possessing the material nonpublic information transmits it to another person who engages in a securities trade. *See* Merritt B. Fox & George N. Tepe, *Personal Benefit Has No Place in Misappropriation Tipping Cases*, 71 SMU L. REV. 767, 770 (2018) (summarizing the law in this area).

18. *O'Hagan*, 521 U.S. at 652.

Thus, archetypal misappropriation liability is founded on a securities trade made by the information expropriator. The fiduciary or fiduciary-like duty of trust and confidence that underlies misappropriation claims may exist in friendships and family relationships.[19]

The legal doctrine applicable to tipper/tippee and misappropriation liability under U.S. insider trading law can be exceedingly complex in certain factual contexts. This Article is not designed to take on the task of ferreting out those details. That task has been and continues to be undertaken in other writings.[20] Rather, the fundamental legal doctrine is explained in brief in this Part I to give the reader an appreciation of the selection criteria for the friends-and-family insider trading prosecutions described *infra* Part II.

II. PROSECUTED INSTANCES OF CRIMINAL FRIENDS-AND-FAMILY INSIDER TRADING, 2008-18

The 2008–18 criminal friends-and-family insider trading enforcement actions selected for analysis are part of a proprietary data set generated in connection with a larger study of friends-and-family insider trading that has not yet been published. The criminal enforcement actions were initially identified by performing a search for cases included in the Bloomberg Law database. The initial search was purposefully broad—"'insider trading' AND 'criminal'"—and was executed using the date range 01/01/2008 through 08/01/2018. This search yielded 458 results, which were downloaded into a comma-separated values (.csv) file with the related docket numbers. The results were then filtered by removing actions with a docket number that included a "civ" or "cv"

19. *See*, *e.g.*, 17 C.F.R. § 240.10b5-2(b) (2022); S.E.C. v. Yun, 327 F.3d 1263, 1274 (11th Cir. 2003); United States v. Chestman, 947 F.2d 551, 568 (2d Cir. 1991); United States v. Corbin, 729 F. Supp. 2d 607, 616-17 (S.D.N.Y. 2010); S.E.C. v. Goodson, No. 99CV2133, 2001 WL 819431 (N.D. Ga. Mar. 6, 2001).

20. Indeed, a number of my own publications address doctrinal issues under U.S. insider trading law. *See, e.g*, Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017 (2009); Joan MacLeod Heminway, *Martha Stewart Saved! Insider Violations of Rule 10b-5 for Misrepresented or Undisclosed Personal Facts*, 65 MD. L. REV. 380 (2006); Joan MacLeod Heminway, *Save Martha*, *supra* note 11; Joan MacLeod Heminway, *Tipper/Tippee Insider Trading As Unlawful Deceptive Conduct: Insider Gifts of Material Nonpublic Information to Strangers*, 56 WASH. U. J.L. & POL'Y 65 (2018); Joan MacLeod Heminway, *Women Should Not Need to Watch Their Husbands Like (a) Hawk: Misappropriation Insider Trading in Spousal Relationships*, 15 TENN. J.L. & POL'Y 162 (2020).

and actions that were filed *solely* against entities. This reduced the number of enforcement proceedings to 216. Basic information available on Bloomberg Law about each of these cases was then reviewed to determine whether the case involved tipping or misappropriation between or among friends or family.[21] Cases not meeting these criteria were removed from the data set.

Once these relevant cases were identified, the docket and the underlying case filings (including, where available, the initial indictment, any superseding indictments, and other collateral documents filed with the court, as well as court opinions) for each case were reviewed to isolate core information about each case. For each criminal enforcement action, the data set includes the following information, as available:

- The year in which the action was brought and the filing date;
- The case caption information;
- The initial litigation release number, as applicable;
- The source of initial information obtained about the action, together with a link to Bloomberg Law or a url, as available;
- The court in which the action was filed;
- The type of insider trading alleged (tipper-tippee or misappropriation);
- The names of each alleged tipper and tippee (in tipper-tippee cases)[22] and the claimed source of information and alleged misappropriator (in misappropriation cases);

21. Two of the friends-and-family cases in the data set, *United States v. Rajaratnam et al.* and *United States v. Gupta*, involve the transmission of information between family members and friends, respectively, but are also components of a larger expert network insider trading scheme conducted for the purpose of engaging in profitable trades as a business objective. *See*, *e.g.*, United States v. Rajaratnam, 802 F. Supp. 2d 491, 500 (S.D.N.Y. 2011) ("[T]he government . . . sought to prove that Rajaratnam conspired to trade on the basis of inside information he received from Rajat Gupta, a member of the board of directors of Goldman Sachs. Specifically, the government sought to prove that Gupta tipped Rajaratnam . . . ").

22. In legal actions involving multiple downstream "tips" or "tippees," each downstream tip is catalogued as a separate indictment or reportable event. However, all related tips and actions are organized in the data set under the same litigation release, file, or docket number. If a party is named in multiple enforcement actions based on the same related facts, that individual has multiple dockets listed in the data set.

- The relationship of the alleged tippee to the alleged tipper (in tipper-tippee cases) and of the alleged misappropriator to the claimed source of information (in misappropriation cases);
- The sex of the alleged tipper and tippee (in tipper-tippee cases) and the claimed source of information and alleged misappropriator (in misappropriation cases);
- The resolution of the action, if any, including the date of that resolution;[23] and
- The source of resolution information relating to the action.

The data set also includes a brief statement of the key facts, as alleged. As warranted, reviews of companion civil enforcement actions (where available) and Google searches were initiated to obtain missing information from a reputable source. Information yielded from these searches was then added to the data set. Certain information remained unavailable after completion of these searches.

A. Key Datapoints

Appendix I includes a summary of selected data related to the criminal enforcement actions identified using this process. In total, 36 distinct case-captioned prosecutions are represented, several of which include more than one defendant.[24] The years in which the most indictments for friends-and-family insider trading were filed were:

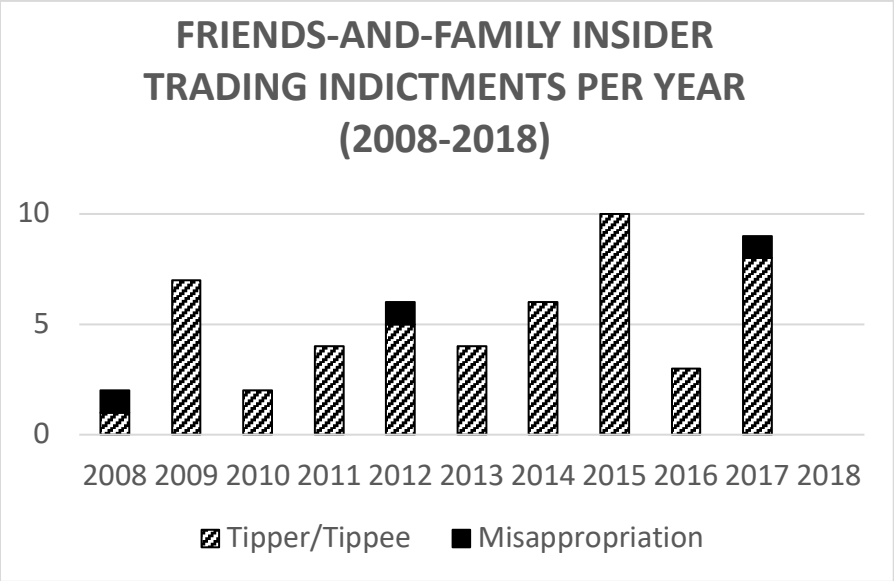
- 2015 (5 cases involving 10 indictments)
- 2017 (5 cases involving 9 indictments)
- 2012 (5 cases involving 6 indictments)
- 2009 (4 cases involving 7 indictments)

23. Cases against individual defendants in the same enforcement action may be resolved with those individual defendants at different times. The resolution date, if any, of legal actions related to each individual defendant has been separately recorded in the data set.

24. Several of the cases involve multiple consolidated indictments. In most cases, the indictments for all included defendants occurred at or about the same time (typically, within a few months of each other). In the case captioned *United States v. Conradt et al.*, however, two significantly later indictments (filed late in 2014) were consolidated with two earlier indictments (filed late in 2012) and are counted as a single case.

- 2013 (4 cases involving 4 indictments)
- 2011 (4 cases involving 4 indictments)

Three cases (involving an aggregate of four indictments) were filed in 2014,[25] three cases (each involving one indictment) were filed in 2016, two cases (each involving one indictment) were filed in each of 2008 and 2010, and no criminal friends-and-family insider trading enforcement actions were filed in 2018. A graphic summary of the distributions of indictments is included below.



In total, these 36 cases include 53 matched tipper/tippee and source/misappropriator relationship pairs in which material nonpublic information was allegedly shared.[26] An inspection of these cases and matched pairs yields several noteworthy findings.

25. In addition to these three new cases, two additional indictments were filed in *United States v. Conradt et al.* in 2014. *See supra* note 24.

26. The case captioned *United States v. Gupta* includes two separate indictments—the first of which (filed in 2011) was initially sealed. The second indictment (filed in 2012) includes additional facts and appears to supersede the first indictment. As a result, the earlier (2011) indictment has been removed from the data set.

- **The overwhelming majority of criminal friends-and-family insider trading prosecutions are tipper/tippee cases.**
  Of the 36 cases, only three are misappropriation cases, each involving an indictment against a single defendant.[27]
- **Spousal relationships are over-represented in the misappropriation prosecutions.**
  Two of the three misappropriation prosecutions involve a husband taking and using information from his wife, and they are the only proceedings in the data set involving a married couple.[28] The third misappropriation prosecution involves the receipt of information from a friend.[29]
- **Most criminal indictments for friends-and-family insider trading relate to information transmitted between friends.**
  Of the 53 matched pairs represented in the data set, 39 involve friends (38 in tipper/tippee relationships). Tippees also include a mistress and a girlfriend's father (each of which may be classifiable as a friend relationship).[30] The most prevalent family relationships represented in the data set include five brother-in-law tippees, three brother tippees, and two husband misappropriators.[31] Other family tippees

27. *See*, *e.g.*, Complaint, United States v. Devlin, No. 08 Civ. 11001 (S.D.N.Y. Dec. 18, 2008) [hereinafter *Devlin*, Complaint]; United States v. McGee, 763 F.3d 304 (3d Cir. 2014); Complaint, United States v. Yan, No. 17 MAG 5156 (S.D.N.Y. July 11, 2017) [hereinafter *Yan*, Complaint].

28. *See, e.g.*, *Delvin*, Complaint *supra* note 27; *Yan*, Complaint, *supra* note 27.

29. *See*, *e.g.*, *McGee*, 763 F.3d at 304.

30. *See*, *e.g.*, United States v. Gansman, 657 F.3d 85 (2d Cir. 2011); Complaint, United States v. Moodhe, No. 17 Cr 491 (S.D.N.Y. 2017).

31. *See, e.g.*, *Devlin*, Complaint, *supra* note 27; United States v. Rajaratnam, 802 F. Supp. 2d 491, 500 (S.D.N.Y. 2011); Complaint, United States v. Kara, No. CV 09 1880 (N.D. Cal. Apr. 30, 2009); United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015); Complaint, United States v. Nguyen, No. 12 Civ. 5009 (S.D.N.Y. June 26, 2012) [hereinafter *Nguyen*, Complaint]; Complaint, United States v. Bayyouk, No. CV 09 1880 (N.D. Cal. Apr. 30, 2009); United States v. Fishoff, 949 F.3d 157 (3d Cir. 2020); Complaint, United States v. Wiegand, No. 15CV1276MMADHB (S.D. Cal. June 9, 2015); Complaint, United States v. Fefferman, No. 15CV1276MMADHB (S.D. Cal. June 9, 2015); *Yan*, Complaint, *supra* note 27.

represented in the data set include a nephew and a father.[32]

- **The actors represented in these criminal proceedings are overwhelmingly male.**
  Only five of the 106 tippers, tippees, information sources, and misappropriators represented in the data set are women; 101 are men.[33]
- **All but one of the actors who allegedly acquired and used material information obtained through a tip or misappropriation (i.e., tippees and misappropriators) is male.**
  Two of the five women represented in the data set are sources of information in misappropriation cases, two are tippers, and one is a tippee.[34]

The predominance of tipper/tippee prosecutions, prevalence of male actors, and dominance of friendship relationships in the represented prosecutions are especially striking.

B. Limitations of Data Set and Related Observations

It is important to issue a note of caution to those who may desire to make generalizable observations about friends-and-family insider trading based on the information included in and derived from the hand-collected data set presented and analyzed in this Article. The data collection methods used in assembling the data set have certain inherent limitations. Accordingly, the information obtained through those data collection methods may have innate, unquantifiable flaws. The shortcomings of the data collection methods include the narrowly tailored criteria for the identification and selection of the included cases and the nature of the data sources.

The data set includes only criminal enforcement actions. As a result, it does not allow for conclusive observations about the

32. *See, e.g.*, United States v. Talbot, 530 F.3d 1085 (9th Cir. 2008); United States v. Stewart, 907 F.3d 677 (2d Cir. 2018).

33. *See, e.g.*, *Gansman*, 657 F.3d at 85; *Devlin*, Complaint, *supra* note 27; Complaint, United States v. Hansen, No. 10 CV 105050 (E.D. Pa. Sept. 27, 2010) [hereinafter *Hansen*, Complaint]; *Nguyen*, Complaint, *supra* note 31; *Yan*, Complaint, *supra* note 27.

34. *See*, *e.g.*, *Gansman*, 657 F.3d at 85; *Devlin*, Complaint, *supra* note 27*; Hansen*, Complaint, *supra* note 33*; Nguyen*, Complaint, *supra* note 31; *Yan*, Complaint, *supra* note 27.

overall prevalence of actionable, unlawful information sharing between or among friends or family members. For example, there are certainly instances in which tipping or misappropriation in personal networks is the subject of civil (rather than criminal) enforcement.[35] These civil enforcement actions can be identified and examined. Also, some unlawful insider trading in personal networks undoubtedly goes undetected by enforcement agents or, if detected, never becomes the subject of public or private enforcement for various reasons. The number of undetected tipper/tippee or misappropriation violations (including those involving information shared in friendships and family relationships) will never be known, and the extent to which enforcement agents fail to adjudicate and punish known or suspected violative conduct is unlikely to be revealed with any precision.

Moreover, the criminal enforcement actions included in the data set were identified and data from them was collected initially and primarily from a commercial legal database, Bloomberg Law. Commercial decisional law databases are easily searchable (making their use in data collection desirable), but they may be incomplete. "Concerns over coverage of federal court decisions on commercial databases are not new—and there is a rich literature on these issues, especially at the federal district-court level."[36] Notably, a recently published study of cases filed in the U.S. Court of Appeals for the First Circuit identified a significant number of missing criminal decisions.[37] As a result, the data set may not include all friends-and-family insider trading enforcement actions prosecuted by the U.S. Department of Justice between 2008 and 2018.

Notwithstanding these limitations, the collected data offer information about a meaningful subset of friends-and-family insider trading enforcement actions. This information lays a foundation for broader and deeper studies of friends-and-family

35. Walter Pavlo, *Insider Trading: Civil or Criminal Crime?*, FORBES (Oct. 24, 2013, 8:15 AM), https://www.forbes.com/sites/walterpavlo/2013/10/24/insider-trading-civil-or-criminal/?sh=39ba03c76564.

36. Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1104 (2021) (footnote omitted). Professor McAlister describes and cites to works from that rich literature. *See id.* at nn.14-18 and accompanying text.

37. *Id.* at 1144 ("It was more than twice as likely that a missing judgment involved a criminal appeal (67.1%) than was true for all merits terminations in the First Circuit during the same time period (31.6% of merits terminations were criminal).").

insider trading that may provide insights relevant to the enforcement of existing insider trading prohibitions or the reform of U.S. insider trading regulation. Among other things, by segregating friends-and-family insider trading cases from the larger body of insider trading enforcement actions, distinct trends or issues may become apparent. Certainly, the facts of these cases have the propensity to raise unique questions (involving, as they do, public financial investment activity that leverages relationships generally considered to be private and personal).

C. General Factual Settings

Indeed, even as a limited sampling of cases over an eleven-year period, deeper dives into the facts of the enforcement actions represented in the data set offer additional food for thought. As a threshold matter, it is significant to note that the willfulness requirement for criminal insider trading enforcement[38] sets these cases off from their civil enforcement counterparts. As a general matter, criminal enforcement represents a powerful corrective force intended (at least in part) to rectify a societal wrong.[39] Potential judicial remedies for criminal violations—e.g., financial penalties, public reprobation, and imprisonment—reflect that sober undertaking. Consequently, the alleged activities of the defendants in criminal friends-and-family insider trading actions consciously draw friends and family members into unlawful conduct that puts their financial well-being, professional development, and personal liberty in jeopardy.

For example, a review of the tipper/tippee prosecutions in the data set reveals that the prototypical case involves allegations of intentional schemes to profit from material nonpublic information by sharing it for the purpose of trading for profit. Much of the information shared through the personal connections evidenced in these cases related to pending corporate transactions, especially

38. *See supra* note 10 and accompanying text.

39. *See*, *e.g.*, Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105, 108 (2003) ("Although the primary goal of civil enforcement is to secure compliance, criminal sanctions function on a broader plane; society can use criminal sanctions to change beliefs, attitudes, values, and goals, and to effectuate policies by influencing what individuals think they ought or want to do in a particular situation."); Mary Graw Leary, *Third Dimension of Victimization*, 13 OHIO ST. J. CRIM. L. 139, 142 (2015) ('[O]ne primary goal of the criminal law is to reflect a moral code of acceptable and unacceptable behavior within the community." (footnote omitted)).

business combinations.[40] In each case, securities trades allegedly were made with awareness of the nonpublic and confidential nature of the information and the unlawful nature of the conduct.[41]

As for the misappropriation cases, one of the spousal misappropriation prosecutions arose from a husband's alleged unauthorized use of material nonpublic information about a pending business combination obtained from his wife, who was working on the transaction as a law firm associate.[42] The other spousal misappropriation action involved a stock broker's alleged unauthorized use of material nonpublic information about multiple corporate transactions obtained from his wife, a partner in a public relations firm.[43] The misappropriation action involving the sharing of information between friends is a case arising out of the unauthorized use of material nonpublic information shared by a corporate executive with an investment adviser who was an Alcoholics Anonymous ("AA") co-participant and informal mentor of the executive after an AA meeting.[44] Both husbands and the AA mentor traded in related securities while in possession of the misappropriated material nonpublic information. Alleged conduct and factual backgrounds in the cases—including the financial or investment knowledge or experience of the tippee or

40. *See*, *e.g.*, United States v. Klein, 913 F.3d 73, 75–77 (2d Cir. 2019) (Schulman, a law firm partner, shared nonpublic news of a forthcoming acquisition with his investment adviser, Klein, who traded while in possession of that information and tipped his childhood best friend, who was a financial advisor); United States v. Metro, 882 F.3d 431, 433 (3d Cir. 2018) (Metro, a managing clerk at a law firm, transmitted material nonpublic information about thirteen future corporate transactions to his friend Tamayo between February 2009 and January 2013. Tomayo traded in related securities through a broker who also traded on his own behalf and for other clients.); United States v. Gansman, 657 F.3d at 90 (Gansman, an attorney in the Transactional Advisory Services Department of Ernst & Young, LLP "repeatedly disclosed material nonpublic information to Donna Murdoch, a woman with whom he was having an affair. . . . Murdoch, in turn, traded on this information before the deals became public, profiting from the increase in stock price that occurred when the deals were later announced.").

41. *See*, *e.g.*, sources cited *supra* note 40.

42. *See Yan*, Complaint, *supra* note 27; *see also* Jonathan Stempel & Brendan Pierson, *MIT Scientist Gets 15 Months Prison for Insider Trading*, REUTERS (Mar. 30, 2018, 4:12 PM), https://www.reuters.com/article/us-usa-insidertrading/mit-scientist-gets-15-months-prison-for-insider-trading-idUSKBN1H61PI.

43. *See Cooperation Nets Probation for Ex-Broker With Role in Wall Street Insider Scheme*, BLOOMBERG L. (Mar. 27, 2012), https://www.bloomberglaw.com/bloomberglawnews/white-collar-and-criminal-law/XDPR7G1O000000?bna_news_filter=white-collar-and-criminal-law#jcite; *see also* Grant McCool, *Broker Who Stole Business Secrets from Wife Avoids Prison*, REUTERS (Mar. 23, 2012, 6:17 PM), https://www.reuters.com/article/ insidertrading-devlin/broker-who-stole-business-secrets-from-wife-avoids-prison-idINDEE82M0OX20120323.

44. United States v. McGee, 763 F.3d 304, 308–09 (3d Cir. 2014).

misappropriator, attempts to disguise the relevant trades, internet searches relating to liability avoidance, and (in the misappropriation actions) the secretive way in which the information was obtained from the source—indicated willful violative conduct.[45]

Many questions spring to mind. Why would friends and family members knowingly implicate each other in criminal activity that could result in significant financial penalties, loss of employment, and imprisonment? Why would a husband voluntarily risk his marriage and cause damage to his and his wife's careers and reputations by illegally using information obtained through interactions taking place in daily marital life? Why would a trusted mentor in an alcoholism recovery group turn traitor on a fellow alcoholic with whom he has spent personal time and confidentially "shared intimate details" about his life? Can these and other like circumstances involved in criminal friends-and-family insider trading actions be fully explained by abuses of power or position or a quest for financial gain?

III. POSSIBLE RATIONALES AND MOTIVATIONS FOR CRIMINAL FRIENDS-AND-FAMILY INSIDER TRADING

Questions about the origins of and motivations for unlawful friends-and-family insider trading inspire this Article and my related work on friends-and-family insider trading cases more broadly. Ultimately, the answers lie in identifying and assessing possible conscious and unconscious catalysts for human behavior in insider trading settings. This Part III samples ideas from a variety of academic disciplines that may offer clues to the factors influencing the behaviors of the central actors involved in criminal conduct employing or founded in the transmission of material nonpublic information through friendships and family relationships—specifically, conduct that violates U.S. insider trading prohibitions. The academic disciplines represented and ideas presented do not by any means constitute an exhaustive list; they merely exemplify ideas that have some salience in explaining the behavior of friends and family acting as tippers, tippees, or misappropriators in criminal insider trading enforcement actions.

45. *See* sources cited *supra* notes 42–44.

A. Economics Perspective: Rational Choice

The work of University of Chicago (and Nobel Laureate) economist Gary S. Becker in modeling criminal behavior and enforcement as a function of the cost of crime has been hugely influential in and outside economic research on crime. In his seminal 1968 article, *Crime and Punishment: An Economic Approach*,[46] Professor Becker illustrated a rational choice theory of crime and punishment through which the costs and benefits of crime commission and criminal enforcement may be evaluated. Where the costs of a crime (including the nature and severity of the penalty and the probability of enforcement) outweigh the benefits, a rational economic actor should be deterred from committing the crime.[47] "The method used formulates a measure of the social loss from offenses and finds those expenditures of resources and punishments that minimizes this loss."[48]

Certainly, a faulty cost-benefit assessment (including one in which the individualized costs and probability of enforcement are underestimated or incorrectly weighted) may result in poor behavioral decision making. Yet, the extent to which friends-and-family tippers, tippees, and misappropriators engage in rational cost-benefit analyses in determining to commit criminal violations of U.S. insider trading law remains to be seen. Qualitative empirical work done in this regard tends to focus on corporate executives trading for their own account (or that of family members) or those involved in expert network insider trading—insider trading occurring as part of a course of business rather than in personal networks.[49]

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46. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

47. *Id.* at 169–70.

48. *Id.* at 170; *see also* Michael B. Dorff & Kimberly Kessler Ferzan, *The Perils of Forgetting Fairness*, 59 CASE W. RES. L. REV. 597, 616–17 (2009) ("Economists' answers focus on deterrence. The law induces obedience by establishing appropriate incentives. We obey the law because the law ensures that it is in our interests to do so. The law can set up these incentives either by promising rewards for compliance or by threatening punishment for disobedience." (footnotes omitted)).

49. *See*, *e.g.*, *infra* notes 50–58 and accompanying text (describing one such project focusing on corporate executive insider trading); *infra* notes 63–67 and accompanying text (describing a study focusing on the relationship between management compensation and insider trading violations).

