The Ongoing Milberg Weiss Controversy

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Some cases never seem to end. More than a decade after the government first began investigating alleged criminal activity by lawyers at Milberg Weiss Bershad & Schulman LLP, a quarter century after the earliest alleged wrongdoing took place, and more than two years after the last criminal defendant pled guilty and went to jail, the case continues to generate headlines and widespread public interest.\(^1\) Like a black cloud, controversy has followed the Milberg\(^7\) prosecution from the start.\(^3\) This was, after all, the top securities class action law firm in the country (so far ahead of its competitors that for many years there wasn’t a close second to speak of),\(^4\) a title to which it may still lay claim even today.\(^5\) Having chosen to prosecute the preeminent plaintiff’s firm, the Bush Administration’s Department of Justice could not have been surprised when its decision to prosecute was criticized for being driven more by politics than law. Some questioned indicting the law firm itself.\(^6\) Others

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1 See, e.g., PATRICK DILLON AND CARL M. CANNON, CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES (Broadway Books 2010); Peter J. Henning, Behind the Rise and Fall of a Class-Action King, N.Y. TIMES, March 1, 2010, at [original pagination].

2 The indictment covered a period when the firm was also known as “Milberg Weiss Hynes & Lerach LLP” and “Milberg Weiss Bershad Specht & Lerach.” The firm subsequently split and its West Coast office became known as Coughlin Stoia Geller Rudman & Robbins (now Robbins, Geller, Rudman & Dowd, LLP). Today, the Milberg firm is known just as “Milberg.”


4 Laura E. Simmons and Ellen M. Ryan, Securities Class Action Settlements, Cornerstone Research, 2007 Review and Analysis 14 (noting that the law firm “was involved as lead or co-lead plaintiff counsel in roughly half of post-Reform Act settlements).

5 Milberg recorded the second highest settlement total of all plaintiff’s firms in the country in 2009. First on the list was its West Coast spin-off, Coughlin Stoia Geller Rudman & Robbins. See Risk Metrics Group Ranks Top 50 Plaintiff’s Firms for 2009, available at http://www.riskmetrics.com/press/20100415_SCAS50.

6 The condemnation of the government’s decision to indict the firm as an entity stretched across the political spectrum. See, e.g., Julie Creswell, Four From Congress Defend Indicted Law Firm, N.Y. TIMES, June 12, 2006 at [need original pagination] (reporting criticism of decision to indict firm as an entity); Editorial, Milberg Mores, Wall St. J., June 16, 2006, at A14 (supporting Democrats’ denunciation of firm indictment); Press Release, U.S. Chamber of Commerce, Chamber Responds to Indictment of Milberg Weiss Law Firm (May 18, 2006).
critiqued the prosecution’s tactics. Still others, more recently, have raised concern about making honest services fraud the central charge in the indictment. The Supreme Court’s landmark decisions this summer interpreting and narrowing the scope of 18 U.S.C. §1346’s reach may bear no direct relevance to the Milberg case but they do serve as an important and timely reminder that the prosecution was centrally based on a notoriously ambiguous statute.

The single greatest source of controversy surrounding the Milberg prosecution, however, has always been about whether anyone was actually harmed by what the lawyers did. That certainly isn’t meant to suggest that, in the absence of proof of harm, the Milberg lawyers were innocent of all criminal wrongdoing: in hiding the payments they made, they likely committed (or at least suborned) perjury. But this high profile prosecution was not built on such pedestrian accusations. Rather, to send the message that this was a major racketeering case, it was essential for the government to show that Milberg’s actions caused significant harm to the investors they were supposed to be representing. Indeed, without proof that someone was injured, the argument for regulating the lawyer’s conduct through the normal means by which professional norms are enforced is hard to overcome.


Lisa A. Casey, Class Action Criminality, 34 J. CORP. L. 1 (2008) (observing, inter alia, that “the mail and wire fraud counts not only stated the essential scheme to defraud the absent class members, but these same counts formed the backbone of the government’s case against Milberg Weiss. These charges make up the bulk of the indictment and are the ones with the largest penalties”); J. Kelly Strader, White Collar Crime and Punishment – Reflections on Michael, Martha, and Milberg Weiss, 15 GEO. MASON L. REV. 45, 85 (2007) (“the mail and wire fraud charges [] are at the heart of the government’s case”).


Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul?, 11 BRIEFLY (Am. Enterprise Inst. for Pub. Pol’y Res., Wash. D.C.) May 2008 at 5 (observing that whether “kickbacks harmed class members” is an empirical question “that lies at the heart of this debate over whether the government should have pursued its prosecution”); Strader, supra note __ at 84 (“The essence of the government’s case [against Milberg] is that for over two decades the defendants arranged for $11.3 million in kickbacks to be paid to named plaintiffs in suits for which the firm acted as lead plaintiffs’ counsel, thereby defrauding the unnamed class members and shareholders”).

Casey, Class Action Criminality, supra note __ at 232-33.

Casey, Class Action Criminality, supra note __ at 177 (“By indicting the law firm under these malleable statutes, the government could charge Milberg Weiss with racketeering even though the alleged illegal conduct was decades old and involved no threats of violence”; Strader, supra note __ at 85 (2007) (“Without that underlying mail and wire fraud, this is a minor cover-up crimes case, not a major mail and wire fraud case”).

Broadly summarized, the indictment alleged that over a span of roughly twenty years and approximately two hundred lawsuits, Milberg lawyers had been making undisclosed payments to the named plaintiffs in the cases they filed.\textsuperscript{14} There isn’t any dispute that one of the reasons Milberg paid these people was so they could have a stable of willing persons at the ready to serve as representative plaintiffs in the class action suits they would file.\textsuperscript{15} That was important because before 1995 the first lawyers to file were often appointed lead counsel, beating out all other comers.\textsuperscript{16} Certainly, those other lawyers who were not named lead counsel could have complained of Milberg’s sharp tactics (though there is also evidence that Milberg wasn’t the only one paying plaintiffs under the table).\textsuperscript{17} Still, the image of other plaintiff’s attorneys as victims bemoaning their loss of millions of dollars in fees hardly would have made for the most sympathetic of headlines and the government, quite sensibly, focused elsewhere. Instead, prosecutors built their case on the theory that it was the unnamed class members who were victimized by these under the table payments. But how?

The government’s theory of harm was never well-articulated. Consider this key paragraph from the First Superseding Indictment:

The kickback arrangements created a conflict of interest between the paid plaintiffs and those to whom they owed fiduciary duties because, as a result of the kickback arrangements, the paid plaintiffs had a greater interest in maximizing the amount of attorneys’ fees awarded to Milberg Weiss than in maximizing the net recovery to the absent class members and shareholders.\textsuperscript{18}

Exactly what conflict of interest resulted, and how that led the paid plaintiffs to have a greater interest in maximizing fees over the class recovery was not explained. These ambiguities aside, it became evident the government intended to prove that but for the conflict of interest the kickbacks created, the named plaintiffs would have tried to convince their own lawyers to reduce their fee or,  

\textsuperscript{14} First Superseding Indictment United States v. Milberg Weiss Bershad & Schulman LLP, No. CR 05-587(A) DDP (C.D. Cal. May 18, 2006) at ¶\text{___} [hereinafter FSI].

\textsuperscript{15} Casey, Class Action Criminality, supra note __ at 164 (“Because judges frequently awarded the role of lead counsel to the law firm that had filed the first complaint against the defendants, time was of the essence for plaintiffs’ lawyers”);

\textsuperscript{16} See Randall S. Thomas et al., Megafirms, 80 N.C. L. REV. 115, 187 (2001) (“Lead counsel is a highly desirable position because this firm receives the largest share of any fees generated in the case and has the most power to control the case”);

\textsuperscript{17} John C. Coffee Jr., Milberg Weiss Indictment, Nat’l. L. J., June 19, 2006, at 18 (“Many have long wondered as to what could motivate anyone with no real financial stake to be deposed in hundreds of cases, and the current indictment will suggest to some that under-the-table payments have long been customary. Indeed, professional plaintiffs appear to have maintained broad and inclusive stock portfolios with trivial holdings that were designed to give their law firms immediate access to court. One does not logically do this for free.”); Casey, Class Action Criminality, supra note ____ at 166 n. 85.

\textsuperscript{18} FSI, at ¶29.
failing that, convinced the court to reduce the fee in favor of a larger recovery for the class.\textsuperscript{19}

Whatever else may be problematic about this theory of harm,\textsuperscript{20} its singular weakness is that it is inconsistent with the widely held understanding that individual plaintiffs are typically nothing more than “figureheads” in the litigation who play no meaningful role in the critical decisions of a case.\textsuperscript{21} As far as the attorney’s compensation is concerned, the individual named plaintiff is understood to have little to say. Put another way, a securities class action plaintiff’s lawyer may ask, “What is the highest fee that a court is likely to approve?” but is not likely ever to consider, “What is the highest fee that can be negotiated with my named plaintiff?”

If this conventional understanding is right—and there is virtually no disagreement that it is\textsuperscript{22}—then the government’s theory of harm makes little sense: in order to obtain higher fees, the Milberg lawyers are unlikely to have thought they needed to bribe the named plaintiffs. Despite this fundamental weakness in its harm theory, the government never had to defend its unsupported accusations because everyone pled guilty, as criminal defendants customarily do. Thus, whether the government ever could have demonstrated that class members were actually harmed remained an open question even after all the lawyers went to jail.

Fast forward to mid-2008 and the publication of an important empirical study by Michael A. Perino.\textsuperscript{23} Perino is one of the leading securities law scholars in the country. His work has been influential in academic circles, with the bench and bar, with regulators at the Securities and Exchange Commission, and with Congress. Indeed, relying in part on another empirical study he authored, Congress passed the Securities Litigation Uniform Standards Act of 1998.\textsuperscript{24} In \textit{The Milberg Weiss Prosecution: No Harm, No Foul} Perino claims to have found the missing evidence of harm to support the government’s theory of wrongdoing that it advanced (but without evidentiary support). Perino’s much publicized empirical findings have been touted not only by the conservative

\textsuperscript{19} See infra text accompanying notes \_\_ - \_\_.
\textsuperscript{20} Two excellent academic critiques of the government’s honest services fraud theory are Casey, \textit{Class Action Criminality}, supra note \_\_, and Strader, supra note \_\_.
\textsuperscript{21} Jonathan R. Macey & Geoffrey P. Miller, \textit{The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform}, 58 U. CHI. L. REV. 1, 20 (discussing lack of control named plaintiffs exercise in class action litigation); Jean Wegman Burns, \textit{Decorative Figureheads: Eliminating Class Representatives in Class Actions}, 42 HASTINGS L.J. 165, 179 (1990); \textit{Greenfield v. Villager Indus., Inc.}, 483 F.2d 824, 832 n.9 (3d Cir. 1973) (“Experience teaches that it is counsel for the class representative and not the named parties, who direct and manage these actions. Every experienced federal judge knows that any statements to the contrary [are] sheer sophistry”).
\textsuperscript{22} Perino, \textit{No Harm, No Foul}, supra note \_\_ at 39 (referring to “the standard dynamics of securities class actions” in which “[a]ttorneys appear to control these actions with little or no input from the representative plaintiffs”); see also infra text accompanying notes \_\_ - \_\_.
business community\textsuperscript{25} but by the mainstream press as well.\textsuperscript{26} His work also has been cited authoritatively by prominent academic commentators in the field.\textsuperscript{27}

The most important point that Perino wants readers to take away from his study is, as he puts it, that the “evidence contradicts Milberg Weiss’ claim that paying kickbacks was a victimless crime.”\textsuperscript{28} What is this missing evidence of harm? Although he points to a number of the study’s results, the finding of central importance to Perino is that Milberg requested and was awarded higher fees in settlements in which the government alleged it paid a kickback (as compared to settlements in which no such allegation was made).\textsuperscript{29} He interprets this finding to mean that paying kickbacks led to larger fee awards. However, even as he reads the data to show that the under-the-table payments Milberg made allowed it to receive higher fees, he has no explanatory theory to account for these results. In other words, it is as though Perino is saying, “I realize it does not make sense that Milberg would have needed to pay a kickback to the named plaintiff to obtain a higher fee; but, what can I tell you, the numbers don’t lie.”