B. Business Management Perspective: Failure to Perceive Harm

In his 2016 book *Why They Do It*,[50] Harvard Business School Professor Eugene Soltes examined why corporate executives would risk all that they had built and acquired by participating in white-collar crime. Ultimately, he finds that these executives do not engage in any easily discernible version of the expected cost-benefit analysis.[51] Rather, their conduct reflects their failure to see or internalize the harms generated by their conduct[52]—"a broader lack of recognition of the consequences of their actions"[53] or what Professor Soltes describes generally as "poor managerial intuitions."[54] The overall vagueness of U.S. insider trading regulations also likely plays a role in the puzzle.[55] Professor Soltes specifically notes, in a chapter focusing on insider trading, that "criteria imposed on what constitutes illicit insider trading in the United States don't always comport with the public's—or even prosecutors'—perceptions of what trading ought to be prohibited."[56] Moreover, identifying the victims of criminal insider trading—those who are harmed by the conduct—can be challenging.[57]

The information shared and analyzed in *Why They Do It* was extracted from interviews conducted by Professor Soltes with convicted former executives.[58] His findings and related reflections certainly are intriguing—perhaps even resonant with some readers and commentators. However, one may wonder whether non-executives engaging in criminal friends-and-family insider trading also fail to apprehend the harms caused by their conduct. There may be differences in the perceptions or intuitions of corporate executives and nonexecutives who trade in the

50. EUGENE SOLTES, WHY THEY DO IT (2016).

51. *Id.* at 327–30.

52. *Id.* at 226 ("[I]nsider traders themselves have trouble intuitively sensing and relating to the harm they cause.").

53. *Id.* at 6.

54. *See id.* at 8.

55. *See id.* at 224–25; *see also* ANDERSON, *supra* note 2, at 59–87.

56. *Id.* at 224.

57. *See id.* at 211–25; *see also id.* at 206 ("The harm tends to be psychologically distant, perhaps more so than with any other white-collar crime.").

58. *See id.* at 4 (explaining that Professor Soltes eventually corresponded with and visited "more than four dozen of the most senior executives who oversaw some of the most significant corporate failures in history.").

corporation's securities while in possession of material nonpublic information.

Undoubtedly, hindsight reveals itself to be 20-20 vision as to the harms caused by criminal friends-and-family insider trading. The chapter in Professor Soltes's book on insider trading closes with the related reflections of Sam Waksal, former CEO of ImClone Systems Incorporated, whom Professor Soltes interviewed for that chapter.[59] Waksal and his family were caught up in an insider trading scandal in the early years of the 21st century that also ensnared domestic diva and media icon Martha Stewart in regulatory enforcement proceedings for insider trading and other alleged violations of federal and state law.[60] Professor Soltes writes:

> With the powerful tools at the disposal of regulators to monitor trades, it's difficult to imagine that people like Waksal couldn't appreciate that trades by family members were being carefully watched. Yet, Waksal never really felt he was causing harm to anyone in particular. He never had that gut feeling telling him to stop.
>
> "They wrote about me as if there was some giant byzantine idea that I was trying to perpetuate when in the end it was a phone call to my daughter that was an error in judgment," Waksal explained. "I don't know what I was thinking. . . . I wasn't, sadly."[61]

Although publicly available facts about the criminal enforcement actions included in the data set assembled for description and review in this Article do not give us complete information about the *ex-post* reflections of the defendants in those cases, some of the sentencing hearings and press reports on those proceedings offer

59. *Id.* at 226.

60. *See* Michael L. Siegel & Christopher Slobogin, *Federal Prosecutorial Power and the Need For Law of Counts*, in MARTHA STEWART'S LEGAL TROUBLES 55, 57–59 (Joan MacLeod Heminway ed., 2006) (collecting academic essays written by corporate, securities, and criminal law scholars on these enforcement efforts against Stewart).

61. SOLTES, *supra* note 50, at 226.

insights about harm recognition that are consistent with Waksal's observations.[62]

C. Corporate Finance Perspective: Questioning Rational Choice

An insider trading study published in the *Journal of Corporate Finance* a decade ago casts some doubt on the full explanatory value of the rational choice theory developed by Professor Becker and others.[63] The study, coauthored by Professors Utpal Bhattacharya and Cassandra Marshall, was designed to determine whether the compensation of a senior corporate manager impacts the likelihood that the manager will be indicted for criminal insider trading.[64] The coauthors posited, assuming rational choice theory has fundamental explanatory power, that the data would show an inverse correlation between executive compensation and insider trading indictments (since lesser compensated managers would have less to lose).[65]

Yet, the data indicated the opposite: "that compensation of top management positively affects the probability of being indicted as an insider trader, after we control for year, industry, size, growth opportunities, and executive age."[66] They conclude as follows:

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62. *See*, *e.g.*, McCool, *supra* note 43 ("Devlin, in tears, told the judge at the sentencing proceeding that his conduct was 'reckless, selfish and inexcusable' and that he had spent the last 3–1/2 years trying to repair the damage."); Nate Raymond, *Ex-research Firm Executive Sentenced for Insider Trading*, REUTERS (Mar. 14, 2013, 6:17 PM), https://www.reuters.com/article/us-insidertrading-nguyen/ex-research-firm-executive-sentenced-for-insider-trading-idUSBRE92D1BE20130314 (reporting that the defendant avowed that "[n]o apology will be enough for what I did," and, in reference to his tippees, that "I made them more important than the people I loved."). It is important to recognize that these admissions, especially those made in connection with sentencing, enjoy the benefits of hindsight and may be self-serving.

63. Utpal Bhattacharya & Cassandra D. Marshall, *Do They Do It for the Money?*, 18 J. CORP. FIN. 92 (2012).

64. *Id.* at 93 ("The main result of our paper is based on a probit test as well as a rare event logit test, which tries to find out whether compensation of the top management affects the probability of being indicted as an illegal insider trader.").

65. *See id.* ("[W]here the potential offender considers the costs and the benefits before committing the crime, the testable implication is that we should see 'poorer' top management committing more white-collar crime. Why? . . . The primary reason is that the 'poor' have less to lose (present value of foregone future compensation if caught is lower for them)."); *see also id.* at 104 ("[W]here the potential offender computes the costs and the benefits before committing the crime, we should see 'poorer' top management committing the most insider trading crimes. . . . [A]ssuming risk neutrality, the benefits of 'poorer' top management are the same but their costs . . . are lower than 'richer' top management. . . .").

66. *Id.* at 93.

> So, do they do it for the money? They may, but it does not seem to be the primary motive. Then why do they do it? Psychological motives (like hubris) or sociological motives (like company culture, or because others do it . . .) may lie behind the white-collar crime of insider trading.[67]

The mentioned psychological and sociological motives hold some promise for further study. However, the results obtained by Professors Bhattacharya and Marshall also may be explained by reference to more classic, common explanations for white-collar crime generally (and insider trading more specifically), including abuses of power or status and greed.[68]

Ultimately, Professors Bhattacharya and Marshall do not offer a specific theory explaining why people violate U.S. insider trading prohibitions. They "leave that for future research."[69] Rather, their study rejects "the null hypothesis" that "the economic motive for a white-collar crime like insider trading [is] strong."[70] Thus, their work sheds little light on the precise nature of the specific motivations for criminal friends-and-family insider trading, except to the extent that the results they obtained may, as they observe, tend to diminish prospects that economic rationality fully explains criminal insider trading behaviors.[71]

D. Philosophical/Psychological Perspective—Possible Effects of Norms

The norms scholarship of Professor Cristina Bicchieri[72] also may have application in efforts to divine the thought processes and

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67. *Id.* at 104.
68. *See* ANDERSON, *supra* note 2 and accompanying text.
69. Bhattacharya & Marshall, *supra* note 63, at 94.
70. *Id.*
71. It bears noting that the data set used by Professors Bhattacharya and Marshall in their study, like the data set examined in this Article, includes only conduct that became the subject of a criminal indictment. *See supra* Part II.B. Further, the study published by Professors Bhattacharya and Marshall, like Professor Soltes's work, described *supra* Part III.B, focuses on alleged insider trading by corporate management (as opposed to others—who are the prototypical defendants in friends-and-family insider trading prosecutions). As a result, only limited inferences can be drawn from the study results, although they offer valuable food for thought.
72. *E.g.*, CRISTINA BICCHIERI, NORMS IN THE WILD: HOW TO DIAGNOSE, MEASURE, AND CHANGE SOCIAL NORMS (2017) [hereinafter NORMS IN THE WILD]; *see also* Cristina

motives of criminal friends-and-family insider traders. Professor Bicchieri's work in this area is deep and rich—too deep and rich to describe and apply here in full. Suffice it to say, norms may explain criminal conduct, including criminal insider trading involving the sharing of information in personal networks.[73]

Norms, described by Professor Bicchieri as a type of interdependent collective behavior (conduct that reflects the actor's understanding of what others expect),[74] may motivate behavior. She describes two different types of norms: descriptive norms and social norms.[75] "A descriptive norm is a pattern of behavior such that individuals prefer to conform to it on condition that they believe that most people in their reference network conform to it (empirical expectation)."[76] A social norm is based on both an empirical expectation (a factual belief of the actor) and a normative expectation (the actor's assessment of the way things should be).[77]

> A social norm is a rule of behavior such that individuals prefer to conform to it on condition that they believe that (a) most people in their reference network conform to it (empirical expectation), and (b) that most people in their reference network believe they ought to conform to it (normative expectation).[78]

Human behavior may conform to or transgress social norms in specific contexts. Conformity to norms may be automatic or involve consideration and deliberation.[79]

Professor Bicchieri's work raises questions about whether certain norms or other collective behaviors may operate in some or all of the criminal friends-and-family insider trading situations represented in the data set. Insider trading involving information shared in friendships and family relationships may be seen as a

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Bicchieri, THE GRAMMAR OF SOCIETY: THE NATURE AND DYNAMICS OF SOCIAL NORMS (2006) [hereinafter GRAMMAR].

73. *Cf. id.* at 1 (questioning why "social practices that cause societal damage, violate human rights, or are plainly inefficient can survive" and linking the answer to norms and other collective behaviors).

74. NORMS IN THE WILD, *supra* note 72, at 1–4.

75. *See id.* at 18–41.

76. *Id.* at 19.

77. *Id.* at 28–41.

78. *Id.* at 35.

79. *See* BICCHIERI, GRAMMAR, supra note 72, at 3–4.

triumph of self-interest over pro-social behavior. As such, the existence of friends-and-family insider trading may indicate the absence of social norms, a transgression of social norms, or the existence and operation of social norms that are contrary to the policies underlying U.S. insider trading regulation.

As a small subset of both the general body of criminal insider trading actions and the vast aggregation of insider trading enforcement actions overall, the collection of 36 friends-and-family cases described in this Article may allow for a more nuanced quest for and assessment of any operative norms. Different descriptive or social norms may exist in specific circumstances or subpopulations—even subpopulations of the limited sampling of criminal enforcement proceedings presented in this Article, for example—depending on the nature of the case (tipper/tippee or misappropriation), the nature of the relationship (friend or family, and type of friend or family relationship), the gender or role of the insider trader, or other attributes (e.g., age, ethnicity, educational background).[80] Separating and analyzing the facts of each case more deeply may provide additional insights into these and other questions about the potential role that norms may play in insider trading.

E. Sociological Perspective—Multifactor Analysis

I offer one last academic perspective for consideration before closing—although there are no doubt many more that could be identified and briefly addressed. This last perspective comes from the work of James William Coleman. I credit my friend and colleague Michael Guttentag for bringing Professor Coleman's scholarship to my attention through his own research and

80. *See id.* at 148 ("Social norms can be thought of as default rules that are activated in the right circumstances."); *id.* at 173 ("[T]here are cases in which group identification and social norms are inextricably connected. Often groups develop their own special norms . . . "). For example, one of the enforcement proceedings in the data set presented in this Article, *United States v. Lee*, involves information tipped by an investment banker to a college friend. *See* Press Release, U.S. Dep't of Justice, Former Investment Banker and His Associate Sentenced for Insider Trading Scheme (July 24, 2013), https://www.justice.gov/opa/pr/former-investment-banker-and-his-associate-sentenced-insider-trading-scheme. Both were still in their 20s at the time of sentencing. *Id.* Their common background (at a formative life stage) and age group may condition them to behave similarly in similar situations based on shared beliefs. One can imagine that families also may develop their own norms. In fact, federal securities regulation assumes normative duties of trust and confidence in certain family relationships (specifically, in spousal, parent/child, and sibling relationships). *See* 17 C.F.R § 240.10b5-2(b)(3).

writing.[81] Professor Coleman's work offers a synthesis that, in some ways, draws together several approaches to understanding why individuals may commit insider trading involving friends or family members.

Specifically, in the book chapter described by Professor Guttentag, Professor Coleman articulates four motivational factors that, together with opportunity, contribute to the commission of white-collar crime: the personality of the actor; cultural considerations; the neutralization of ethical checks on conduct; and the effects of organizational structures and values.[82] Each may have salience in evaluating the possible motivations of an individual's engagement in criminal friends-and-family insider trading. Any impact of personality traits requires individualized assessment, and Professor Coleman has indicated that this factor may carry limited weight in explaining the motives underlying criminal friends-and-family insider trading.[83] However, some commonalities associated with friends-and-family insider trading allow for relevant observations about the application of Professor Coleman's framework.

The cultural and organizational contexts in which friends-and-family insider trading takes place (two factors identified by Professor Coleman) may offer some clues as to why criminal conduct occurs in certain settings and not others. For example, in a 1987 article, Professor Coleman describes a "culture of competition" in which society values an individual's quest for personal gain (financial or reputational).[84] He notes that an individual's insecurity, for example, may motivate gain-seeking

81. *See* Michael D. Guttentag, *"Huh?" Insider Trading: The Chris Collins Story*, 15 TENN. J.L. & POL'Y 95, 105–06 (2020) ("One elegant approach to identifying the causes of white-collar crime, developed by sociologist James William Coleman, separates elements that lead to the commission of a white-collar crime into two broad categories: motivation and opportunity." (citing James William Coleman, *Motivation and Opportunity: Understanding the Causes of White-Collar Crime*, *in* WHITE-COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS 360, 361 (Gilbert Geis et al. eds., 3d ed. 1995) [hereinafter Coleman, *Motivation and Opportunity*])).

82. *See* Coleman, *Motivation and Opportunity*, *supra* note 82, at 360–72; *see also* James William Coleman, *Toward an Integrated Theory of White-Collar Crime*, 93 AM. J. SOCIOLOGY 406, 408 (1987) [hereinafter, Coleman, *Integrated Theory*] ("The theory of white-collar crime presented here is based on the hypothesis that criminal behavior results from a coincidence of appropriate motivation and opportunity." (citations omitted)).

83. *See* Coleman, *Integrated Theory*, *supra* note 83, at 409–10 ("[T]here is far too little consistency in their findings to conclude that such personality theories have much explanatory value.").

84. *See id.* at 414–20.

behavior, especially in the economic sphere.[85] He also notes that "Some crimes result from the effort to live up to the expectations of friends and associates in the offender's occupational world or from an unreflective acceptance of a set of definitions that make certain criminal activities seem to be a normal part of the occupational routine."[86] These reflections about cultural expectations and individual responses to them resonate with some of Professor Bicchieri's observations about descriptive and social norms.[87]

Professor Coleman calls out friendships and family membership in his 1987 article in a way that caught my attention—a way that implicates the study of insider trading crimes committed in friend and family networks. Specifically, he notes that "reciprocal exchange is still common among relatives and friends in even the most capitalistic industrial societies, but it is market exchange that predominates."[88] This thought requires careful inspection in analyzing what motivates criminal friends-and-family insider trading, which involves the sharing of information—often seen as part of a reciprocal exchange (as the law of tipper/tippee cases expressly recognizes[89])—as well as a market exchange (including the existence or promise of securities trading), all taking place in a larger culture that values the quest for wealth or status.

The facts adduced in *United States v. Salman*—which ultimately became the most recent insider trading case decided by the U.S Supreme Court[90]—immediately come to mind. The *Salman* case is represented in the data set described and evaluated *supra* Part II.[91] *Salman* involves a stock tip made by a financial industry professional (Maher Kara) to his brother (Mounir

85. *See id.* at 417 ("[F]ear of failure is the inevitable correlate of the demand for success, and together they provide a set of powerful symbolic structures that are central to the motivation of economic behavior.").

86. *Id.*

87. *See supra* note 81 and accompanying text.

88. Coleman, *Motivation and Opportunity*, *supra* note 82, at 419–20.

89. *See* Dirks v. S.E.C., 463 U.S. 646, 664 (1983) ("[T]here may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."); *see also* Salman v. United States, 137 S. Ct. 420, 427-28 (2016) (affirming *Dirks* on this point).

90. *Salman*, 137 S. Ct. at 420.

91. *See infra* Appendix I.

"Michael" Kara), who in turn passed the information to Maher's brother-in-law (Bassam Salman).[92] Bassam Salman then traded on the information through the brokerage account of a family member.[93] The Court affirmed Bassam Salman's guilt based on the impropriety of the reciprocal exchange between Maher Kara and his brother, Michael, which represented a breach of Maher's duty of trust and confidence—a breach of which both Michael and Bassam Salman were aware.[94]

Bassam Salman's arguments in the *Salman* case also may be interpreted as an example of neutralized ethical constraints (another of Professor Coleman's motivational factors). Bassam Salman did not argue that no one was harmed by his insider trading, or that the money he made in his trades (over $1.5 million) was earned or deserved, or that everybody else also is engaging in trading on material nonpublic information (three classical manifestations of neutralized ethical constraints).[95] However, he did argue that the lack of a financial benefit to Kara Maher rendered his insider trades lawful.[96] In making this argument, Bassam Salman justifies or rationalizes his conduct, arguably neutralizing its ethical content (as well as its legal significance)—at least after the fact.[97]

IV. CONCLUSION

I am certainly not the first to express concerns that insider trading—and white-collar crime as a whole—may not be entirely

92. *Salman*, 137 S. Ct. at 423–24.

93. *Id.* at 424 ("By the time the authorities caught on, Salman had made over $1.5 million in profits that he split with another relative who executed trades via a brokerage account on Salman's behalf."); *see also* United States v. Salman, 792 F.3d 1087, 1089 (9th Cir. 2015), *aff'd*, 137 S. Ct. 420 (2016) ("Salman arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk. Salman then shared the inside information with Bayyouk and the two split the profits from Bayyouk's trading.").

94. *Salman*, 137 S. Ct. at 428 ("[B]y disclosing confidential information as a gift to his brother with the expectation that he would trade on it, Maher breached his duty of trust and confidence to Citigroup and its clients—a duty Salman acquired, and breached himself, by trading on the information with full knowledge that it had been improperly disclosed.").

95. *See* Coleman, *Motivation and Opportunity*, *supra* note 82, at 368; *see also* Coleman, *Integrated Theory*, *supra* note 83, at 410–14.

96. *Salman*, 137 S. Ct. at 424 ("He argues that he cannot be held liable as a tippee because the tipper (his brother-in-law) did not personally receive money or property in exchange for the tips and thus did not personally benefit from them.").

97. *See* Coleman, *Integrated Theory*, *supra* note 83, at 410.

founded in business, power, status, money, and greed. Others before me, including academic researchers whose work is featured *supra* Part III,[98] have puzzled over why individuals engage in criminal insider trading, white-collar crime, and even criminal activity more generally.

Why do they do it? This is one of the fundamental questions in criminology. Is the choice to commit a crime evidence of underlying psychological difficulties? A socially learned antipathy toward legal rules? Or just the product of a cold-hearted weighing of costs and benefits? In some circumstances, the reasons why someone commits a crime may be obvious. "Other times, all we have is mystery."[99]

Criminal activity rooted or occurring in friendships and families is particularly mysterious, given the essential abuse, misuse, or betrayal of trust typically involved. The relationships themselves may be irrevocably impacted by the criminal conduct, and associated damage to related individuals may result. Cost-benefit analyses seem to be especially challenging when friendships and family relationships weigh in the balance. One may sense that rational decision making of that kind may be a less significant explanator of criminal conduct emanating from and involving personal relationships—especially close ones.

As a step in solving the mystery in a limited sphere of white-collar criminal activity, this Article describes and offers commentary on 36 criminal insider trading prosecutions brought between 2008 and 2018. The cases involved allegations of tipper/tippee insider trading or misappropriation insider trading involving information shared with or learned from friends or family members. The nature of these cases and the fact patterns represented in them raise certain key questions about the thought processes and motives of the subject tippers, tippees, and misappropriators. The Article raises those questions and offers a selected literature review that identifies and briefly comments on possible reasons for criminal friends-and-family tipping and misappropriation.

98. *See, e.g.*, SOLTES, *supra* note 50, at 4 (explaining how questions of motive emerged for the author); Bhattacharya & Marshall, *supra* note 63, at 92–93, 104 (expressly raising questions about the economic rationale for insider trading); Guttentag, *supra* note 82, at 96–97, 105 (asking why criminals do what they do).

99. Guttentag, *supra* note 82, at 97 (footnotes omitted).

Additional research is needed to evaluate the explanatory power of these (and other) potential explanations for criminal friends-and-family insider trading. Data and analyses using the publicly available facts from prosecuted cases can only offer limited information about the factors that predict (or commonly precipitate) friends-and-family insider trading violations. However, qualitative empirical studies could be designed to adduce more facts about the factors that predict (or commonly precipitate) friends-and-family insider trading cases and generate a richer set of standardized comparative information about this type of criminal conduct. Indeed, studying both criminal and civil friends-and-family insider trading in this way may provide additional (similar or distinctive) insights.

Apart from general curiosity about the criminal mind and the contexts in which criminal behavior occurs, why might it be important to understand why criminal friends-and-family insider traders do what they do? Without concrete knowledge about why individuals engage in unlawful tipping, misappropriating, and trading, the efficacious regulation of insider trading is unlikely to occur. The appropriate, effective calibration of regulation requires knowledge of the motivations of those who engage or would engage in the regulated conduct. We may observe identical behaviors, but the reasons behind them may significantly vary. "Indeed, the same actions may be independent or interdependent, and interventions aimed at successfully changing behavior must first understand the nature of the collective behavior in question."[100]

More specifically, in her work on applied descriptive and social norms, Professor Bicchieri offers the prospect that harmful norms may be changed through, among other things, legal means.[101] While regulation alone cannot deter all undesired conduct (or guarantee consistent, comprehensive engagement in desired conduct), it can, together with other tactical responses, limit unwanted behaviors and incentivize constructive behaviors. However, to optimize the positive effects of U.S. insider trading regulation, we first must learn more about those who transgress its current contours. This Article provides a foundation for that work and will have been successful if it prompts additional research toward that end.

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100. BICCHIERI, NORMS IN THE WILD, *supra* note 74, at ix.
101. *See id.* at 143–47.

APPENDIX I

Year	Case Caption	Type of Insider Trading [102]	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2008	Gansman et al.	T/T	Male	Female	Mistress
2008	Devlin	M	Female	Male	Husband
2009	Rajaratnam et al.	T/T	Male	Male	Brother
2009	Holzer	T/T	Male	Male	Friend
2009	Bouchareb et al.	T/T	Male	Male	Friend
2009	Bouchareb et al.	T/T	Male	Male	Friend
2009	Kara et al.	T/T	Male	Male	Brother
2009	Kara et al.	T/T	Male	Male	Friend
2009	Kara et al.	T/T	Male	Male	Friend
2010	Talbot et al.	T/T	Male	Male	Nephew
2010	Hansen	T/T	Female	Male	Friend

102. Tipper/Tippee (T/T) or Misappropriation (M)

Year	Case Caption	Type of Insider Trading [102]	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2011	Gupta	T/T	Male	Male	Friend
2011	Skowron, III	T/T	Male	Male	Friend
2011	Holley et al.	T/T	Male	Male	Friend
2011	Salman	T/T	Male	Male	Brother-in-Law
2012	Conradt et al.	T/T	Male	Male	Friend
2012	Conradt et al.	T/T	Male	Male	Friend
2012	McGee	M	Male	Male	Friend
2012	Nguyen	T/T	Female	Male	Brother
2012	Gupta	T/T	Male	Male	Friend
2012	Bayyouk	T/T	Male	Male	Brother-in-Law
2013	Riley et al.	T/T	Male	Male	Friend
2013	Lee et al.	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading [102]	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2013	Dowd	T/T	Male	Male	Friend
2013	Megalli	T/T	Male	Male	Friend
2014	Melvin et al.	T/T	Male	Male	Friend
2014	Conradt et al.	T/T	Male	Male	Friend
2014	Conradt et al.	T/T	Male	Male	Friend
2014	Post et al.	T/T	Male	Male	Friend
2014	Metro et al.	T/T	Male	Male	Friend
2014	Metro et al.	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Brother-in-Law
2015	Fishoff	T/T	Male	Male	Friend
2015	Fishoff	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading [102]	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2015	Cunniffe et al.	T/T	Male	Male	Father
2015	Cunniffe et al.	T/T	Male	Male	Friend
2015	Adcox	T/T	Male	Male	Friend
2015	Wiegand et al.	T/T	Male	Male	Brother-in-Law
2015	Wiegand et al.	T/T	Male	Male	Friend
2015	Fefferman	T/T	Male	Male	Brother-in-Law
2016	Davis	T/T	Male	Male	Friend
2016	Fung	T/T	Male	Male	Friend
2016	Klein et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend

Year	Case Caption	Type of Insider Trading [102]	Sex of		Relationship of
	United States v.		Tipper or Information Source	Tippee or Misappropriator	Tippee or Misappropriator to Tipper or Information Source
2017	Siva et al.	T/T	Male	Male	Friend
2017	Siva et al.	T/T	Male	Male	Friend
2017	Moodhe	T/T	Male	Male	Girlfriend's Father
2017	Blaszczak et al.	T/T	Male	Male	Friend
2017	Brown et al.	T/T	Male	Male	Friend
2017	Yan	M	Female	Male	Husband

INTERNATIONAL WHITE-COLLAR CRIME AND THE GLOBALIZATION OF INTERNAL INVESTIGATIONS TEN YEARS LATER

Lucian E. Dervan*

ABSTRACT

Ten years ago, the study of international white-collar crime and the various impacts of the globalization of internal corporate investigations was still in its infancy. Despite the field's relative underdevelopment at the time, the risks created by cross-border investigations were already presenting themselves, leading me to publish an article in 2011 regarding these evolving complexities entitled *International White-Collar Crime and the Globalization of Internal Investigations*. The piece examined four areas in which pitfalls and perils lay in wait for counsel who failed to recognize the difficulties and diverse regulatory and legal challenges presented by the growth of international corporate investigations. Those areas of analysis included (1) determining who should conduct such investigations, (2) analyzing the risks associated with the collection, review, and transfer of data across borders, (3) analyzing considerations when interacting with employees in varying labor law environments, and (4) determining the best course forward regarding self-disclosures and settlements on the global stage.

In the ensuing decade since the publication of the 2011 article, the world has grown more accustomed to international white-collar criminal investigations and prosecutions and counsel have become better prepared to anticipate and address the above-described concerns during cross-border matters. The original challenges described in 2011, however, remain present today and, in addition, new and unique concerns have arisen. This piece will examine the above four areas of concern to consider how each has evolved over

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the last decade, followed by consideration of where the next ten years might lead.

INTRODUCTION

Ten years ago, the study of international white-collar crime and the various impacts of the globalization of internal corporate investigations was still in its infancy. Despite the field's relative underdevelopment at the time, the risks created by cross-border investigations were already presenting themselves, leading me to publish an article in 2011 regarding these evolving complexities entitled *International White-Collar Crime and the Globalization of Internal Investigations*.[1] The piece examined four areas in which pitfalls and perils lay in wait for counsel who failed to recognize the difficulties and diverse regulatory and legal challenges presented by the growth of international corporate investigations. Those areas of analysis included (1) determining who should conduct such investigations, (2) analyzing the risks associated with the collection, review, and transfer of data across borders, (3) analyzing considerations when interacting with employees in varying labor law environments, and (4) determining the best course forward regarding self-disclosures and settlements on the global stage.[2]

In the ensuing decade since the publication of the 2011 article, the world has grown more accustomed to international white-collar criminal investigations and prosecutions and counsel have become better prepared to anticipate and address the above-described concerns during cross-border matters. The original challenges described in 2011, however, remain present today and, in addition, new and unique concerns have arisen. This piece will examine the

1. Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URB. L.J. 101 (2011) [hereinafter Dervan, *International Internal Investigations*]. Portions of the 2011 article may appear herein and were originally published in that piece. Nothing contained in this article constitutes legal advice.

2. *See id*. In 2012, these four risk areas become the structure for the first American Bar Association Criminal Justice Section conference focused on international internal investigations. The conference, which occurred in Frankfurt, Germany in December 2012, is still held on a bi-annual basis in Germany. The 2012 Frankfurt conference also became the inspiration for the ABA CJS Global White Collar Crime Institute, which occurs bi-annually in various locations around the globe. While the Global White Collar Crime Institute examines issues in addition to international internal investigations, the Institute also regularly includes analysis of the risks posed by cross-border inquiries.

above four areas of concern to consider how each has evolved over the last decade, followed by consideration of where the next ten years might lead.

THE HISTORY AND GLOBALIZATION OF INTERNAL INVESTIGATIONS

Internal corporate investigations are so interwoven into white-collar criminal practice today that it is hard to believe that they remain a relatively recent addition to the American and global legal landscapes. The first major use of such internal investigations in the United States can be traced to the Securities and Exchange Commission's ("SEC") enforcement practices in the 1960s, where the appointment of receivers became a tool for ensuring violating entities would be restored to a "pre-violation, law-abiding condition."[3] Eventually, corporate counsel utilized this enforcement trend to propose that the entities engage in their own internal investigations as part of injunctive relief orders, rather than being constrained by the appointment of an outside receiver.[4] By the next decade, the use of internal investigators hired by the corporation as part of SEC enforcement action resolutions had become the norm, with one court commenting that the new procedures were "a 'desirable and economical practice' that 'allows the company to keep its own house clean and avoid unnecessary governmental supervision.'"[5]

By the late 1970s, particularly after the passage of the Foreign Corrupt Practices Act ("FCPA"), corporations began to recognize the usefulness of conducting internal corporate investigations before the government became involved, rather than just as a part of post-enforcement remediations.[6] By investigating potential

3. *See* Arthur F. Mathews, *Internal Corporate Investigations*, 45 OHIO ST. L. J. 655, 656–57 (1984) ("I first began to observe the development of corporate self-investigations as an outgrowth of the increased pace of the SEC's nationwide enforcement program in the early 1960s.").

4. *See id.* at 658 ("Thus, by the early 1970s, the SEC was gradually learning that an efficacious way to straighten out huge corporate messes brought to surface by some of its major enforcement actions was to restructure boards of directors and cause independent directors or their special counsel to accomplish internal corporate self-investigations, rather than to tie up scarce government resources to do the whole job in each case.").

5. *Id.* at 661 (quoting United States v. Handler, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) 96, 519, at 94, 024 (C.D. Cal. Aug. 3, 1978)).

6. Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1.

misconduct prior to the start of a government inquiry, corporations had the ability to correct any improper behavior and position themselves as pro-active and compliant should the government ever learn of the matter and come knocking.[7] From these early beginnings in the context of SEC inquiries, the modern internal investigation was born and quickly expanded to all manner of misconduct, both civil and criminal.[8] While internal investigations began as domestic inquiries, over time they also started to cross borders and evolved into the international internal investigations that are so prevalent today.

I. SELECTING THE INVESTIGATORS IN INTERNATIONAL MATTERS

As noted in the 2011 piece, "One of the most important initial considerations when launching an internal investigation is determining who will conduct the inquiry."[9] For example, should the investigation be conducted by in-house counsel, an in-house human resources department, or outside counsel? In the criminal context, the retention of outside counsel is typically appropriate because their independence creates greater credibility for the investigative findings and, as attorneys retained by the entity, they are able to shield materials with the attorney-client privilege

7. *See* Mathews, *supra* note 3, at 666 ("As the sensitive foreign payments cases mushroomed in the mid-1970s, the corporate defense bar awoke to the fact that proper corporate maneuvering in advance of, or in the midst of, an SEC enforcement investigation might lead to a less painful resolution of corporate payments . . . .").

8. *See* Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism, and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 869–71 (2003); Kevin H. Michels, *Internal Corporate Investigations and the Truth*, 40 SETON HALL L. REV. 83, 84 (2010); Richard H. Porter, *Voluntary Disclosures to Federal Agencies—Their Impact on the Ability of Corporations to Protect from Discovery Materials Developed During the Course of Internal Investigations*, 39 CATH. U. L. REV. 1007, 1007 (1990) ("In many American corporations, internal investigations are becoming commonplace."). For a discussion of internal corporate investigation practices, see generally Lucian E. Dervan, *Responding to Potential Employee Misconduct in the Age of the Whistleblower: Foreseeing and Avoiding Hidden Dangers*, 3 BLOOMBERG CORP. L. J. 670 (2008) [hereinafter Dervan, *Responding to Potential Employee Misconduct*]; Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils When Conducting Internal Investigations,* 16 ALAS LOSS PREVENTION J. 2 (2005) [hereinafter Murphy & Dervan, *Watching Your Step*].

9. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 106; *see also* Dervan, *Responding to Potential Employee Misconduct, supra* note 8, at 676 ("The first question that must be answered after an employee reports potential misconduct is who will perform the internal investigation.").

and work product protection.[10] In the cross-border context, however, additional complexities arise related to the structure of the investigatory team and the application of privilege.

In 2003, the European Union ("EU") investigated allegations of anti-competitive conduct by Akzo Nobel Chemicals Ltd. ("Akzo") and Akcros Chemicals Ltd. ("Akcros").[11] As part of this inquiry, the EU Commission raided the Akzo's offices in the United Kingdom and seized various documents, including emails related to antitrust issues between a general manager and Akzo's in-house counsel, who was licensed in the Netherlands.[12] Akzo challenged the seizure as a violation of attorney-client privilege, but this challenge was rejected by the European Court of Justice.[13] This conclusion was based on precedent from 1982 in the case of *AM&S v. Commission*, which established that two elements are required for privilege to attach in the EU.[14]

> First, the communication must have been given for purposes of the client's defense. Second, the communication must have been with an independent lawyer, which would not include in-house counsel.[15]

The Court concluded that because the Akzo emails were between a manager and an in-house attorney, the attorney-client privilege did not apply.[16] In ruling in the matter, the court further elaborated on the reasons for this limitation for the privilege. The court stated, "It follows, both from the in-house lawyer's economic dependence and the close ties with [the lawyer's] employer, that

10. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 106–07; *see also* United States v. Upjohn Co., 449 U.S. 383, 396–97 (1981) (establishing the modern standard by which privilege applies to internal corporate investigations).

11. *See* Case C-550/07 P, Akzo Nobel Chems. Ltd. v. European Comm'n, 5 C.M.L.R. 19, 1191 (2010).

12. *See* Benjamin W. Heineman, Jr., *European Rejection of Attorney-Client Privilege for Inside Lawyers,* HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 2, 2010), https://corpgov.law.harvard.edu/2010/10/02/european-rejection-of-attorney-client-privilege-for-inside-lawyers/ ("At issue were two emails about antitrust issues—obtained in a dawn raid aimed at enforcing EU competition laws—exchanged between a general manager and an in-house lawyer who was a member of the Netherlands bar.").

13. *See id.*

14. *See* Case 155/79, AM & S Eur. Ltd. v. Comm'n of the European Cmtys.*,* 1982 E.C.R. 1575.

15. Laurel S. Terry, *Introductory Note to the Court of Justice of the European Union: The* Akzo Nobel *EU Attorney-Client Privilege Case,* 50 INT'L LEGAL MATERIALS 1, 1–2 (2011).

16. *AM & S Eur. Ltd.*, 1982 E.C.R. at 1614–15.

[the lawyer] does not enjoy a level of professional independence comparable to that of an external lawyer."[17] Importantly, however, the court made clear that privilege varies from jurisdiction to jurisdiction and this particular ruling applied to EU Commission investigations, as opposed to, for example, member state investigations.[18] For counsel engaged in cross-border internal investigations, therefore, the *Akzo* and *AM&S* cases are a reminder that privilege protections vary globally and local expertise is necessary to prevent inadvertently engaging in behavior that may jeopardize this protection for clients.

The complexities of who engages in international internal investigations and the impact of those decisions on privilege application has only grown more challenging in the last decade as enforcement bodies have aggressively tried to undermine privilege protections and new privilege laws and rulings have presented themselves on the global stage. In 2017 in Germany, for example, authorities raided the offices of law firm Jones Day in Munich related to the Volkswagen AG emissions scandal.[19] Authorities claimed that the documents seized were not privileged because Volkswagen, who had hired the law firm, was not the target of the investigations, rather the target was Volkswagen AG's subsidiary, Audi.[20] The ability of prosecutors to review the materials from Jones Day was eventually affirmed by the German Federal Constitutional Court in a 2018 decision illustrating the perilous nature of varying applications of privilege doctrines.[21]

In England, the Serious Fraud Office ("SFO") took a similarly aggressive view towards materials created during internal investigations in the mid-2010s when the office demanded Eurasian Natural Resources Corporation provide the enforcer with materials created and collected during an internal investigation related to alleged financial wrongdoing and corruption.[22] Initially,

17. *Akzo Nobel Chems.*, 5 C.M.L.R. at 1198. ("Therefore, the General Court correctly applied the second condition from legal professional privilege laid down in the judgment in *Australian Mining & Smelting Europe Ltd. v. Commission of the European Communities*.").

18. *See* Terry, *supra* note 16, at 3.

19. *See* Francesca Fulchignoni, *Attorney-Client Privielge Challenges in International Investigations*, 47 LITIGATION 9, 10–11 (2021); Ana Reyes & Matthew Heins, *Jones Day Case Highlights Questions of Atty Privilege Abroad*, Law360 (July 27, 2018).

20. Fulchignoni, *supra* note 19; Reyes & Heins, *supra* note 19.

21. Fulchignoni, *supra* note 19; Reyes & Heins, *supra* note 19.

22. *See* Steven F. Molo, Eric R. Nitz, & Ekta R. Dharia, *An American Lawyer in Queen Elizabeth's Court*, 43 CHAMPION 22, 23 (2019).

the High Court in the United Kingdom found that the requested materials, including attorney notes and memoranda from witness interviews and summaries of attorney conclusions in the matter, were not privileged.[23] Eventually, this result was overturned by the Court of Appeals and the SFO chose not to proceed with the case to the U.K. Supreme Court.[24] The SFO matter illustrates, however, the willingness of enforcers to test even long established precedent regarding privilege protections in efforts to secure materials from internal investigations.

A final example of the constantly changing landscape in the privilege field is the recent decision by the Swiss Federal Supreme Court in June 2021 limiting the application of privilege for lawyers from outside of Switzerland, the EU, or the European Free Trade Association.[25] The Swiss case resulted from a money laundering and bribery investigation that began in 2013.[26] During the investigation, the government raided a Geneva-based company that was a "third-party to the proceedings" and seized documents and data, including materials covered by the attorney-client privilege.[27] Some of the materials in question were communications with attorneys who were not Swiss.[28] In examining the case, the Swiss court distinguished cases in which the attorney represented an accused and cases in which the attorney represented another, such as was the case in this matter.[29]

> First of all, the Swiss Federal Tribunal stated that communications between the accused in Swiss criminal proceedings and their lawyers are absolutely protected by attorney-client privilege and cannot be seized by the Swiss prosecuting authorities. This applies regardless of

23. *See id.* at 24.
24. *See id.* at 28.
25. *See* Severio Lembo, Andrew M. Garbarski, & Abdul Carrupt, *Swiss Federal Tribunal Denies Legal Privilege Protection for Correspondence Between Non-Accused Persons and Non-Swiss/EU/EFTA Lawyers*, Bar & Karrer Briefing (July 2022). The Swiss Federal Tribunal decision is available at https://www.bger.ch/ext/eurospider/live/de/php/aza/http/index.php?highlight_docid=aza%3A%2F%2Faza://22-06-2021-1B_333-2020&lang=de&zoom=&type=show_document (last visited Feb. 23, 2022).
26. *See id.* at 26.
27. *Id.*
28. *Id.*
29. *Id.*

> whether the lawyer in question is assisting the accused in the Swiss criminal proceedings, and irrespective of the country of origin of the lawyer. . . .
>
> Turning to communications between "another person" and their lawyer, art. 264 para. 1 lit. d CrimPC affords protection against seizure of such communications, provided that the lawyer: "is authorized to represent clients before Swiss courts in accordance with the Lawyers Act of 23 June 2000 and is not accused of an offence relating to the same case."
>
> . . . .
>
> As a result, art. 264 para. 1 lit. d CrimPC can only be invoked with regard to communications with:
>
> - Lawyers qualified in Switzerland;
> - Swiss nationals authorized to practised as lawyers in an EU/EFTA State under a title listed in the annex of the Swiss Lawyers Act;
> - EU/EFTA lawyers, i.e. (i) nationals of these States, (ii) authorised to practisepractise in their State of origin under a title listed in the annex of the Swiss Lawyers Act and (iii) who carry out an activity recognised by art. 21 ff (provision of services) or art. 27 ff (representation before courts) of the Swiss Lawyers Act.[30]

In Switzerland, it seems, knowing the rules surrounding privilege and the specific nature of one's case are vital when determining with whom to engage in a cross-border investigatory matter.[31]

As the above examples illustrate, decades on from the *Akzo* case, the bounds of privilege in the international realm continue to be tested and amended. As one looks toward the next decade, it is unlikely that more consistency or less aggressive enforcement

30. *Id.* at 2.

31. For a broad view of privilege globally see *An International Guide to Corporate Internal Investigations*, Mark Beardsworth, Patrick Hanes, Ibtissem Lassoued, Saverio Lembo, and Frances McLeod eds. (American Bar Association 2020); *Legal Professional Privilege Global Guide*, DLA PIPER, https://www.dlapiperintelligence.com/legalprivilege/ (last visited Sept. 30, 2022).

tactics will dominate. Rather, continued uncertainty will likely reign in this space. As a result, counsel must continue to carefully consider how to structure cross-border investigations before embarking on the inquiry. These deliberations should not occur in a vacuum but should involve experts from the jurisdictions associated with the matter to ensure the nuances that can create peril are identified and considered early. While engaging in such an analysis is no guarantee in an environment of evolving laws and norms, a deliberative analysis of how to structure an investigation at the front end holds the possibility of avoiding significant missteps later.

II. COLLECTING, REVIEWING AND TRANSFERRING INVESTIGATORY DOCUMENTS FROM ABROAD

As noted in the 2011 article, the collection of documents and data are key aspects of internal investigations.[32] Two areas of law significant to the collection of information during cross-border investigations can become particularly complex and perilous—data privacy and state secrets regimes.

Data privacy is an area of law that has seen increased focus and exponential advancement in recent decades. In 2011, the focus was on EU directives that protected "personal data" and that limited one's ability to collect and process such information.[33] Over the last decade, more sophisticated data privacy regulations have come into force and added further layers of complexity to the

32. *See* Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 676 ("The first step in any internal investigation is the gathering of the relevant information through collection and review of documents."); Murphy & Dervan, *Watching Your Step*, *supra* note 8, at 6–7 (discussing the importance of document collection).

33. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 113–14; *see also* Miriam Wugmeister, Karin Retzer & Cynthia Rich, *Global Solution for Cross-Border Transfers: Making the Case for Corporate Privacy Rules*, 38 GEO. J. INT'L L. 449, 456 (2007).

> According to the EU Directive, personal information can only be processed when one of the following exceptions is met: consent from the individual; contractual necessity (that is, data may be used if necessary for the performance of the contract with the individual); compliance with (local) legal obligations; or the legitimate interests of the entity collecting the personal information outweigh the privacy interests of the individuals.

Id.

process of collecting, reviewing, and transmitting information during cross-border inquiries.

In 2018, for example, a new data privacy regulation called the General Data Protection Regulation went into effect in Europe.[34] According to the EU:

> The General Data Protection Regulation (GDPR) is the toughest privacy and security law in the world. Though it was drafted and passed by the European Union (EU), it imposes obligations onto organizations anywhere, so long as they target or collect data related to people in the EU. The regulation was put into effect on May 25, 2018. The GDPR will levy harsh fines against those who violate its privacy and security standards, with penalties reaching into the tens of millions of euros.[35]

While many associate such regulations predominately with the use of data related to corporate marketing and advertising practices, they are equally applicable to internal corporate investigations. As a piece from Hogan Lovells makes clear, "[t]he GDPR and the national implementation laws, if applicable, set strict limits for conducting internal investigations. Companies have to deal with a variety of requirements and obligations."[36] One of the obligations contained in the GDPR that is particularly relevant to cross-border enforcement actions and internal corporate investigations is the requirement that transfers of data outside the European Economic Area be consistent with the GDPR requirements.[37] This includes ensuring that appropriate safeguards are "implemented to ensure an adequate protection of

34. *See* Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02016R0679-20160504&qid=1532348683434 (last visited Nov. 7, 2022).

35. *What is GDPR, the EU's New Data Protection Law?*, https://gdpr.eu/what-is-gdpr/ (last visited Sept. 30, 2022).

36. Martin Pflueger, *Data Protection in Investigations*, HOGAN LOVELLS, https://guide.hoganlovellsabc.com/data-protection-in-investigations (last visited Sept. 30, 2022).

37. *See id.*

personal data, such as entering into additional agreements with the recipients . . . ."[38]

As one looks to the next decade, it is probable that further regulation of data privacy will lead to increasingly significant obligations related to the collection of information during cross-border investigations. At the same time, corporations and investigating counsel will also likely become more sophisticated regarding data privacy concerns and create better processes to satisfy required protections. What remains unknown is whether, or to what extent, privacy laws will grow to become direct impediments to the ability of entities to conduct thorough and credible inquiries.

While the same impediments could jeopardize government investigations, there seems to be significant movement to protect the ability of enforcers to secure data. In the United States, for example, the passage of the Clarifying Lawful Overseas Use of Data ("CLOUD") Act in March 2018 allowed the United States to enter into executive agreements with other countries to more easily share information.[39] According to the Department of Justice:

> The United States enacted the Clarifying Lawful Overseas Use of Data (CLOUD) Act in March 2018 to speed access to electronic information held by U.S.-based global providers that is critical to our foreign partners' investigations of serious crime, ranging from terrorism and violent crime to sexual exploitation of children and cybercrime.
>
> In recent years, the number of mutual legal assistance requests seeking electronic evidence from the United States has increased dramatically, straining resources and slowing response times. Foreign authorities have relatedly expressed a need for increased speed in obtaining this evidence. In addition, many of the assistance requests the United States receives seek electronic information related to individuals or entities located in other countries, and the only connection of the investigation to the United States is that the evidence

38. *Id.*

39. *Cloud Act Resources*, U.S. DEP'T OF JUST. (last updated Aug. 20, 2021), https://www.justice.gov/dag/cloudact.

> happens to be held by a U.S.-based global provider. The CLOUD Act is designed to permit our foreign partners that have robust protections for privacy and civil liberties to enter into bilateral agreements with the United States to obtain direct access to this electronic evidence, wherever it happens to be located, in order to fight serious crime and terrorism.
>
> The CLOUD Act thus represents a new paradigm: an efficient, privacy and civil liberties-protective approach to ensure effective access to electronic data that lies beyond a requesting country's reach due to the revolution in electronic communications, recent innovations in the way global technology companies configure their systems, and the legacy of 20th century legal frameworks. The CLOUD Act authorizes bilateral agreements between the United States and trusted foreign partners that will make both nations' citizens safer, while at the same time ensuring a high level of protection of those citizens' rights.[40]

Already, the United States has entered into executive agreements with the U.K. and Australia.[41] As the use of such agreements make it easier for governments to acquire and utilize data related to white-collar investigations, it remains to be seen whether entities and their counsel will find their own ways to efficiently address the growing bevy of data privacy regulations. Without such options evolving for defense and investigating counsel as well, one may see a growing dichotomy in which the government gains access to important data even as data privacy regulations become more demanding, but others are increasingly shut out. As such, the manner in which corporations and investigating counsel prepare for and address laws protecting data will be of great significance during the next decade of cross-border investigations.

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40. *Id.*

41. Press Release 21-1252, U.S. Dep't of Just., United States and Australia Enter CLOUD Act Agreement to Facilitate Investigations of Serious Crime (Dec. 15, 2021), https://www.justice.gov/opa/pr/united-states-and-australia-enter-cloud-act-agreement-facilitate-investigations-serious-crime#; Press Release 19-1065, U.S. Dep't of Just., U.S. and UK Sign Landmark Cross-Border Data Access Agreement to Combat Criminals and Terrorists Online (Oct. 3, 2019), https://www.justice.gov/opa/pr/us-and-uk-sign-landmark-cross-border-data-access-agreement-combat-criminals-and-terrorists.

State secrets regimes were also identified in the 2011 article as risk areas for international internal investigations and that remains true today.[42] China, for example, has strong state secrets laws that broadly define such materials to include "matters that relate to state security and national interests."[43] Violations of these types of law also often carry steep penalties. In China, the state secrets laws carry punishments up to death for intentional violations.[44] For individuals engaged in cross-border investigations, therefore, broad state secrets language creates uncertainty when collecting, reviewing, and transferring materials.