Empirical research has an important place in law, but it is vital not to forget that statistics is an art, not a science, insofar as the quality of results depends on the actions and interpretations of the researcher.\textsuperscript{30} In this paper, we argue that despite Perino’s much deserved reputation as a leading figure in the field and notwithstanding the carefully constructed and rigorous study he has authored, the evidentiary proof of harm he claims to have found simply cannot withstand scrutiny. Bruce Kobayashi and Larry Ribstein have previously raised a methodological difficulty with his work\textsuperscript{31} to which Perino subsequently responded.\textsuperscript{32} His response successfully falsified one hypothesis they proposed but it misses a larger point, which we develop more fully below, regarding non-linearities between fees and settlement amounts that is suggested by their earlier

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\textsuperscript{25} Perino received the 2008 Award for Outstanding Research from the U.S. Chamber of Commerce, Institute for Legal Reform. See http://www.stjohns.edu/campus/blog/archive/pr_law_080930.news_item@digest.stjohns.edu%2Facademics%2Fgraduate%2Flaw%2Fpr_law_080930.xml. ILR’s self-declared mission includes “neutraliz[ing] plaintiff trial lawyers’ excessive influence over the legal and political systems [and] eliminate[ing] frivolous lawsuits.” See http://www.instituteforlegalreform.com/about-ilr.html.

\textsuperscript{26} Joe Nocera, Serving Time, But Lacking Remorse, N.Y. TIMES, June 7, 2008; Study Claims Milberg Weiss Scheme Hurt Shareholders, N.Y. L. J., May 28, 2008, at 1.


\textsuperscript{28} Perino, No Harm, No Foul, supra note ___ at 58.

\textsuperscript{29} Id. at 8, 58 and 62.


In addition, we raise two additional, original types of criticisms of the study’s methodology. The first methodological critique we offer concerns the data that Perino is using. Here we raise issues pertaining to the representativeness of the sample, sample size and distribution of the data among the sample, and the choice of which data to include and which to leave out of the study. The second methodological issue relates to the variables Perino uses—and those he does not—as controls within the linear regression models he runs.

We could not test many of our hypotheses because we were not given access to Perino’s research data. However, as discussed below, we were able to collect some of the same data by independently gathering it from outside sources, primarily from a database of settlements maintained by MCSI, Inc. Previously known as Institutional Shareholder Service’s Securities Class Action Services (ISS), this is the same database on which Perino primarily relied for his data collection. As we discuss, the replication data we have collected yields results that are not consistent with some of the descriptive statistical findings Perino reports. Specifically, we find no difference either in mean or median fee awards between cases in which the government alleged Milberg paid a kickback and all other cases. Additionally, the data we independently obtained validates some of the methodological concerns we raise. Most critically, the replication data strongly suggests that the reason fees may have been higher in the indictment cases is that almost all were filed before the Reform Act. By contrast, the vast majority of cases in the replication data of Perino’s non-indictment sample were filed in a later period in which fee awards have been lower. In sum, our replication results, along with the other methodological questions that we raise (but cannot validate or falsify without access to the full data he used), provide substantial reasons to doubt the reliability of Perino’s findings.

We argue further that, even if all methodological problems are put to one side, there are equally substantial reasons to be concerned about the inferential conclusions Perino draws from the data, especially his bottom line conclusion that the evidence “contradicts Milberg Weiss’ claim that paying kickbacks was a victimless crime.” Perino is only reporting an average differential of 2.6% in fee awards between indictment cases and those in which no kickback was paid and, even assuming the accuracy of this finding, when results of his regression analysis are taken into account even this modest differential almost entirely

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33 See infra text accompanying notes __ - __.
34 We asked for access to his data so that we—or others—could try to replicate the results but Perino declined to make it available. See email from M. Perino to L. Hoffman, July 26, 2010, copy on file with author. It would obviously be preferable to be able to use the identical dataset to test our hypotheses. See generally Lee Epstein and Gary King, The Rules of Inference, 69 U. Chi. L. Rev. 1, 46 (2002) (describing replication norm in political science). Nevertheless, as discussed in the text, we were able to replicate some of the data he used and, separately, raise other methodological critiques that can be tested.
35 At the time Perino collected his data, it was maintained by Institutional Shareholder Services. See Perino, No Harm, No Foul, supra note __ at 28. ISS was subsequently acquired by RiskMetrics Group in January 2010 which, in turn, was acquired by MCSI in June 2010. See http://www.riskmetrics.com/news_releases/20100601_msci.
disappears and is no longer statistically significant. We conclude that, when read carefully, his conclusions are not supported by the data he has gathered and collected. Far from demonstrating that kickbacks allowed Milberg to obtain higher fees, his study fails to rule out the possibility that other, entirely benign reasons could explain the higher fees Milberg received. This includes what may be the most straightforward explanation of all: that the firm may have earned those fees by the cases they brought and the recoveries they obtained on behalf of class members.

The paper proceeds as follows. Part I examines the government’s investigation of Milberg and deconstructs the charges that were brought against the firm and its lawyers. Part II introduces and summarizes the major findings of Perino’s study. Part III raises methodological criticisms of the study and tests some of our hypotheses using data we were able to independently obtain. Beyond these methodological critiques, Part IV argues that there are substantial reasons to be concerned with the inferential conclusions Perino draws from the data. Finally, Part V considers some of the policy ramifications that are suggested by our critique of Perino’s study and the central question of harm in the Milberg prosecution.

I. The Government’s Investigation and Prosecution of the Firm and its Lawyers

The indictment of the Milberg firm and four of its lawyers was the result of a seven-year investigation into the firm, its attorneys and paid plaintiffs. Nearly all of the activities that form the basis of the charges against Milberg occurred prior to the passage of the PSLRA (some dated back to 1981, a quarter century before the first indictments were handed down). Nevertheless, the government’s case against Milberg centrally emphasized the reform legislation’s purposes and the ways in which Milberg broke the spirit of the law, even though the statute was technically inapplicable to most conduct and even though, as we shall see, no literal violations of the PSLRA could have been alleged even as to conduct arising after its passage.

According to the indictment, Milberg maintained a group of “ready, willing, and able” plaintiffs by kicking back a portion of the legal fees the firm received. In exchange, these persons (and, on some occasions, their relatives) acted as lead plaintiffs in dozens of class-action suits brought by Milberg. The firm held these professional plaintiffs in the wings, presumably directing them to purchase stock in target corporations. When ready to file suit against a targeted corporation, Milberg could quickly call on one of its professional plaintiffs to

36 Casey, Class Action Criminality, supra note __ at 156-57
37 Id.
38 FSI, supra note __ ¶ 55.
39 Id. ¶ 27.
40 See e.g., id. ¶ 35 (reporting that plaintiff and his family appeared as lead plaintiffs in as many as 40 such suits); id. ¶ 37 (alleging that plaintiff and his family appeared as lead plaintiffs in as many as 70 such suits).
41 Casey, Class Action Criminality, supra note __, at 165.
serve as lead plaintiff, greatly increasing the firm’s ability to file first and obtain the coveted lead counsel position. In the case of a successful lawsuit, which almost always meant a settlement before trial, Milberg paid the agreed upon share of legal fees to the plaintiff in one of two ways. Most commonly, the firm wired money to an “intermediary attorney” in the guise of a referral fee. Eventually, this payment made its way into the hands of the plaintiff. Alternatively, on several occasions, representatives of the firm would simply hand a cash-filled envelope to the plaintiff. In this manner, Milberg was alleged to have doled out over this twenty-five year time span roughly eleven million dollars from the proceeds of more than one hundred and eighty separate settlements.

Instead of pursuing possible criminal charges for perjury or seeking disciplinary sanctions against the lawyers, the government indicted the firm and four of its partners on far more controversial charges. The principal charge in the indictment was for honest services fraud. Section 1346 has been one of the most favored portions of the mail and wire fraud statute by prosecutors because of its elasticity, which has made it easily applicable to a wide range of conduct. The rest of the counts, such as for obstruction of justice, were largely based upon the defendants’ alleged attempt to hide evidence that would have shown their deprivation of honest services to the unnamed class members. In short, as Kelly Strader perceptively put it, without the honest services fraud charge, the case against Milberg Weiss would have amounted to a “minor cover-up crimes case, not a major mail and wire fraud case.”

The central allegation made in the indictment was that unnamed class members were deprived of the “intangible property right to the “honest services” of the named plaintiffs and the lawyers in charge of the suits, in violation of Section 1346. There were many specific factual allegations supporting the honest services fraud count but, essentially, they all can be boiled down to the

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42 Id.
43 Julie Creswell, Case Turns Toward Law Firm, N.Y. TIMES, April 29, 2006, at [need original pagination]. The web of lawyers serving as intermediaries stretched across the country. FSI, supra note ___, ¶ 31.
44 Id.
45 Ellen Rosen, A Class-Action Shuffle, N.Y. TIMES, July 7, 2006, at [need original pagination].
46 See, e.g., Sorich v. United States, 129 S. Ct. 1308, 1311 (2009) (mem.) (Scalia, J., dissenting from denial of certiorari) (“I would grant the petition for certiorari and squarely confront both the meaning and constitutionality of § 1346 [honest services provision]. Indeed, it seems to me quite irresponsible to let the current chaos prevail.”); United States v. Brown, 459 F.3d 509, 534 (5th Cir. 2006) (DeMoss, J., concurring in part and dissenting in part) (“The constitutionality of § 1346 may well be in serious doubt.”).
47 Casey, Class Action Criminality, supra note ___ at 160 (“The named plaintiffs and Milberg Weiss committed honest services fraud—a violation of the mail and wire fraud statutes—by sharing fees. In addition, the government accused Milberg Weiss of conspiracy, racketeering, and money laundering, all charges deriving from prosecutors’ claim that the payments to named plaintiffs deprived absent class members of their representatives’ honest services”).
48 Strader, supra note ___ at 86 (2007).
49 FSI, supra note ___ at ¶ 25, 41.
basic contention that by paying the named plaintiffs under the table, the Milberg lawyers (and the named plaintiffs) breached fiduciary duties owed to the unnamed class members which resulted in the unnamed class members receiving less than they would otherwise have received.

As framed, it was or, at least, should have been apparent that the government’s prosecution of Milberg and its lawyers was centrally based on a key assumption: that in breaching fiduciary duties they allegedly owed the lawyers caused harm to the unnamed members of the classes for which they had been appointed lead counsel. The government’s theory of harm in the indictment was not well-laid out, however. At one point the government alleged that unnamed class members were denied “material economic information that affected their right and ability to influence and control class actions brought on their behalf.”\footnote{Id. at ___.} Deprived of this “material economic information,” class members allegedly were unable to control the attorneys’ fees obtained by Milberg in the lawsuits. The indictment did not explain, however, the way in which the undisclosed payments to named class members could be considered “material economic information” to the group. Nor did it adequately account for what class members would have done with this information, had they known it.

One might plausibly read the indictment as suggesting that the amount of the money paid to the named plaintiffs was money that belonged to the unnamed class members. The problem with this contention is that all of the money that was paid by Milberg to the named plaintiffs came out of its attorneys’ fee awards. None of the eleven million dollars in kickbacks came from the payments class members received from the defendants as part of any agreed upon settlement. Since the money paid by Milberg to the named class members came from the attorney’s fee awards, the claim that unnamed class members were harmed required a different foundation. The government attempted to provide that foundation when it asserted in the indictment that all of the money paid to the named plaintiffs by Milberg would have gone instead to the unnamed class members in the form of a larger class payout. In this regard, a key allegation in the indictment is paragraph 29:

> The kickback arrangements created a conflict of interest between the paid plaintiffs and those to whom they owed fiduciary duties because, as a result of the kickback arrangements, the paid plaintiffs had a greater interest in maximizing the amount of attorneys’ fees awarded to Milberg Weiss than in maximizing the net recovery to the absent class members and shareholders.\footnote{Id. at 29.}

Though not well articulated, one can plausibly read these allegations to mean that the payments made to the named class members ultimately had the effect of taking money out of class members’ pockets. That is, the named plaintiffs would have, but for the conflict of interest the secret payments to them caused, opposed their own lawyers and convinced them to reduce their attorney fee
request by, roughly, the eleven million dollars that were paid as kickbacks.\textsuperscript{52} Failing that, they would have convinced the court to reduce the lawyer's requested fee. Said another way, the government's basic view was that had the named plaintiffs not been paid off, they would not have hesitated to insist that the Milberg lawyers shave their requested fees and they would have been successful in their insistence, either by prevailing on the lawyers to cut the requested fees or, failing that, asking the court to do so.\textsuperscript{53}

Without doubt, this was a difficult theory on which to base one of the most controversial prosecutions of the decade. In the years before passage of the Reform Act, it was generally understood that the lead plaintiff occupied a passive, “figurehead”-type role in the litigation\textsuperscript{54} with lead counsel controlling the lawsuit, making the critical decisions about strategy, legal fees, and settlement amounts.\textsuperscript{55} In this period, the lead plaintiff did not even have the power to reject or approve the proposed settlement which must be approved, instead, by the court.\textsuperscript{56} It is notable in this regard that most of the cases at issue in the Milberg indictment arose in this period, before the Reform Act went into effect in 1995 (as we will see, fully 90% of the indictment cases arose between

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\footnote{52} Casey, \textit{Class Action Criminality, supra} note ___ at 219 (noting that “the government assumed that, were it not for the corrupting promise of kickbacks, the representative plaintiffs would have had the motivation (economic incentive) and the ability to monitor counsel effectively. The prosecutors’ theory further assumed that, having monitored counsel, the representative plaintiffs would have objected to Milberg Weiss's fee requests as excessive”).