The combined risks that emanate from privacy and state secrets laws when engaging in information collection can be seen through several examples from China. Xue Feng, for example, a naturalized American citizen, worked for an American company as a geologist. While in China, he purchased unprotected data containing information about oil and gas in the country.[45] After passing the information back to his employer in the United States, Feng was arrested and charged with violation of the state secrets laws and eventually sentenced to eight years in prison.[46] In another incident in China, two certified fraud investigators, Peter Humphrey, a British citizen, and Yu Yingzeng, an American citizen, were arrested for improperly obtaining private information on individuals while assisting with an internal investigation of potential misconduct for a pharmaceutical company.[47] According to one news outlet, "The case against Humphrey and his wife

42. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 115–17.

43. *State Secrets Protection Law of the People's Republic of China*, CONG.-EXEC. COMM'N ON CHINA, Art. 2, *available at* http://www.cecc.gov/pages/virtualAcad/index.phpd?showsingle=140200 (last visited Sept. 12, 2022).

44. *See* Sigrid U. Jernudd, Comment, *China, State Secrets, and the Case of Xue Feng: The Implication for International Trade*, 12 CHI. J. INT'L L. 309, 319–20 (2011).

45. *See id.* at 322–23; Ariana E. Cha*, Trial of American Puts Spotlight on the Business of 'State Secrets' in China*, WASH. POST (Mar. 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030303852.html ("When Xue bought the surveys and maps for use in his company's research reports, the information was openly available."); Andrew Jacobs, *China Upholds Conviction of American Geologist*, N.Y. TIMES (Feb. 18, 2011), https://www.nytimes.com/2011/02/19/world/asia/19beijing.html.

46. Jacobs, *supra* note 45.

47. *See* Adam Jourdan, *China Charges GSK-Linked Investigator for Illegally Obtaining Private Information*, REUTERS (July 13, 2014), https://www.reuters.com/article/us-china-gsk-investigators/china-charges-gsk-linked-investigators-for-illegally-obtaining-private-information-idUSKBN0FJ05G20140714.

[Yingzeng] . . . [became] a key piece in a long-running investigation into GSK, whose China executives [had] been charged with orchestrating a widespread network of bribery to promote sales."[48] Humphrey and Yingzeng were eventually sentenced to 30 and 24 months respectively in prison.[49]

The above examples illustrate the continued dangers associated with violating data privacy and state secrets laws a decade after the 2011 international internal investigations article raised these concerns. Today, there is also another growing concern related to national interests for those engaged in cross-border investigations—the possibility of becoming embroiled in geopolitical controversies. The potential that someone might not only fall within the bounds of a broad data privacy or state secret law, but also might become part of a larger international diplomatic controversy, is illustrated by the recent Huawei case. In 2018, China detained Michael Kovrig, a former diplomat, and Michael Spavor, an organizer of business trips to North Korea, both of whom were Canadian citizens.[50] They were charged with espionage and illegal provision of state secrets.[51] According to Peter Humphrey from the GSK case, the Kovrig and Spavor detentions were about more than just state secrets. Humphrey wrote, "[b]oth detentions were seen as an act of diplomatic hostage-taking in revenge for the arrest in Canada on fraud charges of Meng Wanzhou, the chief financial officer of Huawei, a Chinese telecoms technology company with close ties to the CCP regime."[52] According to the *New York Times*, "Mr. Spavor became a warning about the growing risks of operating in China, as tensions with the West rise and Beijing takes an increasingly combative approach to defending its interests."[53] Eventually, Spavor was sentenced to 11

48. *Id.* CSK is a global biopharma company.

49. *See* Peter Humphrey, *'I Was Locked Inside A Steel Cage': Peter Humphrey on His Life Inside a Chinese Prison*, FINANCIAL TIMES (Feb. 15, 2018), https://www.ft.com/content/db8b9e36-1119-11e8-940e-08320fc2a277.

50. Suranjana Tewari, *Michael Spavor: Canadian Jailed for 11 Years in China on Spying Charges*, BBC (Aug. 11, 2021), available at https://www.bbc.com/news/world-asia-china-58168587.

51. *See id.*

52. Peter Humphrey, *The Cruel Fate of Michael Kovrig and Michael Spavor in China*, THE DIPLOMAT (Dec. 10, 2019), https://thediplomat.com/2019/12/the-cruel-fate-of-michael-kovrig-and-michael-spavor-in-china/.

53. Chris Buckley, Dan Bilefsky & Tracy Sherlock, *China Sentences Canadian Businessman to 11 Years in Prison*, N.Y. TIMES (Aug. 10, 2021), https://www.nytimes.com/2021/08/10/world/asia/china-canada-spavor-kovrig.html.

years in prison.[54] Before Kovrig could be sentenced, however, both men were released in a prisoner-swap that saw Meng returned to China at the same time.[55] The Huawaei case is a strong reminder that the complexities of international cross-border work come not just from varying laws and regulations, but also from the inherent risks associated with operating in countries where one might inadvertently become part of a larger geopolitical matter.

III. DEALING WITH EMPLOYEES IN AN INTERNATIONAL CONTEXT

As noted in the 2011 article, there are two defining encounters with employees during cross-border investigations. The first is when employees are interviewed by outside counsel as part of the inquiry's fact-finding mission.[56] The second is when a determination of wrongdoing is made, and the corporation must decide whether and how to discipline employee misconduct.[57] These two encounters continue to present challenges to investigating counsel because this is another area where different laws and regulations place varying restrictions and prohibitions on what conduct is permitted.

In the United States, much of the conversation around employee interviews revolves around the providing of the "Upjohn Warning:"

> The warning typically includes the following elements: the attorney represents the corporation and not the individual employee; the interview is covered by the attorney-client privilege, which belongs to and is controlled by the corporation, not the individual employee; the corporation may decide, in its sole discretion, whether to waive the privilege and disclose

54. Christian Paas-Lang, *Michael Kovrig and Michael Spavor Arrive in Canada After Nearly 3-year Detention in China,* CBC NEWS, (Sept. 25, 2021), https://www.cbc.ca/news/politics/spavor-kovrig-in-canada-1.6189640.

55. *See* Patrick Reilly, *Two Canadians Freed from China After Deal Reached with Huawei Exec in Swap Deal*, N.Y. POST (Sept. 25, 2021), https://nypost.com/2021/09/25/canadians-michael-spavor-and-michael-kovrig-released-from-china-prison/.

56. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 118; *see also* Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 676.

57. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 119.

> information from the interview to third parties, including the government.[58]

Ensuring employees know that counsel does not represent them and that the privilege held by the corporation may be waived is vital to ensuring flexibility should the corporation decide to later reveal the contents of the employee interview to the government or waive privilege as to the matter under investigation.[59] Except where employment contracts or organized labor agreements impose additional obligations, counsel is generally able to operate without limitation when interviewing employees about potential misconduct in the United States. Such, however, is not the case in many other parts of the world.

In many European countries, blocking statutes prohibit corporate investigating counsel from interviewing employees about potential misconduct.[60] In the U.K., for example, authorities expect to be contacted prior to internal investigators interviewing employees who may possess relevant information.[61] While not required by law, the importance of such cooperation is made clear in the cooperation guidelines from the United Kingdom Serious Fraud Office ("U.K. SFO"), which writes, "[t]o avoid prejudice to the investigation, consult in a timely way with the SFO before interviewing potential witnesses or suspects, taking personnel/HR actions or taking other overt steps."[62] In Switzerland, blocking statutes have created legal uncertainty regarding which internal investigatory interviews of employees require prior government approval.[63] In response, a practice has developed of conducting

58. Dervan, *Responding to Potential Employee Misconduct*, *supra* note 8, at 677.

59. Robert M. Radick & Rusty Feldman, *A Warning About 'Upjohn' Warnings: A Word of Caution for Individual Employees,* N.Y.L.J. (June 25, 2021), https://www.maglaw.com/media/publications/articles/2021-06-28-a-warning-about-upjohn-warnings-a-word-of-caution-for-individual-employees/_res/id=Attachments/index=0/NYLJ06282021497826Morvillo.pdf.

60. *See* D. Michael Crites, *Recent Trends in White Collar Crime*, INT'L WHITE COLLAR ENFORCEMENT, 2011 EDITION, 2010 WL 5312199, at *2 (2010) ("[M]any countries have blocking statutes that prohibit counsel from interviewing witnesses without permission from the host country.").

61. Beardsworth et. al, *supra* note 31, at 301–02.

62. *Corporate Co-Operation Guidance*, U.K. SERIOUS FRAUD OFF. (Aug. 2019) https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/corporate-co-operation-guidance/ (last visited Sept. 27, 2022).

63. Valentine Bagnoud, Deborah Hondius & Sandrine Giroud, *Swiss Blocking Statute: Update on Do's and Don'ts under the Threat of Criminal Sanctions,* LALIVE (Dec. 3, 2019), https://www.lalive.law/swiss-blocking-statute-update-on-dos-and-donts-under-the-threat-of-criminal-sanctions/.

some employee interviews outside the country. This procedural work-around has not entirely addressed the issue, however, as it remains unclear whether this really rectifies the blocking statute concerns or whether employees can actually be made to engage in such travels.[64] Further, as was observed in the U.K., Swiss authorities may look with suspicion upon employee interviews conducted before authorities have the opportunity to meet with the subject.[65] And, in the worst-case scenario, such early interactions with employees could lead to allegations of witness tampering by authorities.[66] As a final example of the varying obligations found in different jurisdictions, French ethical obligations require that attorneys "inform the person interviewed that they can be assisted or advised by a counsel when it appears, before or during the interview, that a specific wrongdoing can be attributed to them at the end of the investigation[.]"[67] Further, in France, the conversation between the investigating counsel and the employee is not privileged, as would be the case in the United States pursuant to *Upjohn v. United States*.[68]

Similarly, counsel must be aware of the various differences in approach to employee discipline for either refusing to participate in the internal investigation or in response to the discovery of misconduct. While it is common in the United States for counsel and the corporation to possess broad discretion in disciplining an employee, this is not necessarily the case in other jurisdictions.[69] First, in some countries, employees cannot be forced to cooperate with an internal investigation or be punished for a failure to do so.[70] In Germany, for example, recent draft legislation specifically

64. *See* Beardsworth et al, *supra* note 31, at 203.

65. *See id.*; s*ee also* Crites, *supra* note 60, at *2, *8, *12.

66. *See* Beardsworth et al, *supra* note 31, at 203.

67. *See* Beardsworth et al, *supra* note 31, at 98 (quoting National Internal Regulations of France, art. 8 (translated from French)); *see also* Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697 (2020).

68. *See* Beardsworth et al, *supra* note 31, at 99; Upjohn v. United States, 449 U.S. 3838 (1981).

69. *See* Dervan, *International Internal Investigations*, *supra* note 1, at 119.

70. *See id.*; *see also In-House Counsel's Guide to Conducting Internal Investigations*, O'MELVENY, https://www.omm.com/omm_distribution/white_collar_defense/guide%20_to_conducting_internal_investigations_jan_2020.pdf (last visited Sept. 30, 2022) ("In some countries, employees may not be required to cooperate with internal investigations, and cannot be disciplined for their failure to do so."); Arlen & Buell, *supra* note 67, at 735 ("In many other countries, employers cannot use the threat of termination to pressure employees to

incorporates language addressing the right of employees to refuse to answer questions during internal investigations if the answer would "endanger themselves or their relatives."[71] Second, many countries place temporal and procedural restrictions on employee discipline. In France, for example, employees must be disciplined within two months from the time the corporation knows of sanctionable misconduct.[72] In Belgium, the temporal restrictions for disciplining an employee can be limited to a matter of days and the timer may even begin before a formal investigation has begun if credible allegations were received.[73] Similar tight temporal restrictions exist in Austria, France, and Iraq.[74] The procedural complexities of disciplining are further exemplified by the law in the United Arab Emirates. In the UAE, a series of procedural hurdles must be satisfied before discipline may be handed down.[75] These include: providing written notice of the alleged conduct to the employee, providing an opportunity for the employee to comment, investigating defenses or explanations given by the employee, and providing written notice of the penalty, reasons supporting the penalty, and the consequences of continued misconduct.[76] Such disciplinary procedures in the UAE must begin within thirty days of the discovery of the misconduct.[77] A final example of the complex considerations that arise during disciplinary action in cross-border matters is the procedure in the U.K. by which disputes related to employee sanctions may result in proceedings before the Collateral Employment Tribunal. This is a public forum. Thus, consideration must be given to the risk that missteps in disciplining employees for misconduct might open the

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cooperate because employment laws either preclude such threats of impose procedural impediments to employee discipline.").

71. *See* Beardsworth et al, *supra* note 31, 125–26.

72. *See id.* at 90.

73. *See* Donald C. Dowling, Jr., *International HR Best Practice Tips: Conducting Internal Employee Investigation Outside the U.S.*, 19 INT'L HUM. RES. J. 1, 3 (2010) (quoting Carl Bevernage, *Belgium*, INT'L LAB. AND EMP. L. 3–38 (William L. Keller et al. eds., 2009)).

74. *See* Donald C. Dowling, Jr., *How to Conduct an Internal Investigation*, LITTLER, https://www.littler.com/files/international_investigations.pdf (last visited Sept. 30, 2022).

75. *See Disciplinary [sic]Action in the United Arab Emirates,* AL TAMIMI & CO. (Oct. 2013), https://www.tamimi.com/law-update-articles/disciplinary-action-in-the-united-arab-emirates/.

76. *See* Beardsworth et al, *supra* note 31, at 254.

77. *See id.*

internal investigation itself and the subject of the inquiry to public disclosure before this public forum.[78]

Once again, investigating counsel must be aware of the various legal and regulatory landscapes that may be encountered during cross-border investigations. While employee interactions are key aspects in both responding to and addressing potential misconduct, it is important to avoid missteps that might lead to additional legal or ethical exposure for the attorneys engaged in the inquiry and their corporate clients.

IV. SETTLEMENT AFTER INTERNATIONAL INTERNAL INVESTIGATIONS

The final issues discussed in the 2011 article were the varying considerations during disclosures and settlements following cross-border investigations.[79] One significant change in settlement procedures over the past decade has been the global growth in the creation of Deferred Prosecution Agreement ("DPA") and Non-Prosecution Agreement ("NPA") regimes.[80] While DPAs have long been a popular mechanism to resolve corporate criminal investigations in the United States, the last decade has seen a significant increase in their use by other countries.[81]

DPAs in the United States originated as tools to divert individual defendants from the traditional criminal justice system.[82] In the early 1990s, however, the federal government began utilizing this diversion practice with corporations through DPAs and NPAs.[83] Over time, the practice grew in frequency. According to one analysis, from 2000 to 2002 there were only two or three DPAs and NPAs per year.[84] By 2015, the number had reached 102.[85] The significance of this increase was captured in

78. *See id.* at 291.

79. *See id.*; Dervan, *International Internal Investigations*, *supra* note 1, at 122.

80. *See* Peter Spivack & Sujit Raman, *Regulating the "New Regulators": Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

81. *See id.* at 163.

82. *See id.*

83. *See id.* at 163–64.

84. *2021 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, GIBSON DUNN (February 03, 2022), https://www.gibsondunn.com/2021-year-end-update-on-corporate-non-prosecution-agreements-and-deferred-prosecution-agreements/.

85. *Id.*

2012 by then Assistant Attorney General Lanny Brewer when he stated, "DPAs have become a mainstay of white-collar criminal enforcement."[86] Last year, the same analysis indicated that there were 28 corporate DPA and NPA agreements.[87]

While DPAs and NPAs grew in significance in the United States during the 1990s and 2000s, they received a slow and sparse reception internationally. But that has changed markedly in the last decade. Since the drafting of the 2011 article, Brazil, France, the United Kingdom, Singapore, and Canada have adopted versions of the DPA/NPA model and others are now exploring their use.[88] The adoption of the DPA model in the United Kingdom garnered perhaps the most significant attention during the last ten years. The U.K. adopted the DPA in 2014 as part of the Crime and Courts Act of 2013.[89] According to the U.K. SFO:

> DPAs can be used for fraud, bribery and other economic crime.[90] They apply to organizations, never individuals.
>
> The key features of DPAs are:
>
> - They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).
> - They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'

86. Lanny A. Breuer, Assistant Att'y Gen., Assistant Attorney General Lanny A. Breuer Speaks at the New York City Bar Association (Sept. 13, 2012), *in* U.S. DEP'T OF JUST. NEWS *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.

87. *See 2021 Year-End Update*, *supra* note 84.

88. *See* Code Pénal [C. Pen.] [Penal Code], 41-1-2 (Fr.) (Amended 2020); *Brazil: AGU Regulates Civil Non-Prosecution Agreement in Administrative Improbity Cases*, MAYER | BROWN (July 30, 2021), https://www.mayerbrown.com/en/perspectives-events/publications/2021/07/brazil-agu-regulates-civil-nonprosecution-agreement-in-administrative-improbity-cases; *infra*, note 92; *infra* note 99.

89. *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFF., https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements (last visited Oct. 14, 2022).

90. *Id.*

- They avoid lengthy and costly trials
- They are transparent, public events[91]

After the implementation of the DPA, the U.K. SFO created a Code of Practice regarding their implementation.[92] As in the United States, cooperation is a key component of the SFO's decision-making around DPAs:[93]

> Considerable weight may be given to a genuinely proactive approach adopted by P's management team when the offending is brought to their notice, involving within a reasonable time of the offending coming to light reporting P's offending otherwise unknown to the prosecutor and taking remedial actions including, where appropriate, compensating victims. In applying this factor the prosecutor needs to establish whether sufficient information about the operation and conduct of P has been supplied in order to assess whether P has been co-operative. Co-operation will include identifying relevant witnesses, disclosing their accounts and the documents shown to them. Where practicable it will involve making the witnesses available for interview when requested. It will further include providing a report in respect of any internal investigation including source documents.[94]

During the first five years of their existence, the U.K. SFO entered into four DPAs.[95]

Two of the most recent entries into the DPA regime are Canada and Singapore, each of whom introduced the mechanisms in 2018 and neither of whom has yet utilized the settlement tool.[96]

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91. *Id.*

92. *Deferred Prosecution Agreements Code of Practice*, SERIOUS FRAUD OFFICE (2013) https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.

93. *Id.* at § 2.8.2(i).

94. *Id.*

95. *See Deferred Prosecution Agreements 5 Years On – The Americanisation of UK Corporate Crime Enforcement*, WHITE & CASE (May 10, 2019), https://www.whitecase.com/publications/alert/deferred-prosecution-agreements-5-years-americanisation-uk-corporate-crime.

96. *See* Lawrence E. Ritchie & Sonja Pavic, *Canada's Deferred Prosecution Agreements: Still Waiting for Takeoff*, OSLER (Dec. 11, 2020), https://www.osler.com/en/resources/regulations/2020/canada-s-deferred-prosecution-

In Canada, the process set down for determining DPA eligibility focuses on compliance efforts and public interest.[97] The listed factors for consideration also include whether the entity is willing to assist in the identification of others involved in the misconduct.[98] The system adopted in Singapore is similar to that found in the U.K., including the requirements of court approval and public access.[99] While there is no official guidance issued with respect to the use of DPAs in Singapore, it has been posited that their use will likely be consistent with the U.K.'s, given the similarity in approach.[100]

The next country to adopt DPAs may well be Australia.[101] In 2017, the Australian Attorney-General's Department released a report entitled *Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*.[102] According to the paper, DPAs were seen as a potential mechanism to improve enforcement in the white-collar space:

> While Australia has a well-developed legal and regulatory framework for corporate misconduct, the opaque and sophisticated nature of corporate crime makes it difficult to detect. Often, corporate criminal activity is only identified because 'whistleblowers' come forward, or because the company self-reports. The Australian Government is considering options to facilitate a more effective and efficient response to corporate crime by encouraging greater self-reporting by

agreements-still-waiting-for-takeoff; Zachary S. Brez et. al, S*ingapore Introduces Deferred Prosecution Agreements*, PROGRAM ON CORP. COMPLIANCE AND ENFORCEMENT AT N.Y.U., https://wp.nyu.edu/compliance_enforcement/2018/04/04/singapore-introduces-deferred-prosecution-agreements/ (last visited Oct. 14, 2022).

97. Ritchie & Pavic, *supra* note 96.

98. *Id.*

99. Brez et. al, *supra* note 96.

100. Eunice Chua & Benedict Wei Ci Chan, *Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?,* INT'L COMMENT. ON EVIDENCE (2020).

101. *See* Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 SYDNEY L. REV. 187 (2021).

102. *See Improving Enforcement Options for Serious Corporate Crime: A Proposed Model for a Deferred Prosecution Agreement Scheme in Australia*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, (Mar. 2017), https://www.ag.gov.au/sites/default/files/2020-03/A-proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.pdf.

> companies. A key focus of this consideration is a possible deferred prosecution agreement (DPA) scheme.[103]

Legislation was later introduced, though the process of legislative approval has been slow.[104] Nevertheless, it is likely that in the near future Australia will join the growing list of countries adopting some form of DPA or NPA scheme.[105] For counsel conducting cross-border investigations, therefore, the settlement landscape continues to evolve. This shift towards DPAs and NPAs over the last decade has signaled not only the growth of U.S. centered resolution mechanisms, but also the growing cohesion, cooperation, and norm penetration between global enforcement bodies.

V. CONCLUSION

The list of pitfalls and perils counsel may encounter during cross-border investigations is long and complex. This piece has only selected a handful of risks and diverse legal and regulatory approaches to illustrate the vital importance of awareness during international internal investigations. It is unlikely anyone will have the experience and expertise to know all of the intricacies one might face when crossing from one nation to another, but an awareness that there are many dangers is an important aspect of being prepared for these eventualities. Seeking counsel from others with the requisite experience and expertise in each impacted region and country is of vital significance because of the many missteps that may not yet have revealed themselves to the community of practitioners engaged in this work.

In reflecting back on a decade of international white-collar investigations, this piece also brings forward something else of importance—a recognition of the duality and dichotomy that is the global enforcement environment today. In many ways, the world continues to grow smaller. International enforcement bodies are working together more closely in this decade and the procedures

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103. *Id.*

104. *See* Campbell, *supra* note 101, at 188.

105. *See Deferred Prosecution Agreement Scheme Code of Practice*, L. COUNCIL OF AUSTL. (July 12, 2018), https://www.lawcouncil.asn.au/publicassets/99a9a215-b6d5-e811-93fc-005056be13b5/3470%20-%20Deferred%20Prosecution%20Agreement%20Scheme%20Code%20of%20Practice.pdf (advocating for the adoption of the DPA).

used during investigations and to resolve international white-collar cases are growing more uniform and standardized. Simultaneously, however, borders are going back up, nationalism is rising, and national independence is moving ahead of global and regional union. As we peer into the next decade, these competing forces will inevitably influence the current set of competing risks for cross-border investigations and create many new ones.

LESS IS MORE?: ACCOUNTABILITY FOR WHITE-COLLAR OFFENSES THROUGH AN ABOLITIONIST FRAMEWORK

Pedro Gerson[1]

ABSTRACT

White-collar crime is underenforced: not enough cases are brought, not many convictions are secured, and when they are, those who were convicted usually benefit from leniency not seen in other kinds of criminal wrongdoing. Calls for accountability center on strengthening the traditional tools of criminal law enforcement to reach actors that have so far eluded criminal liability. These responses, however, risk further entrenching the systems that have led the United States to mass incarceration and its many real and tangible harms. In this Article, I question whether an abolitionist framework is possible for white-collar crime. First, I argue that given the type of perpetrator and conduct involved in white-collar offenses, it seems as though white-collar offenses cannot be addressed under an abolitionist framework. I then show, however, that traditional justifications for incarceration are no more valid in the white-collar context than in other ones. Finally, I suggest how non-carceral responses may better ensure accountability for white-collar wrongdoing. My goal is not to suggest that we should embrace these responses immediately but that they are possible and worth building.

INTRODUCTION

The prison abolition movement is grounded, in part, on three related but separate principles.[2] The first is that incarceration does

1. Pedro Gerson is Associate Professor of Law at California Western. Thank you to Ben Levin, Daniel Yeager, Danielle Jefferis, as well as all the participants of the Stetson Business Law Review Symposium for their ideas and suggestions on this Article. All errors are my own.

2. At the outset, I recognize that as Dorothy Roberts wrote, "it is hard to pin down what prison abolition means." Dorothy Roberts, *Abolition Constitutionalism*, 133 HARV. L.

not adequately serve any of the purported goals of punishment, namely: deterrence, incapacitation, rehabilitation, expressivism, and retributivism.[3] Second, incarceration—and policing[4]—create tangible and significant harms both at the community and the individual levels.[5] Third, the institutions of incarceration and policing in the United States are a continuation of a history of racial oppression.[6] The criminal legal system as currently constituted, in turn, perpetuates this oppression but under the veneer of legality and legitimacy.[7] In the language of law and economics, abolitionists argue that both the benefits of incarceration are at best much smaller, and the costs of this tool of social control are far greater than what most people—from lay persons to lawmakers—assume.

As a result, abolitionists have proposed that crime control and the redressing of social harms more generally be delegated to other social institutions besides jails and prisons. Restorative and transformative justice models, for example, seek to change how we respond to crime through methods that re-envision what accountability means while repairing community fissures that are

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REV. 1, 6 (2019). This is because prison abolition is a movement that seeks to reimagine much of our social infrastructure and, as such, many people of that movement are invested in different aspects of that infrastructure. However, as further explained in Part I, for purposes of this essay, I will refer to abolitionism as the effort to eliminate prisons as tools of social control (or the "prison industrial complex"). *See Critical Resistance: Beyond the Prison Industrial Complex 1998 Conference*, CRITICAL RESISTANCE, http://criticalresistance.org/critical-resistance-beyond-the-prison-industrial-complex-1998-conference [https://perma.cc/2AF5-A2ET] (last visited Oct. 15, 2022).

3. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 20–21 (2003); Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1149 (1990) (interviewing inmates at Lorton Prison and in Washington D.C. and arguing that prison only serves for incapacitation).

4. PATRICK SHARKEY, UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE AND THE NEXT WAR ON VIOLENCE (2018) (arguing that the great crime decline was made possible by a model of aggressive policing that perpetuates urban social and economic inequality and that leaves communities vulnerable to the abuse of law enforcement).

5. *See, e.g.*, NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (The National Academies Press ed. 2014), https://www.nap.edu/read/18613/chapter/11 (showing that incarceration strains family relationships, decreases welfare and increases incidence of depression and anxiety of the children of incarcerated parents, and creates economic insecurity for entire families).

6. Incarceration, of course, has many more costs, such as: the administration of law itself, the cost of incarceration itself, the destruction of the incarcerated persons nonmonetary wealth, etc. For a fuller accounting of the costs of incarceration see Peter Salib, *Why Prison?: An Economic Critique*, 22 SSRN JOURNAL 111, 113 (2017).

7. *See generally infra* Part I.B.

caused by social harm.[8] However, abolitionists are not only, or even primarily, interested in reactive institutions. Rather, they ask us to shift criminal law and policy to preventive measures that "strengthen the social arm of the state and improve human welfare"[9] such that many of the social and environmental factors that make people vulnerable to criminality are eliminated.[10]

Catalyzed by the 2020 uprising against police violence across the United States, abolition scholarship has moved from the fringes of the legal academy to the center of much of recent criminal law scholarship. This Article engages with that scholarship by analyzing responses to white-collar crime—and the issues of enforcement—through an abolitionist lens.

As discussed *infra*, both from an *ex-ante* and *ex-post* perspective to crime, white-collar crime presents particular challenges to prison abolition frameworks and justifications. In short, it is hard to see how the preventive tools advocated by abolitionists will do much to prevent white-collar crimes, as the people engaged in that behavior are not typically the ones made vulnerable to crime by their material or social conditions. Furthermore, current alternative models of justice are not easily applicable to white-collar criminals because either the victims lack personhood or, more importantly, are not as easily visible and/or are often dispersed across various communities. Moreover, much of abolition scholarship is sustained by descriptive claims about unequal access to justice and law enforcement suffered by people facing criminal prosecution.[11] However, traditional white-collar defendants, as defined in this Article,[12] rarely confront a system that is designed against them. Rather, because of their race and wealth, they are at the top of the "penal pyramid" and thus are protected from suffering grave injustices at the hands of the criminal legal system.[13] Furthermore, precisely because these

8. *See infra* Part IV.

9. Allegra M McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015).

10. *See, e.g.*, JESSICA SIMES, PUNISHING PLACES: THE GEOGRAPHY OF MASS IMPRISONMENT (2021).

11. *See generally infra* Part I.B.

12. *See generally infra* Part I.A.

13. THE NEW CRIMINAL JUSTICE THINKING (Sharon Dolovitch and Alexandra Natapoff eds.) 72 (2017) (describing the criminal legal system operates as a "penal pyramid" where the majority of defendants at the bottom are not given the same procedural and substantive protections that the idealized version of criminal law and process envisions, which those at the top do get) [hereinafter NATAPOFF, *Penal Pyramid*].

defendants have a lot of economic and human capital, punishment in the form of incarceration may seem more morally justified and desirable.[14] This mismatch between moral blameworthiness and current severity of punishment, as well as the relative inability to prevent white-collar harm through current preventative justice policies,[15] calls into question whether white-collar criminal enforcement is compatible with abolitionism.

However, as discussed in Part III, using a carceral approach to respond to white-collar crime is not unproblematic. First, incarceration causes tremendous individual and community harm, so any argument to increase its use must show that the benefits of incarceration outweigh these costs. By analyzing white-collar crime through the lens of the "traditional" justifications of punishment, I argue that this is not the case. Moreover, as discussed in both Parts III and IV, there are abolitionist responses that may be better able to guarantee accountability than continuing to use the carceral model. These responses do not exclude a role of punishment necessarily, just the role of incarceration. I by no means intend the proposals outlined in this Article to be definitive. Rather, I hope to start a conversation about the frontiers of prison abolition and white-collar crime.

The stakes of this debate are not merely academic. As outlined in Part I B and Part III, incarceration has real, tangible harms on individuals and communities. The fundamental question is do we want to keep pursuing policies that entrench the use of imprisonment and thereby perpetuate these harms, or do we want to explore other avenues for accountability and redress. At a minimum, it means that reformers within the current criminal legal framework need to do more work of explaining why increasing the role of incarceration for white-collar offenses is justified. Meanwhile, for abolitionists, it means also answering questions and thinking about how to address crimes that are currently excluded from the abolitionist paradigm.[16]

To take abolitionism seriously is to probe it in all directions and try to understand its limitations. Abolitionism is, after all, a

14. *See generally infra* Part II.

15. *See generally infra* Part III.

16. In so far as there is a paradigm, most abolitionist literature is focused on harms caused by people in marginalized communities. This makes sense both from a policy as well as a theoretical perspective. After all, most of the resources in our carceral system are devoted to policing and incarcerating individuals from those communities.

process of re-education and re-questioning.[17] Abolitionists like to start from the premise that they do not have all the answers.[18] I do not, either. This Article is written in that spirit. It is a quest to find and probe the limits in the hopes of articulating priorities and answers to questions of abolitionism that may come from reform-oriented and politically liberal factions.

This Article is organized as follows: the first section defines white-collar crime and explains the broad contours of prison abolition. Part II outlines the particular challenges of thinking about white-collar crime through an abolitionist lens. Part III then compares the current approach to an abolitionist approach to white-collar crime. This illustrates that abolitionist responses can indeed achieve goals of both deterrence and retribution. Finally, Part IV argues that accountability can be achieved through an abolitionist framework and practice and may do so better than current carceral models.

I. TWO DEFINITIONAL NOTES: WHITE-COLLAR CRIME AND PRISON ABOLITION

A. White-Collar Crime

As can be gleaned from the other essays in this Symposium, there is great definitional indeterminacy around the term white-collar crime. For this reason, it is important to start with what I mean by white-collar crime and why I am using this definition. The National White Collar Crime Center defined white-collar crime as: "illegal or unethical acts that violate fiduciary responsibility of public trust, committed by an individual or organization,[19] usually during the course of legitimate occupational activity, by persons of high or respectable social status for personal or organizational gain."[20] Notably this definition is not only concerned with the nature of the criminal act, but also the kind of actor committing it.

17. *See* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (ABOLITIONIST PAPERS) (2021).

18. *Id.*

19. The fact that an organization can be considered the perpetrator of white-collar crime makes the idea of criminal punishment in general even more complicated.

20. Gerald Cliff & Christian Desilets, *White Collar Crime: What It Is and Where It's Going*, 28 NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 481, 487 (2014) (citing Gary R. Gordon, The Impact of Technology-Based Crime on Definitions of White Collar/Economic Crime: Breaking Out of the White Collar Paradigm, UTICA COLLEGE OF SYRACUSE UNIVERSITY 143, 144 (1996).

This emphasis on what kind of actor is committing it is unusual in that no other category of criminal conduct is defined by the socioeconomic status or educational level of the perpetrator. However, it harkens back to sociologist Edwin Sutherland's definition of white-collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation."[21]

There are two things to note about defining white-collar crimes by the type of conduct and the kind of perpetrator.[22] First, the kind of act that we consider to be white-collar crime is expanding and therefore a list of crimes that count as white-collar crime will be under-inclusive. As Gerald Cliff and Christian Desilets have shown, "computers and the Internet have opened up an entirely new realm of possibilities for the commission of white collar crime."[23] Therefore, we can expect that new ways of achieving the social harms of financial, property and/or identity theft and various forms of losses of privacy will continue to grow. Second, the individual who commits the crime is important. The definition that I use is more expansive than Sutherland's because white-collar crime is now not only perpetrated by people of high socioeconomic capital but also people of high human capital.[24] What both of these groups share is the ability to satisfy their (and their family's) material wants and necessities, and ideally derive meaning[25] from legal enterprises. In short, a person who can

21. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983). Sutherland is the person who coined the term and for him, as a sociologist, defining white-collar crime with regards to the social status of the perpetrator made sense as a way to understand why these people committed crime when they were not prone to any criminogenic factors.

22. One objection to only focusing on the type of actor is that how would you treat actors that become very wealthy through crime and could thus continue growing their wealth through legitimate means instead. While this is true, it is fundamentally a different problem. The kind of actor that interests me is the one that did not need crime to gain economic, human, and cultural capital. Actors who use crime to gain any of these forms of capital may find it hard to move into legitimacy for a number of reasons.

23. Cliff & Desilets, *supra* at 20, at 504.

24. Human capital refers to the abilities and qualities of people that make them productive. It is usually tied to education, family, and health. *See* GARY S. BECKER, HUMAN CAPITAL 9 (1975).

25. An explanation may be that people engage in this criminal conduct because they derive more than pecuniary value from this conduct.

launder money[26] or develop a phishing[27] scheme can use those skills for legitimate business activities.

An important caveat to note at the outset is that this definition of white-collar crime is significantly narrower than the one used by law enforcement, which focuses on the type of offense and centers on crimes of "deceit, concealment or violation of trust" without the use of force.[28] Unfortunately, the data we have on white-collar criminal enforcement (and crime more generally[29]) is rather sparse. However, an FBI report from 2000 showed that the median property lost in "white-collar crime incidents" was $210.[30] The same report also showed that convenience stores suffered 300% more economic crimes than banks; while this may be attributable to the fact that there are many more convenience stores with less security than banks, crimes at convenience stores do not fit in with cultural constructions of what white-collar crime is. As Ben Levin wrote about this study: "[T]he scale of the incidents and what they included (low-level property crimes, check fraud, etc.) fails to jibe with the dominant cultural (and legal) imagination of 'white-collar crime.'"[31]

In focusing on high wealth, status, and/or human-capital defendants this Article is explicitly addressing the distributive concerns of greater criminalization.[32] In essence, this Article

26. The organization Financial Action Task Force defines money laundering as: "the processing of these criminal proceeds to disguise their illegal origin." *See Money Laundering*, FINANCIAL ACTION TASK FORCE (FATF), https://www.fatf-gafi.org/faq/moneylaundering/ (last visited Oct. 16, 2022).

27. Merriam-Webster defines phishing as: "the practice of tricking Internet users (as through the use of deceptive email messages or websites) into revealing personal or confidential information which can then be used illicitly." *Phishing*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/phishing (last visited Oct. 16, 2022).

28. White-collar crime is defined by the Department of Justice as "those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. These acts are committed by individuals and organizations to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage." *See* U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, *White Collar Crime: A Report to the Public* 3 (1989).

29. Matthew Hutson, *The Trouble with Crime Statistics*, THE NEW YORKER (Jan. 9, 2020), https://www.newyorker.com/culture/annals-of-inquiry/the-trouble-with-crime-statistics.

30. Cynthia Barnett, *The Measurement of White-Collar Crime Using Uniform Crime Reporting (UCR) Data*, U.S. DEP'T OF JUST. (2000), https://ucr.fbi.gov/nibrs/nibrs_wcc.pdf.

31. Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV.1429, 1483–84 (2021).

32. *Id.* at 1481–88 (arguing that the criminalization of wage theft and other white-collar crime can negatively impact marginalized communities more than wealthy ones because this is often the trajectory of even "progressive" criminalization but also because

imagines the type of law enforcement that scholars such as Jennifer Taub and politicians like Elizabeth Warren have sought,[33] where actors are not "too big to jail."[34] The goal of focusing on this type of idealized white-collar crime enforcement is not to side with it, but to contrast one ideal with another: abolition. This exercise will therefore put two possible futures against each other.

B. Prison Abolition

Because there is no unified theory of prison abolition, it is impossible to properly discuss all aspects of abolition in this space, and therefore what follows is necessarily a simplified summary. The "abolition movement is complex and multi-faceted, resists theoretical uniformity, and is irreducible to a single reproach or demand."[35] Some writers focus on abolition as a means of achieving racial justice,[36] others as a tool to construct a society that does not rely on prisons as institutions of social control,[37] and others see closing prisons as part of a larger project to end racial capitalism.[38] Moreover, many write about abolition in the context of dismantling other institutions and systems beyond jails.[39] Of course, these focus points are not necessarily in tension and can in fact be

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the breadth of what counts as white-collar crime permits law enforcement to target easier to get low-level offenders).

33. *See* S. 1010, 116th Cong. (2020) (expanding corporate liability but only to officers with decision-making capacity in corporations that generate over $1 billion in revenue); JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME 218–23 (2020) (arguing for more traditional criminal law tools such as greater power for prosecutors, more transparency, and more protections and incentives for whistleblowers to curb white-collar crime).

34. BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (showing the great power asymmetries between prosecutors and corporations, in favor of the latter).

35. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 127 (2019).

36. *See* ANGELA DAVIS, ABOLITION DEMOCRACY (2005) (drawing a connection between structural racism and the prison industrial context).

37. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 3–4 (2007) (making the case that the United States has ceded governance to criminal law and policy).

38. *See* DAVIS, *supra* note 36; RUTH WILSON GILMORE & GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

39. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1617 (2019) ("Abolitionist organizers understand their work to be related to . . . historical struggles against . . . imperialism and its legacies in more recent practices of racial capitalism, and against immigration enforcement and border fortification.").

complimentary.[40] What unites all different visions of abolition is a "vision of a world without prisons."[41] However, abolition is not only negative. Paraphrasing abolitionist organizer and thinker Mariame Kaba: abolition is about both ending the prison industrial complex and about building new ways and institutions to relate to one another.[42] Therefore, in this Article I explicitly interpret abolitionism as eliminating the use of carceral institutions and of building new ways of either preventing social harm or holding people accountable for committing social harms.

Much of abolitionist scholarship is grounded in theoretical, sociological, and/or historical analyses of prisons and the societies that construct and enable them.[43] These viewpoints give abolitionism much of its intellectual and moral strength and enable organizers to connect abolitionist goals with community histories and futures. However, many of these analyses and interpretations are also limiting in that they center the movement to a particular geographical place.[44] Of course, understanding *mass* incarceration requires an understanding of the history of the United States. However, viewing punitive[45] prisons as

40. *See, e.g.*, ABOLISHING CARCERAL SOCIETY 4 (Abolition Collective ed., 2018) (a manifesto for abolishing "all systems of oppression" drawing inspiration from those that have sought that fight).

41. *See* Roberts, *supra* note 2, at 44.

42. *See* KABA, *supra* note 17.

43. Abolitionist writings will point to works of history and sociology to substantiate their claims such as: ELIZABETH KAI HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2016) (linking mass incarceration to public policies starting in the 1960's expanded both the definition and the targets of criminalization); MICHAEL H. TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA at x–xi (2011) (attributing mass incarceration to a lack of white empathy and the desire for the white majority to "maintain social, economic, and political dominance over blacks"); CALEB SMITH, THE PRISON AND THE AMERICAN IMAGINATION 23 (2009) (discussing how the prison is "a central institution in the building of the modern order" that both reflects and is reflected in the broader political and social cultures of the United States); JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 7 (2017).

44. This is especially true of abolitionist theory that is grounded in the history of slavery, its abolition, and the enactment of Jim Crow. *See, e.g.*, Kim Gilmore, *Slavery and Prison — Understanding the Connections*, 27 SOC. JUST. NO. 3 195, 195–96 (2000) (linking, but also differentiating, the prison industrial complex to chattel slavery); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 1–2 (2010) (showing how mass incarceration is a tool of social control which is born out of and replicates the racial inequities of the Jim Crow era).

45. Institutions that are devoted to rehabilitation like in Scandinavia are excluded from this definition. *See, e.g.*, Emma De Carvalho, *What Norway Can Teach Us About Prison Abolition*, THE JFA HUM. RTS. J. (June 03, 2021), https://www.thejfa.com/read/what-norway-can-teach-us-about-prison-abolition. However, those penal institutions are the exception, not the norm.

fundamentally destructive institutions that are ill-suited to respond to social harms is a universal claim. For this reason, I will be focused mainly on "universal" justifications for eliminating prisons. These are: first, incarceration is unable to deter, incapacitate, or rehabilitate individuals.[46] Second, the modern prison is a place that causes tremendous social harm,[47] shortens lifespans[48], destroys communities[49] and families[50], and greatly reduces both individual and social wealth.[51] Finally, incarceration sucks up resources that could be used to provide care or services for individuals and communities that would actually reduce social harm.[52]

I focus on this perhaps narrower justification of abolition because it forces us to contend with both the real and opportunity costs of incarceration that I just outlined while also expanding the

46. *See infra* Part III.

47. *See, e.g.*, Blecker, *supra* note 3, at 1187–92 (depicting the daily violence within one prison and presenting testimonies that in fact some people worry about imprisonment mainly due to safety concerns regarding corrections officers). *See also* Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM J. & BEHAV. 588, 595 (2007) (finding that that physical assault against a male is roughly 18 times more likely in prison than in the general population); *No Escape: Male Rape in U.S. Prisons*, HUM. RTS. WATCH, (Apr. 01, 2001) https://www.hrw.org/report/2001/04/01/no-escape-male-rape-us-prisons (finding that between 10 and 30% of incarcerated men in the United States had been sexually assaulted).

48. Christopher Wildeman, *Incarceration and Population Health in Wealthy Democracies: Incarceration and Population Health*, 54 CRIMINOLOGY 360, 373–74 (2016) (each year in prison reduces an individual's life expectancy by roughly two years).

49. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004) (summarizing research showing the community effects of mass incarceration to conclude that "mass imprisonment damages social networks, distorts social norms, and destroys social citizenship"). There have been many more recent studies confirming the studies Roberts used in her article. *See, e.g.*, Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138 (2015) (showing people who live in neighborhoods with a higher proportion of incarcerated people have a higher probability of having a depressive or generalized anxiety disorder); *The Intergenerational Impact of Carceral Punishment*, LPE PROJECT (Sept. 22, 2020), https://lpeproject.org/blog/the-intergenerational-impact-of-carceral-punishment/ (interviewing a former incarcerated man who describes the meaning and scale of impact that mass incarceration had on him and his community).

50. Ram Sundaresh et al., *Exposure to Family Member Incarceration and Adult Well-being in the United States*, 4 JAMA NETWORK OPEN (2021) (explaining that people with a family member in prison have 2.6 fewer years of life expectancy); Christopher Wildeman & Hedwig Lee, *Women's Health in the Era of Mass Incarceration*, 47 ANN. REV. OF SOC. 543–65 (2021) (summarizing literature on the effects of incarceration on women's health and its limitations).

51. *See* Salib, *supra* note 6, at 125 (arguing that prisons should be closed because they impose massive social costs).

52. *See, e.g.*, KABA, *supra* note 17; McLeod, *supra* note 39.

debate beyond the borders of the United States. This means that people interested in more criminal enforcement must articulate why increasing social harm through incarceration is necessary to eliminate or reduce white-collar crime. It very well may be that it is justified, but to know we must openly confront the social harms inflicted by incarceration.[53]

If descriptive claims about what abolitionism means are varied, then normative claims about what should be done are even more so. With that in mind, in this Article I will pull from a range of abolitionist scholarship to articulate visions of what abolitionism could mean in the context of white-collar crime. My focus, as mentioned above, is narrow: ending the use of prisons to address white-collar crime. Importantly, I do not meaningfully engage[54] with the idea that eliminating prisons involves overhauling capitalism entirely and replacing it with a communist or socialist economic system.[55] Under this view, perhaps, the issue of white-collar crime may be taken care of by this economic transformation.[56] However, it is not clear that a different economic paradigm would necessarily end white-collar harm, therefore this Article assumes that prison abolitionism can occur without transforming the current economic paradigm in its entirety.

53. One potential response is to decrease the social harm caused by prison. It has been shown, for example, that prisons in Norway do not lead to recidivism. *See infra* note 169. If the social harm of prison were lowered, then maybe it would be a more justifiable tool of social control. This would not go in line with more forceful critiques of prison as a tool. However, perhaps not so much. If an alternative prison were to *fully* internalize the social and personal costs of incarceration and respond to them to truly minimize or eliminate them, then that is a project that I believe is close to what many abolitionists seek.

54. Admittedly, fully engaging with a Marxist critique of white-collar crime is a much larger project.

55. *See, e.g.*, GILMORE & GULAG, *supra* note 38.

56. Part of the cause of white-collar crime after-all is that extreme wealth concentration is criminogenic. Following this logic, if we were to live in a society with equally distributed welfare and material conditions then the incidence of social harms of the type caused by white-collar crime would not exist. This is partly the argument in Frank Pearce's classic *Crimes of the Powerful: Marxism, Crime and Deviance* where he argued that corporate malfeasance was inseparable from capitalism and, in fact, corporations saw criminal conduct as one more tool for wealth accumulation. As such, criminal conduct becomes an integral part of capitalistic endeavor, not an aberration of it. *See* FRANK PEARCE, CRIMES OF THE POWERFUL: MARXISM, CRIME AND DEVIANCE (1976).

II. THE CHALLENGE OF WHITE-COLLAR CRIME & ABOLITION

White-collar crime is underenforced.[57] We do not know exactly how much,[58] but we do know that there is a large amount of corporate wrongdoing for which no one is held accountable. This matters because "[b]y failing to maintain an atmosphere of legality, law enforcement turns its back on victim classes twice: first, by denying them material protective resources, and second, by depriving them of a robust, responsive legal system."[59] In terms of white-collar offenses, the damage is also in the signal that wealthy offenders are protected from the criminal legal system in a way marginalized groups and persons are not.[60]

The underenforcement of white-collar offenses is attributed to a number of factors: fear,[61] cozy relationships between prosecutors and corporations (and careerism of the former),[62] an asymmetry of resources between private defendants and public prosecutors,[63] no protection or incentives for whistleblowers,[64] ineffective fines,[65] a lack of corporate transparency,[66] and the inexistence of centralized

57. *See* WARREN, *supra* note 33; JOHN COFFEE, CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020); GARRETT, *supra* note 34.

58. Joe McGrath & Deirdre Healy, *Theorizing the Drop in White-Collar Crime Prosecutions: An Ecological Model*, 23 PUNISHMENT & SOC'Y 164, 165 (2021) (suggesting that the drop in prosecutions was caused in part by the DOJ focusing on fewer but more serious cases).

59. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1718 (2006).

60. *But see* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001) (attributing white-collar underenforcement to other means of accountability, not to an absence thereof).

61. JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2018) (arguing that prosecutors lack the courage to take on tough cases).

62. *See, e.g.*, The Revolving Door Project, www.therevolvingdoorproject.org (last visited Dec. 29, 2022) ("scrutiniz[ing] executive branch appointees to ensure they use their office to serve the broad public interest, rather than to entrench corporate power or seek personal advancement.").

63. COFFEE, *supra* note 57 (showing the vast amount of financial and manpower resources needed to carry out just one investigation to suggest that the DOJ simply cannot compete with private actors); GARRETT, *supra* note 34 (arguing that some corporations are too valuable to the economy for them to be held accountable).

64. COFFEE, *supra* note 57; GARRETT, *supra* note 34; TAUB, *supra* note 33 (arguing for more rewards for whistleblowers, either through direct incentives or through expanding their ability to bring *qui tam* complaints, and also more protections for them).

65. COFFEE, *supra* note 57 (showing that fines levied have no impact in companies stock prices); TAUB *supra* note 33 (showing that many fines are not even collected).

66. *But see* Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2010) (arguing that sunshine policies have largely been unsuccessful in ensuring greater accountability).

data about white-collar criminal enforcement.[67]All of these factors matter and the particular policy prescriptions will depend on which one policymakers prioritize. However, at bottom, all these diagnoses lead to prescriptions that hope to increase the use of carceral institutions to punish corporate wrongdoers. As Jennifer Taub put it "[t]he only way to stop their behavior is through sure and painful enforcement. Take their money, take their liberty, set an example."[68]

Recognizing that the policy proposals imply the expansion of the carceral state, should the abolitionist demand for a world without jails exclude white-collar crime? There are several reasons to think so.