\footnote{53} \textit{Id.} (noting that the prosecution’s theory assumed that if lawyers could not be convinced to lower their fee, “the representative plaintiffs would have convinced the courts of the merits of their objections and the courts, persuaded that Milberg Weiss's fee requests were, for some reason, excessive, would have reduced the law firm's fees, thus enlarging the classes' recoveries”).

\footnote{54} \textit{See, e.g.,} Elliott J. Weiss & John S. Beckerman, \textit{Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions}, 104 YALE L.J. 2053, 2060, 2065 (1995) (in academic article first proposing institutional lead plaintiff reform, authors note that individual investors widely viewed as “poorly informed about the theories of their cases” and “is unlikely to monitor effectively her attorney’s prosecution of the action”). The limited role the individual investor played in securities litigation was recognized in the Reform Act’s legislative history; see also S. Rep. No. 104-98, at 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 685 (noting that investors have “great difficulty exercising any meaningful direction” over securities class action cases); see generally John C. Coffee, Jr., \textit{The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action}, 54 U. CHI. L. REV. 877, 877 (1987); Geoffrey P. Miller, \textit{Competing Bids in Class Action Settlements}, 31 HOFSTRA L. REV. 633, 634 (2003) (“representative plaintiffs are usually mere eponyms. The litigation is controlled by plaintiffs’ attorneys, who function as entrepreneurs with little monitoring by their ostensible clients”).

\footnote{55} Jill E. Fisch, \textit{Aggregation, Auctions, and Other Developments in the Selection of Lead Counsel Under the PSLRA}, LAW & CONTEMP. PROBS., Spring/Summer 2001, at 56 (“The stakes of class members are generally too small to warrant active monitoring. Instead, class actions are effectively run by class counsel. Plaintiffs’ lawyers bear most of the risk of the lawsuit and exercise virtually complete control over litigation decisions.”).

\footnote{56} \textit{See, e.g.,} Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999) (approving settlement over objections from several named plaintiffs and other class members). \textit{See also generally} John C. Coffee, Jr., \textit{Litigation Governance, Taking Accountability Seriously}, 110 COLUM. L. REV. 288, 298 (2010).
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1991-1998). Note that the statute is inapplicable to any private action filed before December 22, 1995, regardless of when the case actually settled.

After the statute’s passage, the substitution of stronger institutional investors for individual investors in the lead plaintiff position has often had the effect of reducing fees, but individual investors who serve as lead plaintiffs typically remain weak. In sum, then, it is extraordinarily difficult to square the presence of a weak individual named plaintiff, who lacks the ability to negotiate with the lawyer over fees, with the conflict of interest theory that the government advanced in the Milberg indictment.

II. Perino’s Study: Purporting to Find Evidence to Support the Government’s Theory of Harm

Recognizing that the government had been criticized for not adequately demonstrating how class members were injured by Milberg’s conduct, Perino undertook to determine whether support for the government’s position nevertheless could be found. Perino had no involvement with the Milberg case. However, as an academic with a long interest in securities litigation, he found himself interested in what he describes as “an empirical question that lies at the heart of this debate over whether the government should have pursued its prosecution:” namely, whether the payments to the representative plaintiffs injured the class members, as the government asserted. He claims to have found such support in data on settlement amounts from various securities class action settlements.

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57 See infra text accompanying notes ___ - ___.
59 Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 WASH. U. L.Q. 869, ___ (2005) (finding that when the lead plaintiff is a private institutional investor, attorney’s fees post-PSLRA actually end up being higher as a percentage of total recovery than they were pre-PSLRA). Public institutional investors appear to be exercising more bargaining power, but recent empirical work has also demonstrated that attorneys’ fees remain high even among public institutional investors when an official who manages a state pension fund demands campaign contributions from lawyers competing to gain the fund’s involvement as lead plaintiff in securities litigation. See Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, The Price of Pay to Play in Securities Class Actions, University of Michigan Law School, John M. Olin Center for Law and Economics Working Paper No. 09-025, available at http://ssrn.com/abstract=1527047 (January 21, 2010 draft).
60 See Stephen J. Choi, Motions for Lead Plaintiff in Securities Class Actions, New York University Law and Economics Working Papers, Paper 167 (June 2009 draft), at 29 (empirical study showing, inter alia, that “[w]eak lead plaintiffs will allow higher attorney fee motions all other things equal); see also generally Geoffrey P. Miller, Competing Bids in Class Action Settlements, 31 HOFRSA L. REV. 633, 634 n.2 (2003); Coffee, Litigation Governance, supra note ___ at 297 (“Typically, the class members [including the class representatives] will neither have the right to select or replace the attorney nor to determine the attorney’s fee (which will instead by set by the court”).
61 Perino, No Harm, No Foul, supra note ___ at 5.
cases, most of which is not publicly available. Specifically, Perino compares settlement awards in the cases covered by the indictment (which he calls the “indictment” cases) to settlements in other securities class action cases, both those in which Milberg was lead counsel and those in which another firm was appointed to that role (the “non-indictment” cases). From an examination of this data, Perino emphasizes several points.

A. Settlement Size

Perino’s first empirical finding in the paper is that “no statistically significant relationship exists between the Indictment variable and overall settlement size.” By this he means to show that settlements in the cases under indictment were not any larger—either in absolute terms or as a percentage of total investor losses—than settlements of cases in which there was no allegation of secret payments having been made to the named plaintiffs. Perino’s finding is meant to be responsive to a point Milberg lawyers apparently made in their defense that, far from harming the plaintiff class, they achieved higher settlements in these cases that benefitted all class members. Perino argues that because the data does not show a correlation between payments made to the named plaintiffs and higher settlement awards, there is not any reason to credit Milberg with achieving better results for all class members. Later, after examining fee awards Milberg received, Perino circles back to this finding and uses it as support for his ultimate conclusion that class members were victimized by the undisclosed payments made to the named plaintiffs.

B. Fee Requests

Perino’s next finding concerns Milberg’s fee requests. Perino’s findings regarding fee requests are generally similar to his findings regarding fee awards, though there are a few differences we do highlight below that are significant. It is enough here to say that as far as fee requests are concerned, Perino reports that the data shows that, controlling for all other variables, the fee requests Milberg asked the Court to approve in the indictment cases were higher than in non-indictment cases. Significantly, he reports that as settlement value increased, the fee requests by Milberg in the indictment cases were larger than

62 See supra note ___.
63 Perino, No Harm, No Foul, supra note ___ at 6.
64 Having obtained access to the same database that Perino used, we are not at all clear how he arrived at his data on percentage of investor losses (what he calls the “ratio of settlement to MDL”). For most of the indictment cases, that information is not available in the ISS database. We can only speculate that Perino had access to other information not included in the ISS database from which he derived this data. We leave to one side that percentage of investor losses is not always an easy figure to calculate (it depends, among other things, on how to evaluate general allegations in a complaint).
65 Perino, No Harm, No Foul, supra note ___ at 36.
66 Id. at 58 (finding that Milberg fee awards were higher in the indictment cases and observing that “[w]hile it is possible that these extra fees were rewards for superior performance, there was no statistically significant correlation between recoveries and the indictment cases”).
fee requests in the non-indictment cases.\textsuperscript{67} He argues that this empirical evidence is consistent with the government’s argument that a paid plaintiff has an incentive to maximize attorney’s fees. Of course, as Perino recognizes, even if the payments made by Milberg incentivized the named plaintiffs not to oppose Milberg’s fee requests (and even if we assume that the named plaintiffs have the power to insist that the lawyer’s requested fees be lower\textsuperscript{68}), the courts had to subsequently approve fee awards in these cases.\textsuperscript{69}

C. Fee Awards

Perino’s most significant empirical findings concerns the fee awards themselves. Perino finds that Milberg’s fee awards in the indictment cases were higher than the fees awarded in non-indictment cases. The difference in the average fee was just over three percentage points higher in the indictment cases. More precisely, he reports that the mean (and median) indictment case fee was 29.57\% (30.00\%), as compared with 26.40\% (27.96\%) for non-indictment cases.\textsuperscript{70} Note that these are descriptive statistics only (not controlling for any other features of the cases). Following a similar approach, he also reports that when one compares only the subset of Milberg cases, the fee awards in the indictment cases were still higher than in non-indictment cases (that is, in cases in which Milberg itself had been appointed lead counsel but had not been accused of paying any kickbacks). Comparing the two different kinds of Milberg cases, the average fee in the indictment cases was just less than three percentage points higher.\textsuperscript{71}

After using linear regression analysis, Perino reports a 2.6\% differential between fees in indictment and non-indictment cases, measuring the fees awarded as a proportion of settlement.\textsuperscript{72} Separately, Perino reports Milberg received fees (in both indictment and non-indictment cases) that were approximately 4-5\% higher than those other firms received on average. He then reports what he regards to be his most significant finding: “[A]s settlements grow larger the fee awards in the indictment cases grow at a faster rate than the fee awards in the non-indictment cases.”\textsuperscript{73} Looking only at the subset of Milberg cases, Perino reports that “Milberg was awarded an increasingly larger share of the settlement in the indictment cases than in other cases it handled.”\textsuperscript{74} These findings in hand, Perino comes to his main conclusions:

\begin{itemize}
  \item \textsuperscript{67} Id. at 46.
  \item \textsuperscript{68} But see supra text accompanying notes ___ - ___.
  \item \textsuperscript{69} Id. at 51 (“High fee requests are a necessary but insufficient condition for harm to the class. After all, an excessive fee request will not harm absent class members so long as \textit{ex post} judging is effective in reducing such requests.”).
  \item \textsuperscript{70} Id. at 52-53.
  \item \textsuperscript{71} Id. at 53.
  \item \textsuperscript{72} Id. at 56 (Table 6, Model 5).
  \item \textsuperscript{73} Id. at 55.
  \item \textsuperscript{74} Id. at 58.
\end{itemize}
This evidence contradicts Milberg Weiss’ claim that paying kickbacks was a victimless crime. The positive and significant correlation between fee awards and the *Milberg* variable shows that, all else equal, Milberg Weiss obtained fees that were on average between 4% and 5% higher than the fees other firms obtained.\(^5\)

Referencing his prior finding that there was no statistically significant correlation between kickbacks to plaintiffs and total settlement size, he continues:

While it is possible that these extra fees were rewards for superior performance, there was no statistically significant correlation between recoveries and the indictment cases. Nonetheless, as settlement size increased, fees in the indictment cases grew at a faster rate than fees in the non-indictment cases. . . . These results are consistent with the hypothesis that that [sic] absent class members were in fact harmed in the indictment cases—they appear to have received a lower proportion of the settlement proceeds than class members in otherwise substantially similar non-indictment cases.\(^6\)

In sum, Perino is reporting that the data shows that in the indictment cases, Milberg received high fee awards, and increasingly higher awards as settlement size increased as compared with both cases in which other firms were lead counsel and cases in which Milberg was lead counsel but it did not pay a kickback.

III. Methodological Problems With the Study Data

Perino is the first to try to gather proof to support the government’s theory of harm in the indictment which was offered without supporting evidence. His study is significant both because it has been widely discussed and because it was constructed with methodological rigor. Perino is to be commended for his thoughtful framing of the study parameters, extensive data collection efforts, and the great lengths to which he went to ensure the statistical integrity of his findings. Nevertheless, despite his best efforts, there are substantial reasons to doubt the reliability of the findings he reports.

We begin by raising two original kinds of methodological criticisms. The first methodological critique we raise concerns the data that Perino is using. Here we raise issues pertaining to the representativeness of the sample, sample size, distribution of the data among the sample, and the choice of which data to include and which to leave out of the study. The second methodological issue relates to the variables Perino uses—and those he does not—as controls within the linear regression models he runs. Specifically we will argue that Perino does not properly control for key factors including time-period, location, and risks involved with the cases. The third methodological criticism we raise expands

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\(^5\) *Id.* at 58.