First, traditional white-collar defendants rarely confront a system that is designed against them.[69] Quite the contrary, these defenders are usually wealthy, white, and well-represented, and so they face a system on—at a minimum—a level playing field.[70] If abolitionism is justified by the injustices suffered by people at the base of the "penal pyramid,"[71] then its claims are weakened for those confronting the system from a position of privilege.[72]

Second, abolitionist organizers in the United States have tied their movement to the historical struggle against slavery and

67. *See* TAUB, *supra* note 33 (articulating the need for centralized data to track white-collar offenses to better understand enforcement and improve it).

68. *Id.* at 219.

69. NATAPOFF, *Penal Pyramid*, *supra* note 13 (describing the criminal legal system as a pyramid in which the majority of defendants at the base—who are generally poor and marginalized people of color—are not afforded substantive and procedural rights and protections while confronting the criminal process, while those at the top—the wealthy, white, and well-represented—get the highest protections that the law allows). Pedro Gerson, *Crooked Politicians: Elusive Criminal Punishments and Paths to Accountability*, 54 LOY. L.A. L. REV. 1013 (2021) (showing how the Supreme Court enforces a maximalist view of criminal law protections for powerful defendants).

70. Some may use this to argue that the way in which white-collar crime is prosecuted can be interpreted as something closer to abolition than how most other forms of crime are enforced. After all, white-collar crime defendants are often given many alternatives to jail, and severe punishment is often eluded. However, this is a fundamental misunderstanding of abolition. The movement is about a different conception of accountability and justice, not about impunity, which is how much of white-collar crime is treated. *See* McLeod, *supra* note 39. "Justice in abolitionist terms involves at once exposing the violence, hypocrisy, and dissembling entrenched in existing legal practices, while attempting to achieve peace, make amends, and distribute resources more equitably." *Id.* at 1615.

71. *See, e.g.*, Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156–1239 (2015); Roberts, *supra* note 2.

72. It is this symmetry that may explain why the Department of Justice has embraced deferred prosecution agreements over criminal liability. These "allow the company to avoid a conviction but which impose fines, aim to reshape corporate governance, and bring independent monitors into the boardroom." GARRETT, *supra* note 34, at 6.

racial oppression.[73] As Dorothy Roberts put it: "The pillars of the U.S. criminal punishment system—police, prisons, and capital punishment—all have roots in racialized chattel slavery."[74] This is a positive claim that I do not contest; however, what happens to the abolitionist demands when the majority of offenders are white and wealthy?

Third, both criminal law and abolitionism are expressions of morality. They differ in terms of what it means to deal with the problems of social harm, but they both translate moral intuitions into law and policy. Morally, white-collar criminals are indefensible or inexcusable because their wealth, education, and/or social capital make their actions repugnant. If we agree with this, should we not punish them?

Finally, white-collar offenders are so far outside abolitionists preoccupations that to center the discussion of abolitionism on white-collar crime seems misconstrued, or even offensive. Abolitionism should first and foremost be a movement of liberation. It should not be coopted to insulate corporate wrongdoers from accountability. Or, at a minimum, the abolitionist demands should not apply to corporate wrongdoing until they apply to those at the base of the moral pyramid.

On the other hand, by pushing for greater criminal enforcement for white-collar offenses there is a risk that we entrench the carceral state. In other words, to uncritically embrace most anti-white-collar crime policy prescriptions, risks propping up even more the use of incarceration as a response for social harm. If abolitionism can be justified for crimes of violence, then should it not also extend to corporate crimes, regardless of the characteristics of the defendant?

Moreover, as mentioned *supra*, prison is a place of enormous social harm.[75] Regardless of our moral intuitions about the wrongfulness of privileged actors using their knowledge and status to commit crimes, is inflicting more social harm the best response we have? In the next section, I try to answer these questions. In doing this analysis, I point out the limitations of abolitionist responses but emphasize that perhaps they will be better in

73. Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1587 (2019).

74. Roberts, *supra* note 2, at 20.

75. *See supra* Part I.B.

preventing white-collar offenses and prompting accountability and justice than our current carceral model.

III. CARCERAL VS. ABOLITIONIST RESPONSES TO WHITE-COLLAR CRIME

The goal of this section is to question the role of incarceration as a means of controlling white-collar crime and contrast it with abolitionist responses that may better attain criminal law's own stated goals.[76] Because my focus is on incarceration, I focus on white-collar crime that can be attributed to individuals—not corporate criminal wrongdoing. Although I mention other theories of punishment, I focus mainly on deterrence and retribution because both in theory[77] and in policy,[78] carceral responses to white-collar crime are most justified by appealing to these values. Because the American criminal legal system has abandoned rehabilitation, I will not discuss it.[79] In each subsection I argue

76. I am referring here to the traditional justifications of punishment articulated in American and English jurisprudence: retribution, deterrence, incapacitation, rehabilitation.

77. Levin, *supra* note 31 (showing that enhanced wage theft enforcement is better justified by retributivism than by any other deterrence, incapacitation, rehabilitation, or expressivism).

78. *See, e.g.*, Taub, *supra* note 33 *(*advocating for more enforcement to both "make it hurt" (retributivism) and "send a message" (deterrence)).

79. As a penological theory, rehabilitation has been questioned for a long time. So much so that over thirty years ago the Supreme Court found rehabilitation to be "an unattainable goal for most cases." *Mistreta v. United States*, 488 US 361 (1989). The reality of American incarceration is that prison is not structured to rehabilitate offenders. From the strict scheduling to environmental factors such as the use of uniforms, and abusive disciplining practices such as solitary confinement, incarceration does not enable people to lead better lives after release, and in fact makes it even harder for them to. *See* Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands*, 27 FED. SENT'G REP. 33–45 (2014) (comparing prison practices in Europe and in the United States and showing that American prisons are not designed to rehabilitate; *see also* LEONARDO ANTENANGELI & MATTHEW R. DUROSE, DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 24 STATES IN 2008: A 10-YEAR FOLLOW-UP PERIOD (2008–2018) (2021) (showing that the Bureau of Justice Statistics found that in a sample looking at 24 states, 82% of prisoners released in 2008 were rearrested within 10 years, and 66% were re-arrested within 3 years. If prison was rehabilitative, we would see much lower levels of recidivism). Moreover, addressing white-collar crime specifically, it is hard to see how prison could be rehabilitative. One argument may be that the simple experience of prison may make these offenders realize that crime does not pay. However, this is more of a specific deterrence argument than a rehabilitative one. Even assuming that programming in jail serves rehabilitative purposes, precisely what kind of program is there or would there need to be in order to rehabilitate white-collar offenders? Moreover, not even the prosecution of these crimes is justified in terms of rehabilitation, precisely because the offenders are of high human capital. It is not that by punishing these offenders they will

that there are abolitionist means of achieving each objective of punishment. However, I concede that these non-carceral responses may not be enough to properly respond to white-collar crime, especially from a retributivist perspective. This signals, however, that incarceration of white-collar crime is more a reflection of a *moral* position than a functionalist or pragmatic one. This forces both reformers and supporters of the status quo to frame their arguments in terms of normative commitments about punishment. In the subsequent section I argue against retributivism and for accountability because, as Martha Nussbaum has suggested, retributivism depends on a type of anger that hinders emancipation because it focuses societal efforts on pain rather than constructive accountability.[80]

A. Deterrence

Deterrence is a both a formally[81] and intuitively attractive model for criminal policy. Make the cost of crime high enough, the logic goes, and crime will not occur.[82] As former prosecutor Mary Jo White put it "[t]here's no bigger deterrent than a jail sentence."[83] However, there is not very good empirical evidence of how much deterrence imprisonment accomplishes.[84] Rather, the evidence shows that certainty and celerity of interdiction, not the severity of punishment, has a greater impact on crime reduction.[85]

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become better people. In short, imprisoning white-collar crime offenders cannot serve rehabilitative purposes.

80. *See* Martha Nussbaum, *The Weakness of the Furies*, BOS. REV. (Feb. 19, 2020), https://bostonreview.net/articles/martha-c-nussbaum-tk/; MARTHA C. NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016) (Nussbaum suggests that there is a distinction between transition anger and retributive anger. The former is anger that pushes us to look forward to demand change, the latter is "the wish for payback for commensurate pain to befall the aggressor." Transition anger, for Nussbaum, is useful because it is a catalyst for protest and social change.).

81. One can have issues with Gary Becker's construct of criminal behavior, the cogency and strength of the model as a formal matter, however, is not one of them.

82. Gary Becker, *Crime and Punishment: An Economic Approach*, J. OF POL. ECON. (Mar. – Apr. 1968). This model has been updated to incorporate opportunity cost Ehrlich 1973, time-allocation Burdett et al. 2004.

83. Mary Jo White, *What I've Learned About White-Collar Crime*, HARV. BUS. REV., (July–Aug. 2019), https://hbr.org/2019/07/what-ive-learned-about-white-collar-crime.

84. Whatever evidence there has been found in favor of the effect of incarceration on deterrence, it was mostly in general regression analyses that failed to properly identify and isolate causality. *See* Steven D. Levitt & Thomas J. Miles, *Economic Contributions to the Understanding of Crime*, 2 ANN. REV. L. SOC. SCI. 147, 153 (2006).

85. Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. OF ECON. LITERATURE 5–48 (2017); *see also* Daniel S. Nagin, *Deterrence in the*

Psychologists and criminologists critical of deterrence as a justification for incarceration have argued that people's behavior does not comport with the model's economistic assumptions. In other words, people are not rational actors when they decide to commit crime.[86] Behavioral economists have arrived at similar conclusions when suggesting that bounded rationality, bounded willpower, and behavioral biases make people discount the cost of severe punishment or ignore it entirely.[87] Moreover, given that people do not know the law, much less the consequences for criminal acts, they have no basis to properly evaluate the relative cost of committing a crime.[88]

While these limitations may be true for general criminal behavior, it is possible that white-collar crime is much more susceptible to deterrence because the perpetrators do carry out cost-benefit analyses when deciding whether to commit crime.[89] The problem at present is that the benefit is too great and the cost is too little because the likelihood of prosecution is small—and of punishment even smaller.[90] To compensate for this, the theory goes, it is important to make the punishment more costly through incarceration.

Twenty-First Century, 42 CRIME AND JUST. 199–263 (2013) (showing mixed evidence of the effect of deterrence but finding more support that crime is more responsive to certainty than to severity of punishment).

86. *See* Glenn D. Walters, *The Decision to Commit Crime: Rational or Nonrational?*, 16 CRIMINOLOGY, CRIM. JUST. L., & SOC. 1–18, (2015) (arguing that crime responds to both rational and nonrational forces); *see also*, John S. Carroll, *A psychological approach to deterrence: The evaluation of crime opportunities*, 36 J. OF PERSONALITY AND SOC. PSYCH. 1512–20 (1978) (presenting evidence that people who commit crimes weigh benefits more heavily benefits than costs and arguing wrongdoing decisions operate at most with limited rationality when they act).

87. *See, e.g.*, Richard H McAdams & Thomas S. Ulen, *Behavioral Criminal Law and Economics* (John M. Olin Program in L. and Econ. Working Paper No. 440 (2008)) (describing how prospect theory, cognitive biases, and other motivations besides selfishness can alter traditional deterrence theory); Blecker*, supra* note 3, at 1176 ("conscious calculation is not so much of punishment as of pulling it off and escaping.").

88. Benjamin van Rooij, *Do People Know the Law? Empirical Evidence about Legal Knowledge and Its Implications for Compliance*, THE CAMBRIDGE HANDBOOK OF COMPLIANCE 467–88 (2021) (concluding that neither laypersons nor specialists know the law, and reporting studies showing that people often replace what they believe the law to be with their own moral intuitions); *see also* John M. Darley, Kevin M. Carlsmith & Paul H. Robinson, *The Ex Ante Function of the Criminal Law*, 35 L. & SOC. REV. 165, 175 (2001) (studying four different states in the United States and showing that "people do not seem to be aware of the laws of their state.").

89. Benjamin Levin, *Mens Rea Reform and its Discontents*, 109 J. OF CRIM. L. & CRIMINOLOGY 491 (2019).

90. *See* GARRETT, *supra* note 34; *see also* TAUB, *supra* note 33.

However, a large problem with using incarceration as a deterrent is that it may in fact decrease the certainty and celerity of punishment, which can reduce the deterrence effect of enforcement.[91] If white collar criminal actors are rational, why should they be more influenced by the threat of longer incarceration sentences rather than less punitive but potentially more certain and immediate interdiction? In other words, incarceration need not be used in order to achieve deterrence. As articulated in Part II, prosecuting white-collar crime is notoriously complicated. White-collar malfeasance responds to regulation and is planned and executed in such a way as to avoid detection and minimize liability. Meanwhile, criminal law's procedural protections are high and enforced to their maximum by white-collar crime defendants.[92] We can therefore expect these prosecutions to be lengthy and for many to fail.[93] In fact, we have evidence that the famous prosecution drop for white-collar crime[94] was caused by focusing resources on larger cases—which we can safely presume are harder to win—and "bottlenecks in the criminal justice process."[95] If incarceration reduces the probability of punishment then it is not an effective deterrent.

These arguments are not theoretical. Almost 20 years ago, Sally Simpson presented compelling evidence that neither corporations nor their officers have been deterred by the criminalization of corporate governance.[96] This is because, first, she found no evidence that expanding criminal liability leads to a reduction in wrongdoing. Second, she points to evidence that "challenges the rational-choice foundation upon which corporate

91. As noted above, celerity and certainty of punishment are more important for deterrence. It can also be counterproductive generally because, as the National Institute of Justice wrote, "persons who are incarcerated learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment." NAT'L INST. OF JUST., *Five Things About Deterrence* (2016), https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

92. NATAPOFF, *Penal Pyramid*, *supra* note 13.

93. This is a descriptive claim. Unfortunately, we do not have good data on the success of these prosecutions and we cannot rely on government statistics as they report all cases they categorize as white-collar, not only the ones of interest here.

94. WHITE-COLLAR CRIME PROSECUTIONS FOR 2021 CONTINUE LONG TERM DECLINE, TRAC REPORTS, https://trac.syr.edu/tracreports/crim/655/ (showing a drop by about 50% in the number of white-collar crime prosecutions over the last decade).

95. Joe McGrath & Deirdre Healy, *Theorizing the Drop in White-Collar Crime Prosecutions: An Ecological Model*, 23 PUNISHMENT & SOC. 164, 164 (2021).

96. SALLY SIMPSON, CORPORATE CRIME, LAW, AND SOCIAL CONTROL (2002).

deterrence rests."[97] A more recent meta-analysis found that the evidence that punitive sanctions, including the likelihood of prosecution, reduced corporate crime was mixed and the effects when they were positive (meaning crime was deterred) were small.[98] Finally, interviews with corporate wrongdoers have shown that they are not as forward-looking or as rational as utilitarians believe.[99]

By refocusing our efforts away from incarceration, we can imagine a system with a lot more monitoring and regulatory oversight that quickly identifies instances of wrongdoing and imposes smaller penalties achieving greater deterrence. These smaller penalties would be the equivalent of quick and certain interdiction and could potentially deter more bad actors from crime. A recent study, for example, found that jurisdictions where the FBI shifted attention from white-collar crime to counterterrorism in the wake of 9/11 saw an increase in wire-fraud, illegal insider-trading, and fraud with financial institutions.[100] Importantly, this was not because changes in FBI oversight led to fewer convictions, but the mere fact of oversight was acting as a deterrent.[101] Other studies have shown more intense SEC

97. *Id.* at 6.

98. Sally S. Simpson et al., *Corporate Crime Deterrence: A Systematic Review*, 10 CAMPBELL SYSTEMATIC REVS. 1, 8 (2014).

99. EUGENE SOLTES, WHY THEY DO IT: INSIDE THE MIND OF THE WHITE-COLLAR CRIMINAL 99 (2016) (one man convicted of insider training told Soltes, "I never once thought about the costs versus the rewards," and another one said, "I just never really thought about the consequences . . . because I didn't think I was doing anything blatantly wrong.").

100. Trung Nguyen, *The Effectiveness of White-Collar Crime Enforcement: Evidence from the War on Terror*, 59 J. OF ACCT. RSCH. 5, 8-9 (2021) (using size of Muslim populations to identify jurisdictions where the FBI shifted its focus from white-collar crime to antiterrorism and finding that "A one-standard-deviation increase in Muslim population density is associated with a 40 percent greater increase in the rate of wire fraud . . . [and] a 4.2 percent greater increase in the volume of opportunistic trades.").

101. This finding is consistent with research showing that police presence acts as a deterrent generally. *See, e.g.*, Jonathan Klick & Alexander Tabarrok, *Using Terror Alert Levels to Estimate the Effect of Police on Crime*, 48 THE J. OF L. AND ECON. 267–79 (2005) (reporting a 15% drop in crime when police is increased by 50%); Steven D. Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270–90 (1997) (showing that greater police presence in election years leads to lower crime rates); Rafael Di Tella & Ernesto Schargrodsky, *Do Police Reduce Crime? Estimates Using the Allocation of Police Forces After a Terrorist Attack*, 94 AM. ECON. REV. 115–33 (2004) (finding that increase law enforcement in Argentina lead to less car theft); Philip J. Cook & John MacDonald, *Public Safety through Private Action: an Economic Assessment of BIDS**, 121 ECON. J. 445–62 (2011) (concluding that more police presence in Los Angeles neighborhoods led to a reduction in crime). For a general review of the literature

oversight leads to less wrongdoing overall[102] and even that greater social media presence from regulators works as an incentive against malfeasance or incompetence.[103]

An objection to this may be that oversight only works if there is punishment at the other end. However, as addressed in the next subsection, a lack of incarceration does not mean a lack of punishment. Accountability and consequences need not mean jail. And, as just mentioned, the severity of punishment seems to have no added deterrence effect. Therefore, greater oversight with some punishment at the end can be effective in reducing white-collar crime.

Another objection may be that oversight is just a different word for surveillance, a measure that abolitionists reject because it is another way to repress entire communities. This repression has a negative impact on the community's social fabric and thus erodes the very connections that create community.[104] And so, while surveillance can bring about temporary peace, it can also create the conditions for even greater levels of violence in the future.[105]

However, there are reasons to think that concerns over mass monitoring do not apply to white-collar offenders. White-collar crime does not happen *within* a community. Quite the contrary, white-collar crime is multi-jurisdictional, with social harms that are often invisible or very diffuse.[106] To the extent that we can talk

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see Aaron Chalfin & Justin McCrary, *The Effect of Police on Crime: New Evidence from U.S. Cities, 1960-2010*, NAT'L BUREAU OF ECON. RSCH. (2013).

102. Terrence Blackburne, *Regulatory Oversight and Financial Reporting Incentives: Evidence from SEC Budget Allocations*, PUBLICLY ACCESSIBLE PENN DISSERTATIONS (2014), https://repository.upenn.edu/edissertations/1209 (when SEC oversight is more intense, managers report lower discretionary accruals, managers are less likely to issue financial reports that will be subsequently restated, and firms' bid-ask spreads decrease. Overall, the results suggest that SEC oversight plays an important role in shaping managers' reporting and disclosure incentives).

103. Jinjie Lin, *Regulating via Social Media: Deterrence Effects of the SEC's Use of Twitter* (Nov. 1, 2021) (Ph.D. dissertation, Yale University) (SSRN) (showing that SEC regulators being active on Twitter reduced opportunistic trades, complaints against investment advisors and misreporting).

104. *See, e.g.*, Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123 (2017) (showing how mass monitoring is an extension and substitution of mass incarceration). *See also* Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform may Lead to a For-Profit Nightmare*, 20 U. PA. J. L. & SOC. CHANGE 125 (2017) (discussing how alternatives to incarceration in the form of supervision and surveillance perpetuates mass incarceration).

105. SHARKEY, *supra* note 4 (showing how the great crime decline was obtained at the expense of the health of communities, creating the conditions for future violence).

106. *See infra* Part IV.

about a community in the context of white-collar crime it is the corporate community, which is not characterized by its strong social fabric (or its contribution to broader community stability).[107] Moreover, many of the characteristics of the crime minimize the types of harms associated with community surveillance. White-collar crime is transactional, usually through electronic means, and without any physical confrontation between assailant(s) and victim(s). All of this means that oversight will also be carried out in this non-personal way. It is difficult to see how this type of surveillance will cause the same community harm that over-policing and monitoring can.

Beyond oversight, however, it does not seem that there are currently[108] many preventative non-carceral tools for white-collar crime. Even these non-carceral tools however are not truly abolitionist. Abolitionists do not write about deterrence, rather they challenge us to build a system "aimed at [the] prevention of interpersonal harm, along with other social problems, that might operate without enlisting criminal law enforcement."[109] In other words, the goal is to prevent social harm by focusing on the material conditions and social and environmental environments that often lead to it. Investing in communities through

107. In fact, despite corporate personhood, law recognizes that businesses are not people and treats them as such. We see this across areas of corporate law, from liability to bankruptcy law.

108. This does not mean that others may not arise. In this Symposium there is a proposal from Mihailis Diamantis and Will Thomas that could be seen as satisfying both deterrence and retribution for corporations. They argue in favor of branding that indicates whether a company has engaged in corporate malfeasance. This type of branding could effectively deter corporations from wrongdoing as well as punish them for it. Of course, this is outside the scope of this essay as it does not apply to individuals. Nonetheless it points in the direction of what measures could be taken other than the ones that currently exist.

109. McLeod, *supra* note 39, at 1219.

education,[110] health care,[111] public infrastructure,[112] and employment programs,[113] becomes important not only in-and-of-itself but also as a tool to guarantee public safety.

Additionally, abolitionists also emphasize the need to have a different "form of social organizations that enables vulnerable persons and communities to care for themselves."[114] This means displacing police as the *sine qua non* institutional response to crime with community organizations that are designed by communities to attend to the problems that those communities face, whether it be gang violence, domestic abuse, or drug dependency.[115] Relatedly, preventive justice focuses on

110. *See, e.g.*, JAMES J. HECKMAN, GIVING KIDS A FAIR CHANCE (2013) (showing that expanding early childhood education is the best policy tool to reduce inequality and break the cycle of poverty); Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155–89 (2004) (finding that schooling significantly reduces the probability of incarceration and arrest); Brian Bell, Rui Costa & Stephen Machin, *Why Does Education Reduce Crime?* 63 (2018) (arguing that education reduces crime partly through incapacitation).

111. *See* Samuel R. Bondurant, Jason M. Lindo & Isaac D. Swensen, *Substance Abuse Treatment Centers and Local Crime* (Nat'l Bureau of Econ. Rsch., Working Paper No. 22610, 2016), *available at* https://www.nber.org/papers/w22610 (finding that an increase in the number of treatment facilities causes a reduction in both violent and financially-motivated crime); Jacob Vogler, *Access to Health Care and Criminal Behavior: Short-Run Evidence from the ACA Medicaid Expansions*, SSRN J. 54 (2017) (showing that Medicaid expansion led to a reduction in violent and property crime).

112. *See, e.g.*, James J. Feigenbaum & Christopher Muller, *Lead Exposure and Violent Crime in the Early Twentieth Century*, 62 EXPLORATIONS IN ECON. HIST. 51, 51 (2016) (showing that "lead service pipes considerably increased city-level homicide rates" and suggesting lead abatement as a tool in crime prevention); Mardelle Shepley et al., *The Impact of Green Space on Violent Crime in Urban Environments: An Evidence Synthesis*, 16 INT'L J. OF ENV'T RSCH. AND PUB. HEALTH 5119 (2019) (carrying out a literature review concluding that "access to nature has a mitigating impact on violence in urban settings" and thus pushing for more greening infrastructure); Aaron Chalfin et al., *Reducing Crime Through Environmental Design: Evidence from a Randomized Experiment of Street Lighting in New York City*, CRIME LAB NEW YORK (Apr. 24, 2019), shorturl.at/ablDP (finding that "communities that were assigned more lighting experienced sizable reductions in crime").

113. *See* McLeod, *supra* note 39, at 1226 (citing research from the U.N. Office on Drugs and Crime suggesting that "transition to alternative crops is associated with a significant reduction in threats of violence due to the insecurity that accompanies narcotics trafficking.") However, *see also* Manuela Nilsson & Lucía González Marín, *Colombia's Program to Substitute Crops Used for Illegal Purposes: Its Impact on Security and Development*, 15 J. OF INTERVENTION AND STATE-BUILDING 309 (2021) (showing that agricultural substitution programs are hampered by continuous violence which impedes peacebuilding operations).

114. McLeod, *supra* note 39, at 1227.

115. It would be impossible to list all the types of organizations and programs that conform "abolitionist alternatives." As an example, however, we can point to the Creative Interventions, an organization dedicated to redress domestic abuse and violence through early intervention, education, and community transformation. Another example is the Bay Area Transformative Justice Collective which focuses on alternative responses to child

decriminalization[116] as a tool to "displace criminal law administration as a primary mechanism for social order maintenance."[117]

In all, this agenda focuses on responding to crime by addressing the various deprivations of at-risk individuals and communities. This is in-line with much of criminology that suggests that poverty, inequality, and prior exposure to violence are criminogenic. While I agree with many scholars that this is a much better way to attend the problem of social harms, this type of preventive justice model is not going to mitigate white-collar crime.

As noted *supra*, white-collar criminals are—in general—people whose material well-being is guaranteed. In other words, these are individuals who are turning to crime in-spite of, not because of, their material and environmental conditions. In fact, part of what makes white-collar crime so morally reprehensible is precisely that the perpetrators are abusing a system of which they are already at the top. So, there is really no role for what Allegra McLeod calls preventive justice. However, that does not mean that there is no role for a greater emphasis on prevention[118] nor that focusing on oversight will not achieve more or at least equal deterrence than incarceration. Rather, I am simply recognizing that the abolitionist arsenal for deterrence is limited.

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sexual abuse. Violence Interrupters is a national organization focusing on gang mediation on stopping retaliation. It is worth noting that the evidence that these programs "work" either has not been gathered or is mixed (see this meta-analysis of Violence Interrupters type programs showing mixed success: Jeffrey A. Butts et al., *Cure Violence: A Public Health Model to Reduce Gun Violence*, 36 ANN. REV. OF PUB. HEALTH 39 (2015)). Mixed results aren't a reason to abandon these programs—in fact they support more investment in them, as their mixed success can be seen as a result of lack of resources not transformational possibilities.

116. This is most obvious in the case of narcotics. Drug decriminalization can lead to ending the criminality of buying, selling, and using drugs, as well as the violence surrounding the drug trade. For a nuanced discussion see ANGELICA DURAN-MARTINEZ, THE POLITICS OF DRUG VIOLENCE: CRIMINALS, COPS AND POLITICIANS IN COLOMBIA AND MEXICO (Oxford University Press ed. 2018) (showing that legalization is not a cure-all for drug violence but can help in reducing prison populations). It need not, however, be focused only on narcotics.

117. Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 110 (2013).

118. Many anti-white-collar crime policies already focus on prevention. For example, greater transparency from financial institutions, closing tax and other legal loopholes exploited by corporate wrongdoers, and closing revolving doors between corporate actors and regulators. How successful any of these are, however, is questionable. *See, e.g.*, Omri Ben-Shahar, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2010) (arguing that sunshine policies have largely been unsuccessful in ensuring greater accountability).

In sum, it is not evident that incarceration works as a deterrent for white-collar crime. Moreover, it could be counter-productive. For this reason, if deterrence is the goal, then policymakers should look to other tools besides incarceration to decrease white-collar crime. Especially in light of the social costs that prison imposes. Even if these are not technically within the framework of abolitionism, they are still non-carceral and worth pursuing.

B. Retribution

Retribution has been described as the central aim of punishment.[119] So much so that some researchers have concluded that "people are intuitive retributivists."[120] However, what people mean by retribution can often be conflated. There are two separate dimensions of wrongdoing that figure prominently in retributivism: the harm or wrong inflicted and the culpability of the wrongdoer for bringing it about. For a retributivist, the goal is to calibrate the punishment to be proportional to, ideally, the harm caused and/or the actor's culpability.

There have been many critiques of the usefulness of retributivism as an actual limiting and guiding principle for punishment. For example, what is the relationship between the size of harm and the intent of the actor?[121] Or, does the wrongdoer's

119. Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J. L. & PUB. POLICY 19 (2003) (a "criminal unfairly usurps liberty to pursue his own interests and plans in a manner contrary to the common boundaries delineated by the law. . . . [d]epriving the criminal of this ill-gotten advantage is therefore the central focus of punishment.").

120. Kevin M. Carlsmith & John M. Darley, *Psychological Aspects of Retributive Justice*, 40 *in* ADVANCES IN EXPERIMENTAL SOC. PSYCH. 193, 211 (2008); *see also* Geoffrey P. Goodwin & Dena M. Gromet, *Punishment*, 5 WIREs COGNITIVE SCI. 561–72 (2014) (showing that although most research has found laypersons to understand retributivism as the main goal of punishment, there are other goals—such as restorative justice—that are based on the same notions as retribution). *But see* Mathias Twardawski, Karen T. Y. Tang & Benjamin E. Hilbig, *Is It All About Retribution? The Flexibility of Punishment Goals*, 33 SOC. JUST. RES. 195–18 (2020) (arguing that people report to be retributivist only because that is the justification with most saliency, if other justifications are prompted then people report to pursue other justifications of punishment).

121. *See, e.g.*, Larry Alexander et al., CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (2009) (because the primary objective of criminal law is to prevent harm, punishment should not take into consideration the wrongdoer's intent); Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action That Causes It*, 24 L. & PHIL. 263, 265 (2005) (arguing that people assume the risks of their actions so they deserve a punishment for whatever harm they risked, regardless of their

background affect their culpability?[122] Moreover, how do we anchor and justify what proportionate punishment is?[123] Regardless of these and other theoretical or conceptual limitations, courts have consistently accepted retributivist arguments both for explaining substantive criminal law and sentencing. Therefore, despite personal reticence about the usefulness of retributivism as a concept, the critique in this Article does not rely on these fundamental questions about the value of retributivism. My goal is, rather, to engage with retributivist ideas on their own terms.

Under either the harm or the culpability dimension, it is intuitive to understand why incarceration is justified—and desirable even—for white-collar criminals. In terms of the former, corporate malfeasance has resulted, among many other things, in high incidence of substance use disorder and death,[124] the emission of harmful chemicals and the destruction of the environment and human life,[125] and airplane accidents.[126] In these cases it will be

intentions). For an opposing view see the Model Penal Code which tries on tying up liability to *mens rea* much more closely than the common law.

122. *See, e.g.*, David L. Bazelon, *Foreword—The Morality of the Criminal Law: Rights of the Accused*, 72 J. CRIM. L. AND CRIMINOLOGY 1143, 1148 (1981) (arguing in favor of recognizing the actor's background when meting out punishment, for "[t]he real sources of street crime are associated with a constellation of suffering so hideous that society cannot bear to look it in the face."). For a somewhat different view see Stephen J Morse, *Severe Environmental Deprivation (aka RSB): A Tragedy, Not a Defense*, 2 ALA. CIV. RTS & CIV. LIBERTIES L. REV. 147, 148 (2011) (arguing that environmental deprivations cannot be used as a defense to crime both because it is unjustified and unworkable).

123. *See e.g.*, Nicola Lacey & Hanna Pickard, *The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems*, 78 THE MOD. L. REV. 216, 221 (2015) (claiming that proportionality is not a natural or abstract idea but rather a "product of political and social construction, cultural meaning-making, and institutional building"); Greg Roebuck & David Wood, *A Retributive Argument Against Punishment*, 5 CRIM. L. & PHIL. 73–86 (2011) (arguing that punishers have the burden of proving that punishment is proportional but ultimately holding that punishment cannot be justified).

124. PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY (2021).

125. There are many examples, *see, e.g.*, *Volkswagen: The Scandal Explained*, BBC NEWS (Dec. 10, 2015), https://www.bbc.com/news/business-34324772 (outlining the details of Volkswagen's practice of cheating in its carbon emissions; *see also* Vanessa Romo, *PG&E Pleads Guilty On 2018 California Camp Fire: 'Our Equipment Started That Fire,'* NPR (June 16, 2020), https://www.npr.org/2020/06/16/879008760/pg-e-pleads-guilty-on-2018-california-camp-fire-our-equipment-started-that-fire (detailing that the California Gas & Electric Company plead guilty to 84 counts of involuntary manslaughter for having faulty equipment that started the 2018 Camp Fire).

126. *See, e.g.*, Press Release, U.S. Dep't of Justice, Boeing Charged with 737 Max Fraud Conspiracy and Agrees to Pay over $2.5 Billion (Jan. 7, 2021), https://www.justice.gov/opa/pr/boeing-charged-737-max-fraud-conspiracy-and-agrees-pay-over-25-billion (detailing an admission of guilt from Boeing for lying to government regulators that lead to its aircraft crashing twice in the same year).

"simple"[127] to mete out proportional punishment against corporations and their officers.[128]

However, despite repeated assertions that "white-collar crime . . . costs society untold billions of dollars—far more than street crime,"[129] it is actually difficult to assess the true size of the social harm of white-collar crime. This is partly because, as criminologists complain, scholars have largely abandoned the victims of white-collar crime.[130] Part of the problem is that it is not clear how each instance of white-collar crime contributes to social harm.[131] In 2018[132] and 2019,[133] for example, the British bank HSBC and the Department of Justice entered into deferred prosecution agreements for tax evasion and fraud. In both instances the bank was forced to pay over $100 million fines. However, in both cases there was no one who directly suffered as a result of HSBC's actions. That is not to say that there was no one affected; if there is less tax collection then that has an impact on

127. I acknowledge the difficulties in proportional punishment that I outlined *supra*.

128. As shown by the backlash against the insulation of the Sackler family from criminal penalties, it is important for retributivists that liability is faced not only by corporations but by the individuals running them. *See, e.g.*, Brian Mann, *The Sacklers, Who Made Billions From OxyContin, Win Immunity From Opioid Lawsuits*, NPR (Sept. 1, 2021), https://www.npr.org/2021/09/01/1031053251/sackler-family-immunity-purdue-pharma-oxcyontin-opioid-epidemic; Sissi Cao, *Critics Rage as Purdue Pharma Settlement Won't Send Sacklers to Jail*, OBSERVER (Oct. 21, 2020), https://observer.com/2020/10/purdue-pharmaceutical-settlement-no-jail-time-sacklers-outrage/.

129. *Bazelon, supra* note 122, at 1147.

130. Hazel Croall, *Who is the White-Collar Criminal?*, THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 157, 158 (2016) (arguing that victimology has neglected victims of white-collar crimes).

131. This is not to say that white-collar crime is victimless. As many have argued, the idea that any crime is actually victimless is fraught. *See, e.g.*, Levin, *supra* note 31 (arguing that wage-theft for example, is clearly not victimless).

132. Press Release, U.S. Dep't of Justice, HSBC Holdings Plc Agrees to Pay More Than $100 Million to Resolve Fraud Charges (Jan. 18, 2018), https://www.justice.gov/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges.

133. Press Release, U.S. Dep't of Just., Justice Department Announces Deferred Prosecution Agreement with HSBC Private Bank (Suisse) SA (Dec. 10, 2019), https://www.justice.gov/opa/pr/justice-department-announces-deferred-prosecution-agreement-hsbc-private-bank-suisse-sa (These are not the most egregious crimes committed by HSBC. In 2012 the bank and the DOJ entered into a deferred prosecution agreement where the company agreed to pay $1.9 billion after being accused of money laundering for Mexican and Colombian drug cartels.); Aruna Viswanatha & Brett Wolf, *HSBC to pay $1.9 billion U.S. fine in money-laundering case*, REUTERS (Dec. 11, 2012), https://www.reuters.com/article/us-hsbc-probe/hsbc-to-pay-1-9-billion-u-s-fine-in-money-laundering-case-idUSBRE8BA05M20121211. I focus on the fraud and tax evasion claims because there is a more direct line between social harm and act in the cause laundering money for drug cartels and the violence that those cartels unleash.

state capacity, which affects public service provision, among many other things. Nevertheless, we do not know how much the state actually lost for these instances of tax evasion and fraud. The size of the settlements are an indication of a negotiation, not harm.

Even more starkly, perhaps, HSBC also agreed to pay a $1.9 billion fine for providing money laundering services to Colombian and Mexican drug cartels.[134] Evidently these activities contributed to the wealth of these criminal enterprises, which facilitated their brutality[135] however, how much of the harm inflicted by the cartels can be attributed to HSBC? This question is not trivial for retributivists. If the punishment is meant to fit the harm, then we need to know what harm there is. Unfortunately, as these examples show, in several cases we simply do not know.

Fault-based retributivism is largely intuitive. This is not meant as a critique but rather a descriptive assertion of how individuals assess wrongdoing.[136] That these intuitions about relative blameworthiness are widely shared across multiple countries and groups should temper the critique that culpability assessments are random.[137] This may be surprising given the great degree of subjectivity involved in ranking wrongdoing, as well as the wide discrepancy in punishment[138] and the prevalence of certain crimes around the world;[139] however, the evidence that people agree at least about *mala in se* crimes is compelling.[140]

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134. Viswanatha & Wolf, *supra* note 133.

135. BENJAMIN T. SMITH, THE DOPE: THE REAL HISTORY OF THE MEXICAN DRUG TRADE (2021) (detailing the history of the drug trade in Mexico and its brutality).

136. Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL L. REV. 1, 3 ("social science evidence suggests that judgments about justice, especially for violations that might be called the core of criminal wrongdoing, are more the product of intuition than reasoning.").

137. Paul H. Robinson & Robert O. Kurzban, *Concordance & Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1832 (2007) (summarizing social science research to conclude that "Intuitions of justice among laypersons exist on a wide variety of liability and punishment issues. They are quite nuanced, no matter a person's level of education. They produce specific directions regarding deserved punishment, not simply broad generalities or outer limits. And there is a good deal of agreement on intuitions of justice regarding a wide range of liability and punishment issues and across all major demographics.").

138. People do differ on severity of punishment, but not on the relative blameworthiness of conduct. *Id.* at 1881.

139. *See, e.g.*, Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 455 (2012) (detailing studies showing that no matter what the level of corruption in a country actually is, individuals think the corrupt behaviors are wrong).

140. *See* Robinson & Kurzban, *supra* note 137, at 1880 (reporting 3 different studies where people ranked wrongdoing showing an agreement 94% of the time).

Nonetheless, this level of agreement falls apart when looking at "wrongdoing outside the core of physical aggression."[141]

White-collar crime is evidently not within the core of crimes of physical aggression. Except for fraud, white-collar crime is more appropriately described as *malum prohibitum* than *in se.* [142]This is especially true for crimes such as tax evasion or insider trading where the harm is more remote than fraud. Because the harm is remote, it is difficult to determine the blameworthiness of any crime, complicating fault-based retributivist justifications for incarceration. Or, at a minimum, for determining levels of incarceration.

Nevertheless, what is wrong about white-collar crime, as I have defined it in this Article, is not really about the type of particular conduct, but rather the perpetrator. In a sense, because white-collar crime is one of people with high human, educational or cultural capital, it is similar to political corruption, a crime widely recognized to be very morally blameworthy.[143] Corruption is defined as the "abuse of entrusted power for private gain."[144] Many forms of white-collar crime fall into this definition: insider trading and embezzlement, for example, are uses of entrusted information (power) for pecuniary gain. The focus of corruption, as opposed to white-collar crime, however, is malfeasance from public officials or involving government affairs.[145] Nonetheless, at bottom they are both crimes about abuse of power.

In this view, white-collar crime is morally wrong because the actors abused their position in society (their cultural, economic, and/or human capital) to enrich themselves. This is very similar to corruption, except that the illicit goods are not public resources. This may make white-collar crime relatively less blameworthy than corruption, but not ranked too far away from it. This is especially so because capitalism affords many opportunities for risk-taking without any punishment. Bankruptcy law, for

141. *Id.*

142. *Malum Prohibitum* is an act rendered illegal through positive law; *malum in se* is defined as an offense that is evil or wrong from its own nature irrespective of statute. *See Malum in se*, MERRIAM WEBSTER, https://www.merriam-webster.com/legal/malum+in+se (last visited Oct 30, 2022).

143. *See* Anna Persson et al., *supra* note 139, at 455.

144. Anne Peters, *Corruption as a Violation of International Human Right*, 29 EUR. J. INT'L L. 1251, 1254 (2019).

145. That is, it is not only a crime involving public officials, because private actors can be guilty of it too. *See* Kevin E. Davis, *Corruption as a Violation of International Human Rights: A Reply to Anne Peters*, 29 EUR. J. INT'L L. 1289, 1290 (2019).

example, allows individuals to draw a clean slate after numerous losses.[146] If losses are fine and forgiven, and risk-taking is legitimized and valued, there is even less justification for skirting corporate law for the sake of enrichment.

In sum, from both a harm and fault-based perspective, retribution for white-collar crime is justifiable. The question is then, does retribution need to be carceral? As discussed *supra* the critique of contemporary white-collar criminal enforcement is that it is far too weak and lax. Even if the policies suggested are not asking for higher maximum sentences, they are advocating for more people to be incarcerated for longer periods of time. Abolitionism is not embraced by all who have criticized mass incarceration or overcriminalization.[147] However, if there are concerns about the abuse of incarceration as a tool of social control, [148] even when there is some moral justification for it, does it make sense to advocate for expanding imprisonment? As Ben Levin has argued, if abolitionist models have been embraced for serious violent crime—the sort that most people around the world agree is morally blameworthy—why should it be impossible to implement for non-carceral responses to white-collar crime?[149] Is white-collar crime harmful or blameworthy enough for an institution as destructive as incarceration? Can the harms, given that they are mostly economic, not be remedied through non-carceral means?[150] At bottom, this is a normative judgment, and I by no means intend to provide an answer here for all. However, getting to this question

146. I am not suggesting that bankruptcy law cannot be punitive or that it cannot be improved, but rather that corporate law is not *premised* on punishment. *See* MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (2019) (exploring what it would mean to have a system like bankruptcy for criminal law).

147. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259–318 (2018) (discussing different advocacy positions on criminal legal reform, contending that reform is necessarily hampered by the elision between structural and practical critiques).

148. Over the past decade, legal academics, policymakers, and a growing consensus among the public—from across the political spectrum—have openly advocated for criminal law reform. Although, as shown by Levin, the consensus over what to do to reduce the imprisonment is very narrow, that imprisonment should not be used as much as it is today is uncontroversial among various groups of advocates. Levin, *supra* note 31, at 1492.

149. *Id.* at 1451–52 ("From institutions rooted in Indigenous approaches to wrongdoing and reparations, or the radical visions advanced by INCITE!, Survived and Punished, Critical Resistance, and other abolitionist groups, the move away from carceral victims' rights is gaining ground . . . If [a] restorative, transformative, or noncarceral approach could be used to deal with intimate partner violence and police violence, then why couldn't it be used to deal with economic harms?").

150. *See generally* Part III.

allows us to see more clearly what we are debating when we talk about white-collar crime and abolition.

As mentioned *supra*, abolitionists do not imagine a society without social harm.[151] In fact, victims are at the center of both abolitionist practice and scholarship in that the enterprise is constructed around the idea that societies need to build institutions that respond more effectively to prisons than to social harm.[152] In the long term, this means creating a radically different "society that has no need for prisons."[153] This attention on radical transformations of what a justice system is and/or can achieve has meant that prison abolitionism scholarship has undertheorized punishment theory.[154]

Rafi Reznik has argued in favor of an abolitionist retributivism that recognizes crimes as moral wrongs and embraces the role of punishment in expressing public and community values.[155] For Reznick, this non-carceral punitivism could take the form of what has been labelled collateral consequences, which is an expansive term that includes, but is not limited to:

> [D]isenfranchisement; exclusion from jury service; prohibitions on holding public office and serving in the military; inability to legally obtain firearm; occupational restrictions; limitations on parental rights; withholding of welfare benefits; mandated regular registration with authorities, exclusion from certain living areas, and further restrictions for sex offenders; deportation for non-citizen, offenders; restrictions on name-changing, which may have grave implications for some people such as transgender individuals; monitoring and surveillance.[156]

Reznik proposes reconceptualizing collateral consequences in such a way that they are no longer hidden avenues for "civil

151. That many people assume that they do is one of the reasons why abolitionism is often confused with utopia.

152. This is another sense in which abolitionism is creative rather than destructive.

153. Roberts, *supra* note 2, at 6.

154. Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 125 (2019) (arguing that abolitionism can be justified through a retributivist lens through "[i]nclusive, caring, non-carceral punishment.").

155. *Id.* at 145.

156. *Id.* at 176–77.

death,"[157] but that they are still used as means of punishment. Reznik's goal is not to hide that these measures are punishment, but rather to center criminal law on deciding which of these measures are justified and useful on retributivist terms. These punishments are not incompatible with the prevention and accountability mechanisms outlined in this section. As Reznik puts it: "[e]x ante prevention, ex post restoration and enduring transformation should not be abandoned, but they must be combined with some version of retribution that recognizes and responds to blameworthiness and desert."[158]

The inclusion of all these measures is not meant to suggest that they are all desirable means of punishing corporate wrongdoers, but rather that non-carceral retributivism can go beyond monetary sanctions.[159] Imprisonment has been justified as a way of punishing insolvent parties[160] or those that figure out ways to avoid paying fines.[161] However, there is no reason why any of the measures outlined above cannot be part of an arsenal of potential punishments to white-collar wrongdoers. In particular, occupational restrictions and surveillance are punitive measures that can signal the community's moral reprobation of white-collar malfeasance. Using these means of punishment in place of

157. There is vast literature discussing the inefficiency and injustice, as well as the illegality, of collateral consequences of criminal involvement. This literature discusses collateral consequences as forms of civil death for constraining perhaps for life the ability of anyone with a criminal conviction to ever fully participate in society. *See, e.g.*, Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953 (2018); Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DEPAUL L. REV. 647 (2017); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

158. Reznik, *supra* note 153, at 159.

159. There are expressivist concerns over doing this. After all, even big fines can be morally reprehensible when the wrongdoers are very wealthy. The outrage around the Purdue Pharma settlement, where the company agreed to pay $4 billion is instructive.

160. Jonathan S. Masur & Christopher Buccafusco, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law,* 87 S. CAL. L. REV. 274, 284–85 (2014) (presenting a law and economics justification for criminal law stating that imprisonment is a way to ensure accountability for "defendants [that are] insolvent or otherwise unable to satisfy a civil judgment.").

161. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 950 (2007) (finding that the labor movement has been unable to collect after judicial findings of corporate wrongdoing due to the latter's abilities in resisting payments).

imprisonment can also preserve the role that criminal law currently plays in ensuring civil compliance.[162]

Some may object to these measures pointing out the inability of "[a]dministrative agencies [collecting] the vast brunt of regulatory and criminal penalties."[163] If they cannot collect fines, how will they enforce non-carceral retributivism? However, this is an argument in favor of alternative punishment. If law enforcement is focused mostly on incarceration, then that means that other punishment is de-prioritized. Government agencies follow suit figuring that their role is helping the investigation but not in enforcing the punishment.[164] Focusing more attention on collection as an important form of punishment, not an incidental one, will better align incentives to enforce monetary penalties.

C. Incapacitation

"Incapacitation as a goal of punishment is in many ways the cleanest form of individual prevention. Its objective is to deny, or at least greatly reduce, the opportunity to commit future offenses."[165] Its logic is simple, prison may not serve to deter or rehabilitate, and we may disagree with its punitivism, but at least the incarcerated person will not hurt society[166] while they are detained.[167] For this reason, incapacitation is seen by many as

162. *See* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 38 (2020) (explaining how criminal law is instrumental in ensuring that victims are compensated by insurance companies).

163. Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 456 (2011) (finding that under-collection is widespread and is caused by agencies de-emphasizing collection as an integral part of their mission).

164. *Id.* at 457.

165. PETER W. LOW, JOHN CALVIN JEFFRIES JR., & RICHARD J. BONNIE, CRIMINAL LAW CASES AND MATERIALS 24 (1982).

166. This argument is limited by the fact that social harm is rampant *within* prisons themselves. *See supra* note 79 and accompanying text.

167. There is good evidence that incapacitation works. The debate is about the size of the effect. *See* Gary Sweeten & Robert Apel, *Incapacitation: Revisiting an Old Question with a New Method and New Data*, 23 J. QUANTITATIVE CRIMINOLOGY 303, 314 (2007) (estimating that each additional year in prison leads to ten fewer crimes a year); Steven D. Levitt, *The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation*, 111 Q.J. ECON. 319 (1996) (estimating that 15 to 20 felony crimes were prevented by each additional year in prison); Alessandro Barbarino & Giovanni Mastrobuoni, *The Incapacitation Effect of Incarceration: Evidence from Several Italian Collective Pardons*, 6 AM. ECON. J. 1, 29 (2014) (finding similar estimates as Levitt by looking at the release of prisoners after "collective pardons" in Italy). More recent studies have suggested smaller effects, theorizing that as mass incarceration increased, the marginal effect of incapacitation reduced. *See* STEVEN RAPHAEL & MICHAEL A. STOLL,

prison's ultimate justification.[168] Incapacitating white-collar criminals should be no different to incapacitating other kinds of offenders.