\(^6\) *Id.* at 58
on a concern previously raised by Kobayashi and Ribstein in a blog post\textsuperscript{77} to which Perino subsequently responded.\textsuperscript{78} Although we did not have access to Perino’s full data, we were able to obtain some of the same data, as well as to gather supplemental information on some of the indictment cases from other public sources. As discussed below, the results of this independent research validate some of our hypotheses, though others could not be tested because the data was incomplete. Our ultimate conclusion in this section of the paper is that there are substantial reasons to doubt the reliability of Perino’s findings.

A. Representativeness of the Samples

The first major methodological problem with Perino’s study concerns the representativeness of the samples of cases he has drawn. There are four aspects to this representativeness critique.

1. The Sub-Sample of Thirty Six Compared With All Indictment Cases

From an empirical point of view, it is problematic that Perino assumes the indictment dataset he draws, comprised of just thirty-six settlements, is representative of the universe of settlements in which Milberg was accused of criminal wrongdoing by paying a kickback. The government alleged in the indictment that Milberg paid kickbacks in connection with more than one hundred and eighty different cases.\textsuperscript{79} Presumably, Perino does not look at this entire group because the first superseding indictment—the most factually detailed of the indictments—only lists fifty-six of the cases by name.\textsuperscript{80} Why does he not at least consider all fifty-six of the identified cases? That listing included both federal securities class actions as well as derivative actions filed originally in state court asserting state law causes of action. Perino excludes all twenty-four of the state derivative suits because he limited his sample to federal settlements, leaving only thirty-two federal securities class action cases for him to look at. The thirty-two cases became thirty-six separate settlements because a few cases yielded multiple settlements and he counted them separately.\textsuperscript{81}

There is a serious problem, however, with drawing the indictment sample only from those cases for which the government chose to indict. Perino recognizes that self-selection bias may have been introduced into the analysis.\textsuperscript{82} As he puts it, if “the government only chose to allege cases in which it determined that settlements were low or fee requests or awards were high, then the Indictment variable would only tell us how good the government was at picking out cases with low settlements or high fee awards or requests.”\textsuperscript{83} We

\textsuperscript{77} See supra note __.
\textsuperscript{78} See supra note __.
\textsuperscript{79} FSI, supra note __ at ¶34-39.
\textsuperscript{80} Id.
\textsuperscript{81} Perino, No Harm, No Foul, supra __ at 28.
\textsuperscript{82} Id. at 28-29.
\textsuperscript{83} Id.
discuss below that Perino’s initial concerns about self-selection bias were well-founded.\textsuperscript{84} For present purposes, the key point to be made is that concern over self-selection bias is even more acute than Perino acknowledges. That is because Perino’s indictment sample of thirty-six settlements is drawn from the fifty-six cases the government handpicked to identify in the indictment. Had he looked, he might have found that the vast majority (that is, the nearly 70%) of the cases referenced but not identified in the indictment were very different than the minority he was able to examine. It certainly is not unreasonable to wonder whether the government chose to identify only those cases which evidenced its theory of wrongdoing. Correspondingly, failure to specifically identify the others is suggestive that it could not find comparably damning evidence in them. The upshot of this critique is that Perino should have qualified his findings by recognizing that there are reasons to doubt that the fees requested and awarded in all of the one hundred and eighty cases for which the government accused Milberg of breaking the law are represented by this sub-sample of thirty-six.

2. The Small Size of the Indictment Sample

The second point to make is that because the sample of indictment settlements is so small, it is important to know how the thirty-six settlements were distributed across the predictors. If many or even a good number of the thirty-six cases were at the extreme ends of some of the predictor variables, then that would skew the regression estimates, perhaps significantly so. While regression analyses certainly may help ease concerns regarding sample size, a regression is only trustworthy to the extent that the chosen linear model correctly captures the relations between the predictors and outcome for the sample. Yet, Perino offers no descriptive information on how the thirty-six cases were distributed. The one exception is for filing date, and what he reveals about it is that the indictment cases were closely clustered together (nearly all were filed before the Reform Act went into effect). As discussed below, the likely effect of this clustering is to bias the results significantly.\textsuperscript{85}

Filing date is only one of a number of variables that might influence outcomes. Without additional information on other important variables, we cannot know whether there were other influential points or outliers also potentially biasing the results. What if, for instance, some or a good number of the thirty-six settlements came from particularly complex or novel cases, making them much riskier undertakings for the law firm to pursue? As we will discuss, a high risk case can justify a court’s award of marginally higher fees to the lawyers who took it on.\textsuperscript{86} Another possibility is that in some or a good number of the indictment cases the Milberg lawyers achieved better than average results for the class. Indeed, we will show that there is evidence that is exactly what happened in some of the indictment cases: the Milberg lawyers

\textsuperscript{84} See infra text accompanying notes __ - __.
\textsuperscript{85} See infra text accompanying notes __ - __.
\textsuperscript{86} See infra text accompanying notes __ - __.
secured better than average results for class members. The critical point to be made here is that because the sample size of the indictment cases is so small and, relatively speaking, so much smaller than the non-indictment cases, without descriptive information on how the thirty-six cases were distributed across all important predictors, we cannot be confident that the indictment and non-indictment cases, on average, were comparable to one another.

3. Exclusion of State Cases

A third methodological problem with the indictment sample Perino has drawn is that he only examined federal cases, excluding all cases that were filed and remained in state court. This may be significant because, as Eisenberg and Miller have shown, class action fee awards by state courts tend, on average, to be somewhat lower than federal awards. A combined data set of both state and federal cases, with a control for type of case could provide a better fit for the model. If Milberg’s fee awards in the state derivative actions were comparable to the lower average fee awards in state cases generally, then the mean fee award Milberg received in the indictment cases may not have been any higher than the mean fee award of the non-indictment cases.

Evidence we were able to independently obtain regarding some of the indictment cases suggests that this hypothesis may very well be valid. As one example, consider the settlement of the California state suit involving the Lockheed corporation, one of the cases covered by the indictment but not included in Perino’s indictment sample because he limited it only to federal cases. Shareholders filed this class action claiming a proposed merger between Lockheed and Martin Marietta was unfair and should have yielded higher shareholder value. According to information obtained through the ISS database, after the case settled attorney’s fees of $6 million were awarded. The ISS data does not show the total settlement size, but published news reports reflect that the settlement resulted in an agreement by Lockheed and Martin Marietta to pay an increased dividend to shareholders of five cents per share for the three quarters immediately after the corporate merger, a result that was estimated to be worth $30 million to shareholders. The resulting ratio of fees to settlement, 20%, is well below both the mean and median ratio reported by Perino for the indictment sample. In other settlements covered by the indictment, state courts seem to have awarded even lower fees.

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87 See infra text accompanying notes __ - __.
90 See, e.g., Vastar Resources, No. 17890 (New Castle County, Delaware Chancery Court). BP Amoco announced that it was planning to acquire for $71 per share the outstanding public shares of Vastar Resources, Inc. (approximately 17,680,000 shares). Investors filed several class action lawsuits claiming purchase price should have been higher. According to the data collected through ISS, BP settled the case by agreeing to raise its purchase price to $83/share while attorney’s fees were capped at $2.1 million.
4. The Non-Indictment Sample

Finally, we question the representativeness of the non-indictment sample Perino drew. Using the same search parameters specified in Perino’s study (settlements in federal securities class actions filed from 1984 through 2005 and settled from 1991 through 2007), our search of the ISS database yielded more than two and a half times the number of non-indictment settlements. For Perino, the n=695; by contrast, our search produced 1834 settlements. We do not have an explanation for this great disparity in the results. Whatever the reason, it appears that the replication data constitutes a reliable sample. As one important measure, we compared median fee amounts with those previously reported in other published sources. For the replication sample, median fee awards, by settlement size, were as follows:

Median Fees Awards, Federal Securities Class Action Settlements, 1984-2005

Correspondingly, a 2009 NERA report, which looked at cases from January 1, 1996 through June 30, 2009, found that the median attorney fee for cases under $5 million was 33%; greater than $5 million but less than $25 million was 30%; greater than $25 million but less than $100 million was 28.3%; greater than $100 million but less than $500 million was 25%, and greater than $500 million was 8%. The consistency of the data across all settlement bands provides good reason to be confident in the reliability of the replication sample we have drawn.

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91 Id. at 28.
92 Even when we excluded indictment cases and those where certain critical information was unascertainable (filing date, settlement amount, and either total attorney’s fees or the fee percentage), the difference in size was still enormous (replication sample n=1608).
93 See, e.g., Stephanie Plancich and Svetlana Starykh, Recent Trends in Securities Class Action Litigation: 2009 Mid-Year Update, NAT’L ECON. RESEARCH ASSOCS., July 2009, at 26 (Figure 24).
Two important variances can be noted between Perino’s non-indictment sample and our replication sample. First, there seem to be a considerably greater percentage of smaller settlements in our replication sample.

Federal Securities Class Action Settlements, 1984-2005, By Amount

As the chart above reflects, fewer than 18% of the cases in the replication sample settled between $20 million and $100 million. By contrast, though Perino does not report descriptive information on the 695 non-indictment cases he collected, one can see from looking at the figures in Perino’s study (see, e.g., his Figure 8A) that the space from just below 17 (16.8) to just over 18 (18.4) on the horizontal axis (representing the settlement size of cases in the range of $20 million to $100 million) is thickly clustered with non-indictment cases. Further, there are significantly fewer settlements in Perino’s non-indictment group between $5 million (15.4) and $20 million (16.8). Yet, more than 35% of the settlements in the replication sample fell within this range. The differential is most stark in the smallest cases: settlements under $5 million appear to make up the smallest percentage of Perino’s non-indictment sample but represent more than 46% of the replication sample.

Second, and more significantly, descriptive analysis of the replication data calls into question the disparity in fee awards Perino reports as descriptive statistics in Figure 9 of the study. He reports both higher mean (26.40%) and median (27.96%) fee award percentages for the non-indictment cases. By contrast, the mean (median) fee award percentage for all the settlements in the replication sample was 28.60% (30%). Measured against the mean (median) fee award percentages Perino reports for indictment cases 29.57% (30.00%), there is less than a one percent difference in the mean and no difference in the median fee award between indictment cases and the replication sample of non-indictment cases. To be sure, Perino places less significance on the descriptive statistics he reports than on the results of the regression analysis. Still, one may regard the absence of any gap between fee awards in the indictment cases and
those in the replication sample as evidence that Perino’s sample of non-indictment cases may not be representative of fee awards generally in federal securities class action settlements.

B. Inadequate Use of Control Variables

Beyond concerns with regard to representativeness of the samples, Perino fails to consider a number of important explanations that could plausibly account for the awards. Perino’s use of control variables acknowledges issue with sample size and selection, and tries to take into account that other variables could influence settlement or fee size. The problem is that there are other factors for which Perino fails to control that also have been shown to be closely correlated with awards. No doubt every regression that has ever been run can be accused of leaving out variables that might alter the results. This is a fair point, but when variables that are significant are not included, one cannot have confidence in the data results. In particular, we identify three control variables that Perino either inadequately used or did not take into account. These variables include the time period from which the case was drawn, location, and the risk associated with the case itself.

1. Time Period

Perino does not provide information on when the 695 non-indictment cases were filed. This is no minor detail. Congressional passage of the Reform Act in 1995 was meant to address the race to the courthouse problem in securities class action cases by, inter alia, replacing the use of professional plaintiffs with a mandate that the lead plaintiff be appointed based on the court’s determination that they would most adequately represent the class, with the heavy presumption being that the one with the largest losses would be most adequate. These reforms, along with a host of others, were meant to help reduce abuses in securities litigation by, inter alia, incentivizing the named plaintiffs to better monitor class counsel. In the bargain, it was also hoped that the reforms would help to reduce attorney’s fees on the theory that investors with the largest losses would be in a better position to negotiate the terms of representation by counsel. If the securities reforms were effective—and we now know that many of them were—one would expect to find relatively lower attorneys’ fees

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94 The three primary variables he tried to take into account were, as he describes them, (1) issuer-defendant characteristics; (2) case characteristics; and (3) settlement characteristics. All three are important, some particularly so. For instance, in the “case characteristics” variable, Perino considers whether the plaintiff alleged that the defendant restated its financials or had violated GAAP. Both have been understood to suggest a stronger substantive merits case than when those allegations are not present.