Incapacitation, however, is a very costly way to reduce crime. This of course applies to all kinds of offenders, which is why it should make us rethink whether in fact incapacitation is a valid justification for punishment. First, unless prison sentences are for life, then incapacitation is at best a temporary solution.[169] This is especially problematic in the United States given that in this country the likelihood of offending *increases* after a spell of imprisonment.[170] Second, studies of incarceration show relatively low estimates of crime prevented per each additional year of incarceration.[171]

THE HAMILTON PROJECT: BROOKINGS INST., A NEW APPROACH TO REDUCING INCARCERATION WHILE MAINTAINING LOW RATES OF CRIME (2014) (looking at U.S. states from 2000 to 2010 finding fewer than five crimes prevented for each additional year of incarceration); Rucker Johnson & Steven Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?,* 55 J.L. & ECON. 275, 302-303 (2012) (finding each additional year reduces only about 2 crimes per year). However, Binder & Notterman, *infra* note 168, present arguments that incapacitation effects are overestimated. First, they point to the fact that social harm is prevalent in prisons and, furthermore, it is not clear that sentencing as we practice it can properly predict the likelihood of reoffending. Empirical assessments of incapacitation are difficult because measurements are very noisy given the many multicollinearity issues of studying incapacitation. In light of this uncertainty, it is hard to know the precise size of the incapacitation effect, however it is safe to assume that some crime is reduced.

168. The Supreme Court embraced this view in *Ewing v. California* when they upheld the validity of California's "Three Strike" laws on the grounds that incapacitation was sufficient justification for imprisonment. This argument tacitly assumes that incapacitation works. Notably, the opinion did not present evidence for this. *See* Ewing v. California, 538 U.S. 11, 30 (2003); *see also* Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1, 7 (2017) (discussing how the court in *Ewing* treats incapacitation effect as common sense).

169. Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, (2015) (unpublished manuscript) ("incarceration generates net increases in the frequency and severity of recidivism").

170. Other countries, which treat incarceration rather differently, do not see such a rise. *See* Manudeep Bhuller et. al., *Incarceration, Recidivism and Employment*, 128 J. POL. ECON. 1269, 1271 (2020) (finding that recidivism rates in Norway fall after incarceration). The difference between the U.S. and Norway can be explained by the far more rehabilitative and less punitive approach taken in the latter. *See* David J. Harding et al., *Imprisonment and Labor Market Outcomes: Evidence from a Natural Experiment*, 124 AM. J. OF SOC. 49, 80 (2018).

171. Older studies find 10-15 crimes reduced but newer studies find an effect of at most only 2 crimes reduced per each additional year of incarceration. *See* Johnson & Raphael, *supra* note 167.

All of this should make one reticent about just how much imprisonment is justified by incapacitation in general.[172] In the case of white-collar crime specifically, there are much more cost-efficient tools to incapacitate someone than prison. White-collar crime depends on individuals participating in complex networks of legitimate business. As such, these networks are already highly regulated.[173] Moreover, participation in them depends on the use of technologies, licenses, institutions, and personal contacts. To incapacitate white-collar offenders, one could limit or prohibit the use or access to any of these technologies to ensure the actor will not re-offend. This could be achieved, for example, by taking away professional licenses, limiting access to particular software, barring people from certain industries, or even through greater individual surveillance. Which of these measures is (or are) merited will of course depend on things like the likelihood of recidivism, the ease with which the harm can be repeated, available professional alternatives for the wrongdoer, etc.

All of these measures are costly, of course. Depriving someone of their profession eliminates their capability of producing wealth which carries social and personal costs as well. However, these pale in comparison to the social welfare losses of incarceration. More importantly, they are all rather effective ways to incapacitate offenders. At least in so far as incapacitation relates to the particular social harm that the wrongdoer effected.

One concern is, therefore, what about incapacitating offenders from committing other crimes? This seems unlikely.[174] First, we know that it is rare for white-collar offenders to recidivate.[175]

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172. There is a stronger argument for incapacitation in the case of high-frequency offenders. However, given the small number of people that fit into this category, it is—at most—an argument in terms of the usefulness of prisons to incapacitate.

173. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 47 (2011) (showing the illusory nature of free markets).

174. It is worthwhile to recognize that we cannot know this for certain as, to my knowledge, there are no studies analyzing whether incapacitation or deterrence effects apply to one crime but not others as noted in the deterrence subsection, differentiating incapacitation effects from deterrence effects is hard enough. It is hard to see how a study could be designed. At most, studies have analyzed the effect of incapacitation looking only at the commission of felonies (as opposed to misdemeanor).

175. U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 17 (2016) (finding that only 4.9% convicted of a federal crime of fraud reoffended, compared with 23% for assault and 11.5% with drug trafficking). What counts as fraud is obviously wider than what I have described as white-collar crime. However, that only serves to reinforce the argument. If one were narrower about the offense, then we would see even less recidivism.

Which means that it is also not probable that they will move to other forms of crime after being caught. Second, given the particular *kind* of criminal act, the likelihood that white-collar offenders will move to other types of crimes is low.[176] This is, at least in part, the rationale for some of the relatively low sentences handed down in white-collar criminal cases.[177] Judges routinely accept that white-collar offenders are not dangerous to society and are unlikely to commit other crimes. Therefore, incapacitating them for long periods of time is not necessary.[178] It follows therefore, that the concern that white-collar offenders will turn to other criminal enterprises if they are not incapacitated is relatively small.[179]

This is not to say that incapacitation arguments are only invalid in the context of white-collar crime. On the contrary, much of the literature discussed in this section points to the limitations of incapacitation as an argument for incarceration in general. My only objective here is to show the particular limitations of incapacitation arguments in favor of further using the carceral state to control white-collar crime, as many reformers want to do.

176. *See* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 114 (Shanna R. Van Slyke, Michael L. Benson, & Francis T. Cullen eds., 2016) (showing that white-collar crime has a low recidivism rate and that because of the sociodemographic and/or social, cultural, economic capital characteristics of the defendants, it is unlikely that these actors will turn to a life of illegality).

177. Jillian Hewitt, *Fifty Shades of Gray: Sentencing Trends in Major White-Collar Cases*, 125 YALE L.J. 1018, 1040–42 (2016) (showing how white-collar offenders have been routinely getting lower sentences than what the U.S. Sentencing Guidelines suggest ever since *Booker* was decided. The author observes a much more pronounced trend in the Southern District of New York, but the relationship is true everywhere. Hewitt argues that this is because the Guidelines are unduly harsh, not because judges do not believe in the rationales for punishment).

178. In fact, following this logic, it seems that incapacitation is not a rationale for any portion of the imprisonment of white-collar offenders.

179. Of course, like with other offenses, there are concerns about higher-rate offenders. Most criminologist agree that a small minority of offenders is responsible for a majority of crimes. If incapacitation serves as a justification for imprisonment, then it really is only for these kinds of offenders. "Selective incapacitation" focuses precisely on incapacitating only high-rate individuals. Of course, knowing who those people are is prospective and there are many concerns about type I errors. *See* PETER W. GREENWOOD & ALLAN ABRAHAMSE, SELECTIVE INCAPACITATION (1982). *But see* Kathleen Auerhahn, *Selective Incapacitation and the Problem of Prediction*, 37 CRIMINOLOGY 703 (1999); Binder & Notterman, *supra* note 168, at 8.

D. Expressivism

One important justification of incarceration is that it serves to express or symbolize moral condemnation for the actions that led to social harm.[180] Using this theory, incarceration for white-collar crime is justified because it sends the message that fraud, money laundering, etc. is unacceptable, and we care about protecting people from these crimes. Moreover, and perhaps more detrimentally, the under-enforcement of white-collar criminal laws undermines the legitimacy[181] of law enforcement agencies and the judicial system as it routinely allows individuals with a lot of resources to avoid grave criminal consequences.[182] In other words, the need for incarceration in these types of crimes has both a moral and a distributive expressive function.

As Ben Levin points out, more robust law enforcement has been justified when there has been a history of state abandonment of a particular kind of victim and "the victim is framed as somehow weak, powerless, or otherwise marginalized, so prosecution and state violence are necessary to level the playing field."[183] We see the same arguments in the case of white-collar crime. The victims are weak because either the harm is too spread out, or it is hard to articulate who the victim is, and there is a history of law

180. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 635 (1996) (explaining why alternatives to imprisonment are often not satisfying for many people and thus arguing in favor of public shaming). Of course, expressivism as a theory is not only applicable to punishment, but rather it is to law in general. *See, e.g.*, RICHARD H. MCADAMS, THE EXPRESSIVE POWERS OF LAW: THEORIES & LIMITS (2014) (suggesting laws by themselves—through whichever mechanism it may be—are not solely responsible for their own compliance); Cass R. Sunstein *On the Expressive Function of Law,* 144 U. PA. L. REV. 2021 (1996) (questioning how law's expressive function may be used to change social norms).

181. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) (noting that "the public is very sensitive to the manner in which authorities exercise their authority . . . [v]iews about legitimacy are rooted in the judgment that the police and the courts are acting fairly." Tyler was referring to actual physical interactions with police, however it follows that if people perceive a fundamental unfairness in the administration of justice then this will negatively impact law enforcement's legitimacy).

182. This concern may be expressed simply in terms of fairness or, it has been used to advance a more Marxist critique of the criminal legal system where relatively lax sentencing of white-collar offenders is seen as a reflection of class solidarity between the defendants, prosecutors, and judges. Something that does not occur in the context of other crimes. *See* John Hagan & Alberto Palloni, *Toward A Structural Criminology: Method and Theory in Criminological Research*, 12 ANN. REV. SOC. 431 (1986) (urging criminologist to study crime as a product of power relations).

183. Levin, *supra* note 31, at 1468–70 (pointing to hate crime legislation and laws addressing intimate-partner violence as examples of this dynamic).

enforcement not taking white-collar crime seriously. To reverse these trends, incarceration needs to be expanded.

There are many philosophical limitations of expressivism.[184] Most relevant to the discussion here however is why should society express its disapproval of crime through "the intentional infliction of the suffering that is punishment."[185] Note the answer cannot be utilitarian or retributivist, otherwise expressivism is just the mechanism through which those goals are achieved. In other words, what is the expressive function of having state-sponsored prisons, and do we want to perpetuate it? I would argue that if we recognize the harms caused by incarceration in the United States, then in its current form at least, the intentional infliction of trauma by the State is expressive of a negative value and thus is capable of undermining the State's legitimacy. Can an expressivist justification of punishment survive in these conditions?

More practically, perhaps, as Ben Levin has argued, expressivism relies on the belief that "members of the public: (a) are aware of legislative activity, (b) view the passage of legislation as embodying community norms, and (c) wish to conform their behavior to community norms."[186] In other words, expressivism—like deterrence—depends on people knowing the law and understanding its implementation. And, as Levin shows, we have good evidence that this is not the case.[187]

Moreover, a continuation of current criminal carceral policies will not be easy. Even assuming all the reforms sought are passed, convicting white-collar offenders will continue to be difficult because wrongdoers will continue to be sophisticated and the criminal legal system will continue to offer many procedural protections. Continuing to fail to secure convictions and long sentences for white-collar offenders may backfire in terms of expressive goals. After all, would that not signify that indeed the system is stacked in favor of the wealthy? A worst-case scenario is that the legitimacy of law enforcement is questioned even more after the proposed reforms fail to put more people behind bars.

The limitations on expressivism as an argument should not mean that white-collar offenders should not face opprobrium.

184. For a philosophical critique of expressivism see Heidi M. Hurd, *Expressing Doubts about Expressivism*, 2005 U. CHI. LEGAL F. 405 (2005).

185. *Id.* at 428.

186. Levin, *supra* note 31, at 1471–72.

187. *Id.*

Quite the contrary, as explained in this section, the failure of accountability does carry the risk of delegitimizing the State. To whatever extent it is possible for laws to express the morals of the community, we should use those tools to express condemnation against white-collar crime. However, the key word here is accountability. It may make more sense to rethink, as I argue in the next section what non-carceral accountability could look like than to further entrench the carceral regime to dismantle it later when all the necessary conditions are met.

IV. ABOLITIONIST ACCOUNTABILITY

The normalization of carceral punitivism impairs our ability to imagine accountability as anything other than incarceration. However, abolitionists have pushed us to reimagine what accountability can look like. There is, evidently, no single abolitionist model of accountability.[188] Restorative justice processes, for example, focus on ways to examine who is harmed, what are their needs, and whose obligation is it to fill those needs.[189] Closely related, are transformative justice practices which in addition to focusing on harm seek to remediate the conditions that lead to it.[190] At a larger scale than these are transitional justice frameworks which aim to establish accountability for mass (frequently state-sponsored) harm.[191]

These frameworks are then translated into many different practices. Some of these are fairly similar like healing circles,[192] circles of support and accountability, peacemaking circles, victim-offender dialogues, and, probably the most common one in the

188. Given the focus of this Article I will not attempt a complete summary nor a typology of all of the different abolitionist models, frameworks, or practices.

189. SUJATHA BALIGA ET AL., RESTORATIVE COMMUNITY CONFERENCING: A STUDY OF COMMUNITY WORKS WEST'S RESTORATIVE JUSTICE YOUTH DIVERSION PROGRAM IN ALAMEDA COUNTY 2 (2017).

190. *See, e.g.*, Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMATIVE HARM (2018), https://transformharm.org/transformative-justice-a-brief-description/.

191. *See* THEORIZING TRANSITIONAL JUSTICE, (Claudio Corradetti, Nir Eiskovits, & Jack Volpe Rotondi eds., 2015).

192. Healing circles are used in many contexts. They are spaces where people sit together to talk and "help[] one another and to each other's healing." Lewis Mehl-Madrona & Barbara Mainguy, *Introducing Healing Circles and Talking Circles into Primary Care*, 18 PERMANENTE J. 4, 2 (2014). They have been used, for example, by the Ella Baker Center for Human Rights in the Bay Area to address social harm in a different way than incarceration. *See Healing Through Action,* ELLA BAKER CTR. FOR HUM. RTS., *https://ellabakercenter.org/healing-through-action/* (last visited Nov. 4, 2022).

criminal legal space, restorative community conferences, which "involve an organized, facilitated dialogue in which young people, with the support of family, community, and law enforcement, meet with their crime victims to create a plan to repair the harm done."[193] Others, the more large-scale harm frameworks, will be reflected in truth and memory commissions,[194] the drafting of new laws, and reparations.[195] These practices are sometimes carried out by state-actors,[196] but more frequently by third-sector organizations under the auspices[197] or even outside of the state. At bottom, the many diverse abolitionist frameworks and practices center on the recognition of the harm caused, on asking for forgiveness, and on proactively taking steps to ensure that the harm is not repeated. Another key characteristic is that these processes are painful and difficult, although in very different ways than incarceration, for both parties involved.[198]

It is possible to take these principles to develop a model for what abolitionist white-collar criminal accountability could look like. In instances where wrongdoing and responsibility is clear, one could imagine creating a forum, akin to a community circle or a truth-commission depending on the scale of the crime, where white-collar offenders would admit the harm they caused, hear from people who suffered as a result of their actions, and establish

193. BALIGA ET AL., *supra* note 189, at 2.

194. *See* PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS (2d ed. 2010) (establishing four key characteristics of these commissions: they deal with the past, investigate continued patterns of abuses and not specific cases, operate for up to two years and then submit reports summarizing their findings and, are usually official bodies sanctioned by the state).

195. *See* THEORIZING TRANSITIONAL JUSTICE, *supra* note 191; *see also* ELISABETH BUNSELMEYER, TRUTH, REPARATIONS AND SOCIAL COHESION (2021) (questioning whether reparations programs can indeed serve to repair the harm of mass atrocities).

196. Transitional justice frameworks in particular are sometimes carried out by State institutions as a process of gaining legitimacy or separating from a previous regime that sponsored or tolerated mass human-rights violence.

197. Different counties in California, for example, collaborate with the aforementioned organizations to implement restorative justice models as diversionary programs for youth. *See e.g., Restorative Justice*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/restorative-justice/ (last visited Nov 4, 2022). Many countries who undergo transitional justice processes collaborate with civil society to create programs and gain legitimacy. *See, e.g.*, HAYNER, *supra* note 194 (noting the work of independent actors with the state in truth and memory commissions).

198. Contrary to expectations, many people that have been involved in these processes of dialogue, report that the experience of dialogue with the victim or their families is very difficult for offenders. *See* JOANNA SHAPLAND ET AL., RESTORATIVE JUSTICE IN PRACTICE: EVALUATING WHAT WORKS FOR VICTIMS AND OFFENDERS (2011) (reporting case studies about the experience of restorative justice for both victims and offenders).

ways to remediate the harm.[199] This last part can be crucial. First, by working directly with, not against, offenders, many of the collection issues addressed earlier could be sidestepped, thus ensuring reparations. Furthermore, in so far as guaranteeing the non-repetition of the harm is crucial to a process of accountability, white-collar offenders are in very good positions to work with other actors to design systems that prevent the very harm they caused.[200]

One potential objection about applying any of these models, or similar ones, to white-collar crime is that often the victim in those cases is invisible. When the social harm is diffuse, who sits in the seat of the victim in a non-adversarial proceeding for accountability? After all, alternative models of justice depend on victims voicing the harm they suffer with the people they hurt.[201] Is this possible when we cannot pinpoint a particular victim? For example, who would speak up in cases of tax evasion? However, if a prosecutor is supposed to speak for the community in an adversarial setting, there is no reason why there could not be a similar community representative in different accountability processes when the victim is not evident.

Even when we can identify victims, however, there are issues. One salient one is that victims may be too numerous to effectively engage in the types of accountability processes that are grounded in communities.[202] White-collar crimes often have victims that span across many jurisdictions and often include non-human

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199. Calls for incorporating some of the elements of these alternative modes of justice, even if not articulated in that language, have been made for over two decades. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85, 109 (2004).

> If you are mugged or your car is broken into, you are distressed not just because you lose the money in your wallet or must pay to replace your radio. You likely feel violated and belittled by the perpetrator and his act. . . . crime also carries a symbolic message from the wrongdoer that the community's norms do not apply to him and that he is superior to the victim and others like him.

Id.

200. If, for example, an individual charged of money laundering worked with government officials to create better prevention or detection mechanisms as part of their accountability process.

201. *See* SHAPLAND ET AL., *supra* note 198, at 115.

202. Abolitionist models of justice are bottom-up rather than top down. They come from the community to serve the interests of the community. I am not objecting to this model of justice, rather I am thinking about its limitations.

animals and living organisms. Without a unified community it is difficult to build a consensus approach as to what counts as accountability for these harms. However, transitional justice shows us that this is not an unsurmountable obstacle. Of course, when the harm is so diffuse accountability for all wrongdoing is difficult, but it is not clear that that is any different when the punishment is carceral.

Another potential objection is that transitional justice itself is contested.[203] If it is not clear that transitional justice can redress the harms that it was designed to, why try to apply a similar model in a different context? However, most critiques (and defenses) of transitional justice have more to do with expectations about what can be achieved through transitional justice, more than whether these processes are useful at all. Critics for example have pointed out that transitional justice is internally inconsistent[204] and incapable of achieving full social cohesion[205] in the wake of mass harms. This may well be true; however, in this context we are not demanding a system of justice to re-weave all of society's threads. Rather, applying these frameworks to white-collar crime is a way to provide more accountability for these harms than our current carceral framework.

In cases where there is a dispute about wrongdoing, both in the sense of whether there was harm and who is responsible for it,[206] we can imagine a greater role for civil and administrative accountability mechanisms than we currently do for white-collar crime. One important advantage of doing this is that, as explained

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203. *Compare* Bunselmeyer, *supra* note 195 (arguing that reparations were incapable of achieving social cohesion) *with* Elsa Voytas, More than Money*:* The Political Consequences of Compensation 6 (Aug. 9, 2021) (unpublished draft), (available at https://osf.io/akz26/) (using the case of Chile to show how reparations can be useful in politically empowering victims of human rights abuses).

204. Nir Eisikovits, *Transitional Justice*, THE STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE, https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/ (last visited Nov. 4, 2022).

205. Bunselmeyer, *supra* note 195.

206. Criminal law also adds another layer of difficulty in the sense of assigning responsibility. One issue is that the corporate vehicle is used to escape liability. The law enforcement response is then to use vicarious liability to find corporate managers responsible, however that sits uncomfortably with traditional notions of criminal law. *See* Barry J. Pollack, *Time To Stop Living Vicariously: A Better Approach to Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1393, 94-95 (2009) (arguing that the current regime of vicarious criminal liability for corporations is unduly broad, and that corporate liability should be tied more directly to the intent of senior management); *see also* TAUB, *supra* note 33*,* (arguing for reforms to corporate personhood so that law enforcement can pierce the veil more easily for cases of egregious malfeasance).

above, white-collar crime is difficult to prosecute. A non-carceral model will lower procedural protections and requirements to find liability, whether it is civil or administrative.[207] While civil or administrative accountability is not of the transformational kind imagined by abolitionists, it is a step in the direction of ensuring harms are recognized and remediated.

Once liability is imposed, then the wrongdoers would enter an alternative accountability process in the vein of restorative or transitional justice. This step is crucial because it is paramount to not equate monetary damages or professional repercussions with accountability. These types of penalties may be desirable, as seen in the previous section, however even assuming that fines are appropriate to the level of wrongdoing,[208] and that they are collected,[209] the monetization of justice is anathema to abolitionist objectives. This is not only because, many scholars tie ending prisons to ending capitalism, but also because paying a fine is a way to easily evade actual justice.

Non-carceral accountability may sound insufficient or fanciful. However, by all accounts, current efforts to curtail white-collar crime are failing.[210] If the current system of punishment is failing, why not try to envision a different one. I do not mean to suggest that the models outlined here are definitive, but to propose that models built in the same spirit can deliver true and long lasting accountability.

Before concluding, it is important to emphasize the distributional and legitimacy concerns about embracing an abolitionist approach for white-collar crime. From a distributional point of view, it would be detrimental to explore abolitionist models of justice for corporate wrongdoing without first doing it for other crimes. As mentioned in Part II, white-collar crime as I have discussed it here, is a crime of the powerful. As such, it is a crime that is afforded all the procedural protections of the criminal law and, in fact, where often the asymmetry between the state and the

207. I have previously argued that this is a reason for expanding administrative accountability for crimes of corruption. *See* Gerson, *supra* note 69.

208. A common complaint from people who study white-collar criminal practice is that wrongdoers often pay large fines that pale in comparison to the amount of wealth created by their crimes. *See, e.g.*, Mann, *supra* note 128 (4 billion settlement for over 10 billion dollars in gains).

209. Ross & Pritikin, *supra* note 163*; see also* Masur & Buccafusco, *supra* note 159 (justifying incarceration in cases of insolvency).

210. *See supra* Part II.

defendant skews in favor of the latter.[211] This has led to a greater use of alternative sanctions in the white-collar realm than in any other area of criminal law. If even more alternatives are created for white-collar criminals, then this will further accentuate the disparities between the top and bottom of the "penal pyramid."

This in turn will call into question, even more, the legitimacy of the criminal legal system.[212] Some abolitionists may believe that this is not a problem. However, our ability to redesign systems of punishment will depend, at least in part, on how our ability to resolve conflict, guarantee accountability, and hand out punishment is perceived because we cannot socially engineer away people's intuitions about just punishment.[213] Therefore, it will be very difficult to transition to an alternative if the whole project of imparting justice is delegitimized.

V. CONCLUSION

In this Article I have presented evidence that the current carceral approach to white-collar crime is failing. For some, this may not be tied to the criminal legal system itself, or of prisons, but rather either to the unwillingness of authorities to prosecute these cases or the difficulty in securing convictions. Instead of trying to change how we punish white-collar crime, therefore, we need to better use the system we have. Only after we have tried and failed should we move to create new institutions.

However, as reasonable as that proposition sounds, one goal of this Article was to show that it also further entrenches our carceral reality. Advocates of expanding criminal liability to more white-collar offenders thus need to justify their policy proposals not only in terms of redressing or preventing harms, but also considering the effects on mass incarceration and the real harms caused by imprisonment. This is especially so, because, as I argued, responding to white-collar crime can be done from an abolitionist ethic. This is not to suggest that we must quickly embrace abolitionists modes of justice for white-collar crime, but rather that it is possible we do so. If so, then we should explore these models rather than further validating the role of prisons as our *sine qua non* response to social harms.

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211. *See supra* Part II.
212. Tyler, *supra* note 181, at 284.
213. *See* Robinson & Kurzban, *supra* note 137, at 1892.

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