95 Cox and Thomas, supra note ___ at 21 (“After a slow start, institutional investors began appearing more frequently as lead plaintiffs so that by 2007 institutional investors appeared in roughly 60% of all securities class action settlements”); see also infra text
awards in the post-statutory period than in the pre-statutory time frame as institutional investors have increasingly agreed to serve as the lead plaintiff and as the overall size of settlements has continued to rise.

Although Perino does not describe the distribution over time of the non-indictment cases, we do know, as noted, that the vast majority of the indictment cases (90%) arose before the Reform Act went into effect. This clustering of the indictment cases matters. If most—or even a significant number—of the non-indictment cases were filed in a later period, then Perino’s finding that attorneys’ fees awards were lower in the non-indictment cases may simply reflect what other empirical work has already confirmed: that the Reform Act, indeed, has created a more competitive marketplace.

Results of the replication data we gathered through ISS validate our hypothesis. Using the same search parameters as Perino, our replication data shows that over 68% of the cases (1104 of 1608) arose after December 22, 1995.

Federal Securities Class Action Cases, 1984-2005, by Filing Date

accompanying notes __ - __.

96 Michael A. Perino, Institutional Activism, Through Litigation: An Empirical Analysis of Public Fund Participation in Securities Class Actions (St. John’s Legal Studies, Research Paper No. 06-0055, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938722, at 2 (concluding that “attorneys’ fee requests and fee awards are lower in cases with public pension lead plaintiffs, either because public pensions are sophisticated repeated players or as a result of attorney competition to represent these institutions”); Michael A. Perino, Markets & Monitors: The Impact of Competition and Experience on Attorneys’ Fees in Securities Class Actions (St. Johns Legal Studies, Research Paper No. 06-0034, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=870577, at 2 (finding “a significant negative correlation between public pension fund participation as lead plaintiffs and the size of fee requests and fee awards”); but see Choi, Fisch & Pritchard, supra note __ (finding post-Reform Act higher attorneys fees, as a percentage of recovery, with private institutional lead plaintiff and no correlation between fees and public pension funds serving as lead plaintiff after controlling for size of case).

97 Coffee, Litigation Governance, supra note __ at 307 n.59.

98 Perino, No Harm, No Foul, supra note __ at 41.

99 Perino even partially concedes this methodological difficulty in discussing the results of his findings regarding Milberg’s fee requests. Perino, No Harm, No Foul, supra __ at 56 (acknowledging that “[t]he smaller variation in fee requests in the earlier period means it may be difficult to pinpoint whether fee requests in the indictment cases were in fact higher than in the non-indictment cases when other factors are held constant. Not only is there a small sample of indictment settlements for which fee request data is available (n=32), but nearly 90% of the indictment cases were in the period 1991-1998” but arguing that a comparison of Milberg to Milberg cases shows a similar pattern). We discuss his interpretations of the Milberg to Milberg data below. See infra text accompanying notes __ - __.
Further, and consistent with the literature cited above, analysis of the replication data shows that the mean and median fee award declined after the Reform Act went into effect. The mean (median) fee award in cases in the replication dataset filed before December 22, 1995 was 31.45% (33.30%); comparable figures for settlements of cases filed after December 22, 1995 were 27.31% (30.00%).

In other words, the replication data strongly suggests that the reason fees may have been higher in the indictment cases is that almost all were filed before the Reform Act went into effect; by contrast, the vast majority of cases in the replication sample of Perino’s non-indictment cases were filed in a later period in which fee awards have been lower.
Beyond this stark disparity, for there to be a meaningful comparison of indictment to non-indictment settlements it is necessary to be even more nuanced than merely drawing a line separating pre- and post-Reform Act cases. Fees in class action cases generally have shown remarkable consistency over the last two decades, but it is also clear that there is an acceptable range of fees that courts award. Most commonly, the cited range of acceptable fees is between 10% and 30% of the recovery. As far as securities cases are concerned, in particular, the range of fee awards has varied at different time periods. Eisenberg and Miller found that in the period covering 1993 – 2002 the average securities class action fee was 23% across all courts. Several other studies have reported a higher average of 32% for the early to mid-1990s period. Another study covering the period 1991-1998 again found that fee awards in securities class action cases averaged 32%. Still another study that covered settlements from 1997-2005 found that the mean award was 28%. And, as noted above, more recent empirical evidence shows that fees have declined still further as public institutions have increased their willingness to serve as lead plaintiffs.

Although Perino apparently has used year-to-year fixed effects in his regressions, he has not reported the specific yearly results or descriptive statistics regarding key outcomes with regard to indictment and non-indictment cases. Even if we knew what the comparative data looked like for indictment to non-indictment cases in any one year, the important questions are whether the overall distribution of indictment and non-indictment cases over time was comparable and whether they were comparable at different time periods. Even if we put to one side all methodological difficulties with the study, as well as concerns about how he reads the data, Perino is only reporting an absolute differential of 2.6% in fee awards between indictment and non-indictment cases. That is, even assuming the accuracy of his findings, Perino is reporting that the average fee award in the thirty-six indictment settlements was less than three percent higher than the average settlement in the approximately seven

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100 Eisenberg and Miller, supra note ___ at 255 (observing that “the level of both class recoveries and attorney fees has not varied substantially over time. These amounts have shown no distinct time trend for most of 16 years. Inflation adjusted recoveries and fees through 2007 were at levels not significantly different from where they were in 1993 and in fact are lower in inflation-adjusted dollars.”).
101 Coffee, Litigation Governance, supra note ___ at 307 (noting that “[t]he simple reality is that the class action attorney in the United States funds the litigation’s costs for a multiyear period and expects to receive a fee, if successful, that is likely to be between ten and thirty percent of the recovery”).
102 Eisenberg and Miller, supra note ___ at 262 (Table 5).
105 Perino, Markets & Monitors, supra note ___ at 20 and Table 2.
106 See supra note ___.
107 Id. at 32.
108 Perino, No Harm, No Foul, supra ___ at 56 (Table 6, Model 5).
hundred settlements that make up his non-indictment sample. When we consider the variances in fee awards in securities class action over different time periods, this is a quite modest difference. It certainly seems less than the “ample evidence,” as Perino puts it, that “cast[s] doubt on Milberg Weiss’ claim that paying kickbacks was a completely victimless crime.”

2. Location

A second inadequacy in the control variables Perino uses is that he does not fully examine and control for location effects. For class action litigation, like real estate, location matters enormously. The forum in which the case is filed has been significantly associated with the size of the fee award. As Eisenberg and Miller have shown, more than half of all federal class actions cases from 1993-2008 were maintained in just five federal districts. Among securities cases, the concentrations are even greater. Six districts accounted for 67% of all securities cases filed in or removed to the federal courts. Indeed, the highest concentration of any case type in any single district was federal securities cases in the Southern District of New York (28%). These concentrations provide powerful evidence that location matters significantly in class action litigation. Eisenberg and Miller observe that this data can be read to suggest that

certain jurisdictions offer advantages for class action litigation, either in the form of experienced judges who can handle these cases in a fair and expeditious manner, faster dockets, a sense on the part of plaintiffs’ attorneys that the courts in these districts are reasonably well-inclined towards class action litigation, a concentration of class action attorneys specializing in the practice, or other factors.

Additional findings from their study further bear out their assessment. In the District of Massachusetts, for instance, a district in which only one percent of the securities class actions are filed, the mean (median) ratio of the fee to the class recovery for all class actions, not limited to securities cases, was 16% (15%). The comparable figures for the Southern District of New York, where more than one out of every four securities class actions is maintained, were 22% (22%), and for the Eastern District of Pennsylvania, in which fourteen percent of the securities class actions can be found, 28% (29%). That is, holding all other factors constant, judges in the Eastern District of Pennsylvania approve attorney’s fee awards that are nearly twice as large as those that are approved by judges in the District of Massachusetts. Intracircuit differences can also be quite dramatic. For instance, in the Eastern District of New York, the mean ratio of the fee award to the class recovery for all class actions was 32%, ten percentage points higher than the mean award approved in the Southern District of New York.

109 Id. at 61-62.
110 Eisenberg and Miller, supra note __ at 258 (Table 2).
111 Id. at 257.
York. These wide variances by locale put in nice perspective the far more modest differentials between fees in indictment and non-indictment cases Perino reports.

Perino does report that he attempted to control for variances by location, but only in a crude way. One limitation of his attempt to control for location is that he controls only for intercircuit differences, thus missing intracircuit differences in fee awards. Yet, as noted, these differentials can be quite substantial. A second limitation of his attempt to control for location is that he is showing the average fee award across all circuits, but he is not taking into account differences in how the fee is calculated in different circuits. The problem is complicated further because even if one were to try to code for differences in how fee awards are calculated, not all courts expressly say how they go about the task. Thus, in some instances, it may simply not be possible to determine what fee calculation method was used. This may explain why Perino did not attempt to control for variance in fee methods. Nevertheless, because differences in the method of calculation can significantly influence the fees that are awarded, we cannot have confidence that the higher mean fee in the indictment cases does not merely reflect differences in the method employed by different courts for calculating the fee.

3. Risk

The third and last point regarding control variables that we raise has to do with the failure to engage in any control for the risks a law firm takes in accepting, investigating, and funding litigation of certain cases. Courts

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112 Id. at 259 (Table 3).

113 Although the most common method for awarding fees is on a straight percentage basis, courts sometimes award fees in securities cases based on a pure lodestar calculation and sometimes use a hybrid approach whereby an initial percentage calculation is used and then a lodestar method is employed as a backup check on the reasonableness of the percentage fee method. All three methods have been deemed legitimate under the Reform Act. See 15 U.S.C 78u-4(a)(6). “Reasonable percentage” isn’t defined but has been understood to permit the court to use either the percentage method or the lodestar (or use one or the other as a cross-check). See In re Enron, 586 F. Supp. 2d 732 (S.D. Tex 2008); see also S. Rep. No. 104-98 at *12 (1995), U.S.CODONG & ADMIN. NEWS 1995, p. 679 (“By not fixing the percentage of attorney's fees and costs that may be awarded, the Committee intends to give the court flexibility in determining what is reasonable on a case-by-case basis. The provision focuses on the final amount of damages awarded, not the means by which they are calculated.”); Fed. R. Civ. P. 23(h) Advisory Committee Notes (providing that the PSLRA “explicitly makes this factor a cap for a fee award in actions to which it applies.”). In addition to these variances in the formal method used, attorney fee awards are influenced by circuit law. In the Ninth Circuit, for instance, a target benchmark of 25% is employed for common fund cases. A benchmark is just that: it is a target at which to aim, but enough room is left for flexibility. Still other places have different benchmarks (or none at all), and/or no mandate as to particular methods of calculating the fee. See In re Enron, 586 F. Supp. 2d 732, 746 n 12 (observing that “Some courts applying the percentage method have tried to establish a specific “benchmark” percentage, either a particular number or a range, subject to adjustments depending on the particular facts of the case, but the suggested benchmark figures have been quite disparate” and listing examples of variances).

114 Eisenberg and Miller, supra note __ at 266-68.
recognize that greater risk may justify a higher fee.\textsuperscript{115} This is borne out by Eisenberg and Miller’s finding that “courts systematically reward risk” in class action cases. In securities cases, in particular, Eisenberg and Miller coded cases as high risk and low/medium risk and report the fee percentage to be 3.7 percentage points higher for high risk cases (26.4 v. 22.7), considering all cases from 1993-2008.\textsuperscript{116}

Despite its significance, Perino does not control for risk; at least, not for particularly risky cases. He does define a \textit{High Profile} variable to be one in which a case had a very high claim for damages, contained allegations of a GAAP violation or a financial restatement, and there was a parallel SEC action.\textsuperscript{117} A \textit{High Profile} case is a low risk case because it would be associated with a better than average probability of being able to prove liability. He does not define a variable for high risk, however. But if some of the indictment cases were particularly risky, this could matter enormously. A judge might reasonably have permitted a slightly higher fee award for Milberg for pursuing to successful settlement a case that was riskier.\textsuperscript{118}

To be sure, coding for risk is complicated. No single factor, standing alone, can adequately serve as a measure for how easy or risky a case is to take on. The lack of strong evidence of wrongdoing is one factor that would make a case more risky to take on, but there are many other variables that go into the equation. For instance, even a case with good liability facts nevertheless may not be as strong on damages, or may be good on damages but the defendant may not have deep pockets. In this latter regard, think of the plaintiff’s lawyer who chooses to take on a case in which the likelihood of collecting from the defendant was estimated at the outset to be poor.\textsuperscript{119} In such a case, if a favorable settlement is ultimately reached it may be perfectly reasonable to reward the lawyer for succeeding in squeezing blood from a turnip (especially one that most others thought was totally dry). The efforts that a particular plaintiff’s lawyer makes in successfully bringing a case to settlement on behalf of the unnamed class members are particularly instrumental when a case is a high risk case. Almost by definition, these are the kinds of cases that are likely to attract less competition from other private lawyers. A related but separate point to consider is that in many instances a marginal case that might be regarded dismissively by the defendant could be transformed into something else by the presence of highly competent counsel. In this regard, the reputation Milberg enjoyed as “the most feared” plaintiff’s firm in the country was surely significant.\textsuperscript{120}

\begin{itemize}
\item \textsuperscript{115} See, e.g., Goldberger v. Integrated Resources, Inc., 209 F.3d 43, 50 (2d Cir. 2000);
\item \textsuperscript{116} Eisenberg and Miller, supra note \_ at 265 (Table 8).
\item \textsuperscript{117} Perino, \textit{No Harm, No Foul}, supra \_ at 31.
\item \textsuperscript{118} Cf. In re Enron, 586 F. Supp. 2d at 771 (“The sheer size, the diversity of Enron securities and investors, and the risks posed by a lengthy duration of such a complex litigation were daunting, especially because under the fee agreement Lead Counsel agreed to advance all costs and to look only to an uncertain recovery for reimbursement of expenses and payment of attorneys' fees in what was bound to be a long and difficult litigation.”).
\item \textsuperscript{119} Cf. \textit{id}. (discussing risks of taking on case in which one defendant was in bankruptcy and another was teetering on insolvency).
\item \textsuperscript{120} \textit{id}. (quoting Affidavit of John C Coffee); see also \textit{id}. at 754 n 23 (“Moreover, as
reputation could have meant the difference between an unfavorable result and a favorable settlement for the class.

All of this is to say that many factors go into what makes a case easy or hard to win and it is very difficult to meaningfully compare across different cases. In consequence, it is prudent to proceed cautiously in assessing whether and to what extent a fee is warranted. Perino’s work does not rule out the possibility that at least some of the indictment cases may have been riskier cases for the plaintiff’s lawyer to bring and that this added risk could explain the marginally higher fees awarded to the lawyers who chose to prosecute them even in the face of these additional challenges.

C. Issues with Linearity: Revisiting Kobayashi and Ribstein

The third methodological issue with Perino’s study that we discuss is one that is suggested by a previous concern raised by Kobayashi and Ribstein in a blog post, to which Perino subsequently responded with an online reply. In their critique of Perino’s study, Kobayashi and Ribstein noted that as settlements increase fees do not increase linearly but instead have a lower rate of reward. They argued that fitting this difference in the rate of settlement to award into a simple linear regression, as Perino does, underestimates the relation and inflates the difference between indictment and non-indictment cases, the former of which had lower average settlements.

Kobayashi and Ribstein acknowledged that Perino attempts to control for this effect though the use of Models 3 and 7 throughout Tables 4-7 but argued that this effort may not have been sufficient. Many more non-indictment cases settled for larger amounts than indictment cases. Choosing $100 million settlement as the cut off, Kobayashi and Ribstein identified through simulation that cases above that level were more likely to fit a line modeling a 25% ratio of fees to settlement as compared to cases below $100 million which fit along a line modeling a 33% ratio of fees to settlement. They argued that this suggested that the relationship between settlement and fees is not linear, and thus that Perino’s method may not fully address the problem they have identified. They concluded by suggesting instead that he should have truncated for settlements above $100 million, as opposed to truncating for fees above $100 million. They argued that this might act as a better control for large settlement

will be discussed, the Court finds that the firm [Milberg] obtained exceptional results that justify such a fee, and their results demonstrate why the firm is so highly respected and feared in the securities field.”).

121 Id. at 777: (“a number of quite variable factors are relevant to the issue of reasonableness, not merely the actual amount of the fee or the percentage of the settlement fund it constitutes, but also considerations such as the stage of the litigation, the number of documents reviewed, and the number of depositions taken. These in turn are affected by factors not on the chart, including the number of parties involved, the number of causes of action and their legal complexity, the length of the class period, and the variety of different kinds of securities covered.”).

cases, given the probability that percentages of fees will be lower as size of settlement increases once the settlement size goes beyond a certain threshold and the fact that few indictment cases fall into this category.  

Perino subsequently responded to Kobayashi and Ribstein by narrowly focusing on the suggestion they made at the end of their critique that instead of cutting out fee requests over $100 million he should have cut out settlements in excess of $100 million. His answer to this point was that he did so in results he did not include in the published version of the study and that they did not alter his findings.  

Although his answer successfully falsified the hypothesis they made with regard to re-running the data by truncating settlements over $100 million, his answer misses a larger point about the nonlinear relationship between fees and settlement size for two main reasons.

First, in the samples Perino considers, the population of cases in the range of $20 million (16.8 on the horizontal axis) to $100 million (18.4) is more thickly clustered with non-indictment cases. Look at the fat middle of Figure 8a from Perino’s study (one could also look at Figures 8b, 12a or 12b; they all illustrate the same point):

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123 Id.

As Figure 8A shows, the space from just below 17 (16.8) to just over 18 (18.4) on the horizontal axis (representing the settlement size of cases in the range of $20 million to $100 million) is thickly clustered with non-indictment cases. While there are some indictment cases in this portion of the field, it is populated with a far higher proportion of non-indictment cases. Since we know fee percentages are lower in higher settlement cases, it is not surprising that the non-indictment cases had lower fee averages than the indictment cases: there were a disproportionate number of them in this higher range. What this means is that dropping settlements above $100 million is not responsive to the unequal distribution of indictment and non-indictment cases in the $20 million to $100 million range.

Second, controlling for the lack of linearity between settlement and fees really requires thinking about settlement size in bands. As can be seen in the following graph, median fees, following a non-linear pattern, vary by settlement amount:
The chart,\(^\text{125}\) which as noted earlier is consistent with the findings we obtained through analysis of the replication data,\(^\text{126}\) depicts the lack of linearity between fees and settlement amounts by showing the distinct bands that exist. Given this information, Perino could have created a series of dummy variables to represent various settlement bands as a better control than the single use of the Settlement variable, as well as a statistically better control as opposed to dropping cases. While it would be difficult to estimate the effect of the use of the settlement bands as a variable, the evidence clearly supports that it would be worth attempting. Perino’s solution to just drop very large settlements (or large fees) still overlooks the possibility that low settlements and different settlements at different bands are influencing the results.

In sum, the main thrust of the linearity problem is that because the distribution of indictment and non-indictment cases was not equal across settlement size, there is a very real likelihood that if he controlled for the lack of linearity between settlement and fees across the settlement spectrum, the average fee differential Perino found between indictment and non-indictment cases might have narrowed, disappeared, or even have been reversed. Indeed, as noted earlier, we find that there is less than a one percent difference in the mean fee award and no difference in the median fee award between indictment cases

\(^{125}\) Stephanie Plancich and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2009 Mid-Year Update*, NAT’L ECON. RESEARCH ASSOCs., July 2009, at 26 (Figure 24).

\(^{126}\) See supra text accompanying notes _ - _. 
and the replication sample of non-indictment cases. Within his sample of non-indictment cases, Perino does not control for the non-linearity between fees and settlement across the settlement spectrum, so we cannot know. Even leaving to one side the replication data results, what we can say with regard to Perino’s non-indictment sample is that, lacking such controls, his study results likely overstate the significance of the average fee differential between indictment and non-indictment cases.

IV. Concerns Regarding Inferential Conclusions Drawn from the Data

We have raised methodological issues with Perino’s study that cast doubt on the reliability of his findings. Even if these methodological questions are bracketed and Perino’s study is taken on its own terms, we argue in this Part that there are substantial reasons to be concerned about the inferential conclusions Perino draws from the data. The big take away that Perino offers at the end of his study—that the evidence contradicts the claim that the kickbacks were a “victimless crime”—is not supported by the data he has collected and reported.

We identify the following three primary issues in regards to how Perino has inferred his conclusions based upon the data. First, we raise concerns with Perino’s conclusions regarding on settlement size. Second, we discuss how the problem of self-selection bias seems to be influencing the results by looking at Perino’s use of the Repeat variable. Here we argue that there are concerns both with regard to specification of the variable and, more significantly, with regard to its outcomes as compared to models that use the Indictment variable. Finally, we question Perino’s interpretations of data deriving from regressions that compare both indictment cases to non-Milberg cases and indictment cases to Milberg cases.

A. Using Settlement Size as a Proxy for Measuring Successful Outcomes

Perino looks at settlement data and finds that the cases covered by the indictment were not any larger—either in absolute terms or when measured by percentage of total investor losses recovered—than settlements of cases in which there was no allegation of secret payments having been made to the named plaintiffs. Note that he does not find that Milberg did worse for the class members in the indictment cases, just that there was no statistically significant evidence that the settlements of the indictment cases were any better than non-indictment cases. Note also that he finds that in both indictment and non-indictment cases the presence of Milberg in the case correlates with statistically significant better results for the class, measured both by total settlement size and by the percentage of investor losses recovered. For total settlement size, there is a positive coefficient (.342) that is significant at 5% and for percentage of

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127 See supra text accompanying notes ___ - ___.
128 Perino, No Harm, No Foul, supra note ___ at 34-39.
129 Id. at 37 (Table 3).
involvement could have been beneficial to the class in numerous other ways. For instance, the gross settlement metric ignores that, but for Milberg’s involvement, there might never have been a settlement or, for that matter, any case at all. Perhaps that might not have been true for the most attractive cases, but certainly if it was a particularly risky case, one cannot assume that another firm would have been willing to take it on. Even Perino has recognized that Milberg’s experience, dominance of the field, and significant resources permitted it to handle litigation other firms might not have taken.132 Yet another possibility is that a different firm might not have been able to put the case into a favorable settlement posture. A defendant, less intimidated by another opponent, might have been less willing to settle; in contrast, when faced with the same suit by highly competent counsel, like Milberg, that defendant might have made a different decision. Once again reputational effects cannot be discounted. In short, the presence of Milberg as lead counsel could have meant all the difference between an unfavorable result and a favorable settlement for the class. Looking at total settlement size, standing alone, simply cannot tell us anything about whether Milberg deserves credit—and how much—for investigating, bringing and pursuing the indictment cases and, ultimately, obtaining recoveries on behalf of class members.133

A second point to make about looking at total settlement size is that it is inherently problematic to compare across gross settlement amounts in different cases. Numerous case-specific variables influence the amount of damages a plaintiff seeks and, ultimately, the amount by which parties ultimately agree to compromise their claims in settlement. Simply put, one cannot measure the

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130 Id. (Table 3, Milberg variable, Models 1, 2, 4 and 5).
131 Id. at 38-39.
132 Id. at 38.
133 Other empirical work indeed confirms that the average settlement Milberg negotiated was higher than those of other firms. See John D. Finnerty & Gautam Goswami, Determinants of the Settlement Amount in Securities Fraud Class Action Litigation, 2 Hastings Bus. L.J. 453, 463-64 (2006).
relative success of lawyers in two different cases by looking only at what the cases settled for.

Third, even if total settlement size were a decent proxy for how much credit a lawyer is owed for his or her results in a particular case, rather than assuming Milberg was not performing any better in the indictment cases there’s a far more obvious explanation for why Perino found no correlation between payments made to the named plaintiffs and settlement awards: one has nothing to do with another. A defendant’s willingness to settle the claims of the class is dependent upon a host of litigation and business-specific considerations, but there is no reason to think that a defendant’s willingness to settle would be influenced by whether the named plaintiffs received side payments from their own lawyers. Even Perino later acknowledges that individual named plaintiffs have very little to do with settlement, and that financial arrangements between the lawyer and the individual named plaintiff would not alter this dynamic. In other words, to say, as Perino does, that the “available evidence thus suggests no relationship between total settlements and the cases in which kickbacks were alleged to have been paid” is not responsive to any serious argument Milberg made or could have made in its defense. It’s a red herring.

2. Percentage of Investor Losses Recovered

So far, we have been talking about the data regarding total settlement size but, as noted, Perino also considers another metric for quality of outcome: percentage of investor losses recovered. Although there are problems with this metric as well (for various reasons the denominator—that is, the damage allegations a plaintiff makes in her complaint—may often be an unreliable measure of what a case is really worth), the percentage of investor losses a settlement recoups is certainly a better proxy for measuring relative quality of result across different cases than is total settlement amount.

On average, securities class action settlements net quite modest recoveries, measured as a percentage of investor losses. In the first five years after the Reform Act went into effect, class action settlements typically recovered between five and six percent of class members’ estimated losses.136

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134 Among that factors that have been shown to be relevant to the settlement calculus, first and foremost is probably the limit of director and officer coverage. Nearly all securities class action cases settle within policy limits. See James D. Cox, Making Securities Fraud Class Actions Virtuous, 39 ARIZ. L. REV. 497, 512 (1997) (“approximately 96% of securities class action settlements are within the typical insurance coverage, with the insurance proceeds often being the sole source of settlement funds”); Tom Baker and Sean Griffin, How the Merits Matter, 157 U. PA. L. REV. 755 (2009) (“the vast majority of securities claims settle within or just above the limits of the defendant corporation’s D & O coverage”). D & O coverage provides insurance against losses that the corporation itself, or its directors and officers, may suffer through various kinds of litigation.

135 Perino, No Harm, No Foul, supra note ___ at 39 (“Attorneys quite naturally will try to maximize the value of these cases. Since this is almost exclusively a lawyer driven process, it is unreasonable to expect that financial arrangements between the attorney and the representative would make much if any difference.”).

That figure has since fallen to the even more abysmal range of between two and three percent. 137

Perino found no statistically significant evidence that indictment cases yielded better (or worse) settlements on this metric than non-indictment cases. He did find statistically significant evidence that the indictment settlements recovered a lower percentage of investor losses as compared with non-indictment cases in which the Milberg firm was lead counsel. 138

We focus first on the finding that Milberg did not recover a higher percentage of investor losses in the indictment cases as compared with non-indictment cases generally. From a review of the limited data available through ISS, as well as through additional information we were able to gather publicly, we found evidence that in a number of the indictment cases Milberg was able to secure higher than average recoveries of investor losses. For instance, according to the district court’s order approving the settlement in In re Baan Company Securities, that case settled for $32.5 million in cash, a figure that the district judge described as “represent[ing] a substantial recovery.” 139 Depending on whose denominator is used, the settlement either was for 16%, or as much as 54%, of the estimated damages. Even using the low end figure, that recovery of investor losses is an astonishing improvement over the average results obtained, a fact that the Court in In re Baan expressly recognized in approving the requested fee. 140 Similarly, in the litigation in the Central District of California involving New Image Industries, our analysis of the available data indicates that investors may have recovered, on average, 14% of their losses, nearly twice as high a recovery as was typical in that time period. Perhaps the most striking example, however, is the ZZZZ Best case. According to published news accounts, investor losses were estimated to be nearly $50 million. 141 How then did the private litigation benefit shareholders? According to data we obtained through ISS, the plaintiffs’ attorneys successfully recovered $24 million through settlement of the case. Using this figure, and deducting the one-third attorney’s fee award indicated, the net recovery for the class was an average recovery of 30% of investor losses, an astonishing result. The ISS data may actually understate the recovery. Other information suggests the settlement may have been as high as $40 million. 142

137 See Coffee, Litigation Governance, supra note ___ at 310 and n 69.
138 He does not find similar evidence that Milberg did worse in indictment cases as compared with Milberg non-indictment cases when using total settlement size as the proxy for success. Perino, No Harm, No Foul, supra note ___ at 37 (Table 3, Model 3).
140 Cite Baan.
142 See webpage of Mark Selzer, available at http://www.susmangodfrey.com/?id=185 (“Mr. Seltzer was appointed by the Los Angeles federal court to serve as sole lead counsel to represent the plaintiff class in the ZZZZ Best securities fraud case. The ZZZZ Best fraud was described by the United States Attorney for the Central District of California as “the most massive and elaborate securities fraud perpetrated on the West Coast in over a decade," harking back to the Equity Funding case. The case was settled for more than $40 million and resulted in several important published decisions sustaining plaintiffs' claims”).
As for Perino’s finding that the indictment settlements recovered a lower percentage of investor losses as compared with non-indictment cases in which the Milberg firm was lead counsel, three additional points should be made. First, self-selection bias may be skewing these results. Even Perino acknowledges the self selection bias concern with this finding regarding the Milberg subset. He notes that he ran, but did not report, regressions substituting Repeat for Indictment and did not obtain a significant finding.143 This makes sense since it is not unreasonable to think that the government would have chosen to indict Milberg for those settlements in which they did worst in recovering provable investor losses. After all, that is the ultimate point of the prosecution: kickbacks harmed the class.

Second, although he runs other models that drop outlier cases when comparing indictment to the larger universe of non-indictment cases, he does not drop any cases that may be outliers within the Milberg subset. This could include, of course, particularly small settlements or, importantly, settlements in which the percentage of investor losses recovered was especially low. Given the small sample size of the indictment cases, these outliers could be significantly skewing the results.

A third, vital point to emphasize is that that even if Milberg recovered a lower percentage of investor losses in indictment cases as compared with Milberg non-indictment cases, it still recovered a higher percentage of investor losses for class members in indictment cases as compared with the average recovery by other firms in the larger non-indictment universe.144 Perino preemptively offers a response to this argument, but it is weak. He notes that the regression results are correlations only and do not prove causation.145 Of course, that observation applies to all of the data Perino reports but does not deter him from inferring causal conclusions from other results. The other problem with Perino’s response is that he treats interchangeably the finding that Milberg was able to obtain higher settlements with the finding that it recovered a higher percentage of investor losses.146 It certainly may be the case that as the largest player in the field, Milberg was able to pick and choose the best cases and that one factor Milberg may have used to decide which ones to litigate was the total value of investor losses (and, thus, potential total settlement size). That is a far less convincing explanation, however, when it comes to comparing the percentage of investor losses that Milberg was able to recover. Maybe this effect is also attributable to the cases being better cases (here, the relevant question might be the relative quantum of hard evidence of wrongdoing), but it may also be attributable to superior performance. The data cannot be read to

143 Perino, No Harm, No Foul, supra note ___ at 34-39.
144 Id. at 37 (Table 3, Milberg variable, Models 1, 2, 4 and 5).
145 Id. at 36-37 (The primary problem with this argument is that neither this study nor any of the previous studies draw a causal link between Milberg Weiss’ participation and higher settlement amounts; they only show that the two are correlated”).
146 Id. at 37 (“it is possible that Milberg Weiss produces better results than other law firms, but other explanations are possible as well. The most likely one is that the cases in which Milberg Weiss participates are systematically of higher quality than cases run by other law firms and that the variables used in the regressions do not completely capture these differences”).
resolve this uncertainty. What can be said is that the data Perino reports show investors in the indictment cases were making out better by having Milberg as their lawyer, as compared with how other investors fared in the non-indictment cases.

B. Self-Selection Bias and the Repeat Variable

To his credit, Perino recognizes at the outset of his study that his indictment dataset necessarily was comprised only of the cases on which the government decided to indict Milberg and that this posed a potential self-selection bias. He attempts to address the problem by creating an indicator variable for Repeat, which represented cases in which the lead plaintiff repeatedly served in that capacity (the cut-off he chose was at least four occasions). On the assumption that a repeat plaintiff for Milberg is likely to have similarly been paid a kickback, Perino uses Repeat as a substitute for Indictment to see whether that would alter the results. He identifies 229 cases in which twelve individuals appeared as representative plaintiffs on at least four occasions each. His rationale, quite sound, is that “[i]t seems reasonable to assume that these plaintiffs struck revenue sharing deals that were similar to those that the repeat plaintiffs in the indictment cases struck with Milberg Weiss.” If the results turned out to be consistent for both Repeat and Indictment, that would help allay concerns about self-selection bias.

Yet, what the data shows is that Perino was right to be concerned. For the vast majority of regressions on fee requests and fee awards, the resulting coefficients were lower for Repeat than Indictment and were almost always at a lower level of significance. This phenomenon can be most starkly seen with the regressions of fee awards where not a single coefficient for Repeat is as high as for Indictment and all of the findings for Repeat are at a lower level of significance. For example, in a comparison between Indictment cases and Repeat cases, in Tables 6 & 7, in model 1, Indictment has a value of .143 and is significant at the 10% level, while Repeat has a value of .060 and is not statistically significant. Again, in model 5, similar outcomes are reported. Indictment has a value of .026 and is significant at the 5% level, while Repeat has a value of .009 and is not statistically significant. When examining interaction terms a similar result is seen along models 2, 3, 4, 6, 7 & 8. Across the board, coefficients are lower and statistical significance is less when looking at the 229 repeat cases rather than the 36 indictment cases. Having correctly intuited that self-selection bias was introduced into the analysis by relying on a dataset composed of the cases the government decided were worth including in the indictment, Perino should have significantly qualified his conclusions.

147 Perino, No Harm, No Foul, supra note __ at 16
148 Id. at 29
149 Model 7 slightly defies this statement, as Indict_Settle is .010 in Table 6 and Repeat_Settle is .011 in Table 7, however, the significance level does drop between the tables, following the overall pattern that fees are lower and the findings are statistically less significant when examining Repeat cases as opposed to Indictment cases.
Additionally, the difference between *Indictment* and *Repeat* cases leads one to wonder what the effect would have been if *Repeat* had been defined differently. Perino uses plaintiffs who appeared in at least four securities class actions as a cut off for *Repeat*. However, he offers no theory for using this number and, therefore, there is no reason to assume twice or three time repeat plaintiffs would be any less likely to be part of the kickback arrangements. This leads us to question Perino’s specification of the *Repeat* variable. We posit that multiple appearances in general are just as likely to be indicative of a kickback as any specific number of multiple appearances. Given the previous evidence that when *Repeat* cases were examined the coefficients and statistical significances were lower, using a lower value of two or three for *Repeat* should result in even lower coefficients and even fewer statistically significant findings. Should this indeed be the outcome, a re-specification could lead to the *Repeat* and *Repeat_Settle* interaction variables not being significant in any of the models. In this circumstance government selection bias would be even more dramatically demonstrated.\(^{150}\)

C. Conclusions Drawn From Comparisons of Milberg to Other Firms, and Milberg to Milberg

Finally, we question Perino’s interpretations of data deriving from regressions that examine both indictment cases to non-Milberg cases and indictment cases to other Milberg cases for which they were not indicted.

1. Milberg to Other Firms

Many of Perino’s results are based on a comparison of fees requested/awarded in the indictment cases with fee requested/awarded (other firms and to Milberg) in the non-indictment cases. Yet, a fundamental difficulty with drawing comparisons of these two datasets is that, by definition, they are not comparable. There are no indictment cases involving other firms. Trying to discern differences between indictment cases and cases not handled by Milberg raises particularly difficult comparability problems given the argument that Perino is trying to make. Perino is examining whether kickbacks paid by Milberg had a harmful effect on members of the classes they represented. To do this, one must compare the outcomes of cases that involved a kickback to ones that did not, both in regards to settlement results, as well as fees.

As far as settlement results are concerned, a finding that fees are higher in indictment cases as compared to the larger universe of non-indictment cases is not surprising since the data shows that all Milberg cases have better settlement outcomes, whether measured by total settlement size or percentage of investor

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\(^{150}\) In addition, given that *Repeat* likely represents other kickback cases (that is why he chose to use it), findings where *Repeat* is not significant also implies that kickbacks are not associated with high fees, thus further undermining the interpretation of the *Indictment* data to support the conclusion that class members were harmed by the kickbacks that were paid.
As for fees, it is difficult to draw conclusions from any reported differentials between Milberg and non-Milberg cases because the higher fees could simply be a Milberg effect at work. To illustrate the cloudiness of drawing such conclusions, recall one of the key paragraphs from Perino’s study summarizing his major conclusions:

This evidence contradicts Milberg Weiss’ claim that paying kickbacks was a victimless crime. The positive and significant correlation between fee awards and the Milberg variable shows that, all else equal, Milberg Weiss obtained fees that were on average between 4% and 5% higher than the fees other firms obtained.

Keep in mind that the 4-5% differential he is citing here refers to the average higher fee Milberg obtained, as compared with other firms, in all of its cases. That is, this differential is based on the fees Milberg received in both indictment and non-indictment cases. It does not reflect the more modest finding he reports that there was a 2.6% difference in the fees Milberg obtained in the indictment cases as compared with non-indictment cases generally (leaving entirely to one side questions we have raised earlier about the reliability of this finding, including that when Repeat is substituted for Indictment even this modest differential almost entirely disappears and is no longer statistically significant).

Nevertheless, Perino cites this 4-5% differential between the fees Milberg received and those other firms obtained as primary support for his conclusion here that paying kickbacks was not a victimless crimes. Yet, this conclusion ignores that the data from regressions he ran confirms that investors were significantly better off with Milberg as their lawyer as compared with any other firm, even in the indictment cases. The reasons why Milberg obtained better results in its cases is not resolved by the data, which means that Perino cannot rule out the possibility that the higher fees are attributable to superior performance by Milberg.

2. Milberg to Milberg

We have seen that there is so much noise around a comparison of Milberg to non-Milberg cases that it is problematic to try to compare fee awards that Milberg received in the indictment cases to non-Milberg fee awards. Within the subset of Milberg cases, however, the conclusions that Perino draws from the data are equally suspect.

The first point to make in this regard is that his conclusions are not supported when all regression results are taken into account. The regression results on fee awards do estimate that as settlements increase in size, Milberg would receive an increasingly larger share of fees in the indictment cases.

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151 Id. at 37 (Table 3, Milberg variable, Models 1, 2, 4 and 5).
152 Perino, No Harm, No Foul, supra note ___ at 58.
153 See supra text accompanying notes ___ - __.
However, when we look at the data on fee requests, we discover something very peculiar. In the regressions for fee requests, *Indictment* and the interaction term he used, *Indict_Settle*, were insignificant. Similar findings result when *Repeat* is substituted. While the difference might be explained had the fee award figures represented larger totals than the fee request figures, it is absurd to think that courts awarded Milberg more in fees than it requested.

Perino acknowledges that the regression results were different for fee requests and fee awards but, rather than thinking this may call into question the findings on fee awards, he readily cites the significant findings as proof that the kickbacks harmed class members in the indictment cases. Choosing to credit the fee award regressions over the fee requests is hard to justify, however, because the R-squared is quite good (0.53) for Model 8 in both Tables 4 and 5; by contrast, the R-squared for Tables 6 and 7 is .37 (.36), showing that it is not nearly as good a fit. Why his findings on fee requests came up as not significant while the findings on fee awards were significant is not known but, whatever the answer, the basic point remains. If we cannot rule out the possibility that random chance explains the variances in the fee requests, there is less reason to trust the data on fee awards.

The other reason his conclusions are suspect with regard to the Milberg to Milberg subset is that he does not run (or report) the data without using an interaction term in the regressions. This failure is significant because the theoretical correlation of higher indictment fees with rising settlements has little value if there were no indictment settlements in which the fee awarded was significantly higher as compared with Milberg non-indictment settlements. Moreover, it is important to see the results without the interaction term because there is a negative coefficient on *Indictment* in every model (Models 6, 7 and 8 of Tables 4, 5, 6 and 7). This implies that indictment cases (at least in theory) start with lower fees than non-indictment cases and then increase more quickly, making up for the lower start. This gives rise to questions regarding what the analysis might look like if the small non-indictment cases were dropped (a relevant point given that there seem to be no small indictment cases). As we discussed earlier, a related approach would be to control by using settlement bands. The failure to remove the interaction term is especially problematic when it comes to his findings regarding the Milberg subset of cases because he has only one model for this subset. While he constructed different models with regard to indictment versus other firm comparison, he did not do so for the Milberg cases only. Thus, outliers that might be skewing the results are not dropped, as they were in Models 3 and 7 of Tables 4, 5, 6 and 7. In sum, the main point, as regards Milberg to Milberg comparisons, is this: there are substantial reasons to doubt Perino’s interpretation of the data deriving from regressions that compare indictment cases to Milberg non-indictment cases.

V. The Continuing Relevance of the Milberg Case

154 Id. at 47 (Table 4, Models 4 and 8).
155 Id. at 49 (Table 5, Models 4 and 8).
156 See supra text accompanying notes ___ - ___.
Having shown that Perino’s study does not, contrary to his assertion, “contradict[] Milberg Weiss’ claim that paying kickbacks was not a victimless crime,” we are left with an important question: why does any of this matter? Why should we care about a case that was officially over several years ago and in which all the lawyers have already plead guilty, gone to jail and been released? Further, even if the Milberg lawyers didn’t harm anyone, we have already noted that they were almost certainly guilty of other crimes, to say nothing of flagrantly violating ethical norms for which they rightly deserved all measure of professional sanction and censure that they received.\footnote{In the wake of Milberg’s prosecution, class-action securities filings reached a ten-year low in 2006. See Perry S. Granof & Gary L. Gassman, \textit{Understanding Current Trends in U.S. Securities Class-actions}, ABA Brief (Winter 2009) (citing Securities Class-action Filings 2007: A Year in Review (Cornerstone Research 2007)). The dip in filings continued well into 2007. \textit{Id.}; see also generally Casey, \textit{Class Action Criminality}, \textit{supra} note \textsuperscript{158} at 161 (“By charging Milberg Weiss with criminal fraud, prosecutors substantially damaged an important element of this country’s securities enforcement regime.”). To be sure, the drop off in filings probably cannot be ascribed entirely to the “Milberg Effect,” the phrase coined by the editorial page of the Wall Street Journal in discussing the impact of the Milberg prosecution on securities class action litigation, Kevin LaCroix, \textit{Comment on the “Milberg Effect"}, The D&O Diary, Sept. 14, 2006, \url{http://www.dandodiary.com/2006/09/articles/plaintiffs-bar/comment-on-the-milberg-effect} (noting that a decline had already begun in September 2005).} So, one might ask, what difference does it make if Perino, like the government before him, has failed to prove the underlying assumption of harm in the Milberg case? In this final part we argue that revisiting the Milberg prosecution—and the harm question that lay at the heart of the case—is important for a number of reasons. Dickensian, the Milberg case conjures up legal equivalents of the three spirits of Christmas. In this final part we explore these three aspects of the continuing significance and relevance of the Milberg prosecution.

A.  The Ghost of Milberg Past

The Ghost of Milberg Past forces us to reconsider not just whether the government was wrong to prosecute Milberg for honest services fraud without adequate proof that the unnamed class members were injured by the payments Milberg made. More broadly, revisiting the case invites normative reflection on the role that a harm requirement should play in applying at least certain criminal statutes. In this connection, the work of Kelly Strader is instructive. Citing the Milberg case as one example, Strader has powerfully argued that for white collar crimes in particular, an \textit{a priori} requirement of harm serves as an important constraint on prosecutorial discretion and can best justify the expenditure of limited resources necessary to maintain a criminal prosecution.\footnote{Strader, \textit{supra} note \textsuperscript{158} at 50-1.} As far as Milberg is concerned, there is evidence that the social costs of indicting the most important plaintiff’s securities class action firm were substantial.\footnote{\textsuperscript{157} [Cite recent legal ethics book chapter on case].} These heavy costs are particularly hard to justify if there was no evidence that class
members were injured by the payments that were made to the representative plaintiffs.

B. The Ghost of Milberg Present

The Ghost of Milberg Present speaks to current policy debates in securities litigation. The important securities litigation reform Congress passed in 1995, the Private Securities Litigation Reform Act, was meant in large measure to curtail perceived sharp tactics by plaintiff’s lawyers. One of the Reform Act’s primary goals was to replace individual investors with institutions which were anticipated to have greater leverage to bargain over fees and better monitor the attorney’s work. While there is some evidence to show that this sometimes actually happens (including one empirical study by Perino), the experiment of replacing individuals with institutions has not been an unqualified success. One particularly troubling development has been the willingness of managers of public institutional funds (which have become the institutional investors most willing to serve as lead plaintiffs in the post-Reform Act period) to insist upon campaign contributions from lawyers competing for their willingness to serve as lead plaintiff. This development is significant and troubling because when it happens the empirical evidence shows that attorney’s fees end up being just as large a percentage of the total recovery as they were before passage of the statute. In other words, one might say that we have

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160 Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.); Thomas, Megafirms, supra note ___ at 189 (“Congress enacted the Reform Act in 1995 to deter entrepreneurial plaintiffs' law firms from filing frivolous securities fraud cases”). Milberg was not just the most prominent illustration of concerns over the agency problems that exist in securities litigation; it was the primary example cited of how the private litigation system can be abused. James P. McDonald, Milberg’s Monopoly: Restoring Honesty and Competition to the Plaintiff’s Bar, 58 DUKE L. J. 507, 522 (2008) (“Congress passed the PSLRA with Lerach and Milberg Weiss in its headlights”); Casey, Class Action Criminality, supra note ___ at 170 (“Following enactment of the law, advocates who helped draft the PSLRA boldly acknowledged that the statute was intended to destroy Milberg Weiss’s securities practice”).


163 Stephen J. Choi, Motions for Lead Plaintiff in Securities Class Actions, New York
come full circle—from “kickbacks” to incentivize individual plaintiffs to “pay to play” practices demanded by the state officials that manage public pension funds—but with little awareness we have done so. Given this state of affairs, one lesson we might learn from revisiting the Milberg case is that in focusing exclusively on the villainy of the plaintiff’s lawyer, it is easy to lose sight of the larger constellation of factors that influence the size, shape and efficiency of the private litigation system. Another and related lesson may be that incentive payments to plaintiffs can actually yield positive social outcomes, suggesting that their illegality might need to be rethought, as Bruce Kobayashi and Larry Ribstein have previously argued.

C. The Ghost of Milberg Yet to Come

Most importantly of all, there is a Ghost of Milberg Yet to Come. Really, there are two visions of the future that are illuminated by reexamination of the Milberg case. The first concerns the Milberg case as a reflection of a larger and widening phenomenon of lawyers being prosecuted for acts undertaken in the course and scope of representation. Although most prosecutions are unrelated to a lawyer’s professional work, there is evidence to suggest that, at least in the last decade, lawyers are being charged under a much wider assortment of statutory provisions, state and federal, and that a far more diverse group of lawyers is being charged with criminal wrongdoing. The Milberg prosecution reflects both of these developments. A decade ago the vast majority of (and most significant) prosecutions were of criminal defense lawyers. While criminal defense lawyers continue to be a primary target of prosecutors, two additional categories of lawyers—those representing clients in civil litigation and those providing advice in non-litigation contexts—have also found themselves in the crosshairs of criminal prosecution. In consequence, even as the total number of prosecutions of lawyers for conduct occurring during the course of representing clients still remains modest, the scope of such prosecutions seems to have expanded into civil litigation and transactional contexts. Yet, there are numerous examples to which one can point in which prosecutors, judging with hindsight the decisions lawyers make in the course of representing clients, often end up exercising their discretion poorly. Not always,
of course; but there are enough examples of prosecutorial misjudgments—of indictments against lawyers being dismissed, of lawyers ultimately acquitted—to suggest that prosecutorial practices in this area warrant more careful examination.

The other and last respect in which the Milberg case bears continuing relevance is to debates over future reforms of the civil litigation system generally. There is a Milberg subtext that can be identified in these debates that is subtle but significant. Referencing the successful prosecution of the firm and its most prominent lawyers, critics portray plaintiff’s lawyers in general, like the Milberg lawyers in particular, as society’s bottom feeders, entrepreneurs willing to do anything to reap oversized fees they do not deserve. Calls for further litigation reform, both of securities litigation specifically, and more generally, routinely reference the Milberg prosecution. Indeed, the competing model—that private enforcement of the securities laws serves as one of the vital mechanisms for regulating industry and protecting society—can more readily be dismissed precisely because the Milberg story seems to confirm critics’ most visceral rhetoric. In purporting to find empirical proof to bolster the government’s prosecution, Perino’s study lends support to this critical view. Yet, to read the Milberg case as a lesson about the excesses of litigation system is to confuse the ethical misjudgments of a few lawyers with all of the good that they did and, more broadly, that private litigation can do.

168 See, e.g., Editorial, Milberg Mores, WALL ST. J., June 16, 2006, at A15 (criticizing decision to prosecute the firm itself but exhorting that the Milberg indictment “has directed a bright, overdue light on the great tort-lawyer money-laundering machine”).

169 Casey, Class Action Criminality, supra note __ at 244 (“corporate interest groups argue that the Milberg Weiss prosecution demonstrates the need for even greater regulation of securities class actions”); Coffee, Milberg Weiss Indictment, supra note ___ at 18 (“The Milberg Weiss indictment represents a major black eye for the plaintiffs’ bar and may encourage business lobbyists to seek new and restrictive legislation”).

170 Michael C. Dorf, The Indictment of the Milberg Weiss Law Firm and America’s Love-Hate Relationship With Class Action Litigation, May 22, 2006, http://writ.news.findlaw.com/dorf/20060522.html (“the Milberg Weiss indictment also raises broader questions about the class action itself. The same kind of harm allegedly done by the Milberg Weiss kickback scheme occurs on a much larger scale, albeit legally, in nearly every large class action lawsuit. The lawyers are typically the driving force behind class action litigation. That is part of what makes the class action such a useful vehicle, but it also creates the risk of abuse that so worries class action critics.”) (emphasis in original).