Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime

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Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime

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Aug. 16, 2011

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Abstract

Recent financial scandals and the relative paucity of criminal prosecutions in response suggest a new reality in the criminal law system: some wrongful actors appear above the law and immune from criminal prosecution. As such, the criminal prosecutorial system affirms much of the wrongdoing giving rise to the crisis. This leaves the same elites undisturbed at the apex of the financial sector, and creates perverse incentives for any successors. Their position of power results in massive deadweight losses for the entire economy as a result of their crimes. Further, this undermines the legitimacy of the rule of law and encourages even more lawlessness among the entire population, as the declination of prosecution advertises the profitability of crime. These considerations transcend deterrence as well as retribution as a traditional basis for criminal punishment. Affirmance is far more costly and dangerous with respect to the crimes of powerful elites that control large organizations than can be accounted for under traditional notions of deterrence. Few limits are placed on a prosecutor’s discretionary decision about whom to prosecute, and many factors against prosecution take hold, especially in resource-intensive white collar crime prosecutions. This article asserts that prosecutors should not exercise that discretion without considering its potential affirmance of crime. Otherwise, the profitability of crime promises massive knock-on losses.

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“Governmental actions such as criminal prosecutions can be seen as ceremonial and ritual performances that designate the content of public morality and symbolize the public affirmation of social ideals and norms.”

I. Introduction

The financial crisis in the United States in the fall of 2008 manifested itself much earlier than first reported. Prior to former Treasury Secretary Hank Paulson’s alarm warning of a financial market meltdown unless billions in bailout funds were handed to him for disbursement in October 2008, the average American may not have been alerted to the trillions of dollars trading in derivatives in virtually unregulated markets, and may not have known that the subprime mortgage industry was handing out liar’s loans

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Derivatives are financial contracts whose prices are determined by or “derived” from, the value of some underlying asset, rate, index, or event. They are not used for capital formation or investment, as are securities, rather, they are instruments for hedging business risk or for speculating on changes in prices, interest rates, and the like. Derivatives come in many forms: the most common are over-the-counter swaps and exchange-traded futures and options. . . . A firm may hedge its price risk by entering into a derivatives contract that offsets the effect of price movements. Losses suffered because of price movements can be recouped through gains on the derivatives contract.

Id. at 45-46.

like candy bars on Halloween. Nevertheless, there were early indications that something was amiss.

As early as 1998, Commodities Futures Trading Commission (“CFTC”) Chairwoman Brooksley Born registered concern about the expansion in the unregulated derivatives markets and related losses, and sought to impose regulations on the derivatives market. Not only were her efforts derailed, but Treasury Secretary Robert Rubin, Federal Reserve Chairman Alan Greenspan, and Securities and Exchange Commission (“SEC”) Chairman Arthur Levitt lobbied successfully to prohibit derivatives trading from being regulated, and ultimately affirmatively removed derivatives from coming within the purview of the CFTC. Their efforts to derail derivatives regulation were nearly foiled by the meltdown of Long-Term Capital Management in September 1998, but despite a glimpse of catastrophic losses that could arise from the unregulated

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8 See Press Release, Treasury Dep’t, Joint Statement by Treasury Secretary Robert E. Rubin, Federal Reserve Board Chairman Alan Greenspan, and Securities and Exchange Commission Chairman Arthur Levitt (May 7, 1998); FCIC REPORT, supra note 3, at 47-48 (in October, 1998, Congress passed a moratorium on the CFTC’s ability to regulate over-the-counter derivatives, as requested by Rubin, Greenspan, and Levitt); cummings, supra note 4, at 530-31.

9 See FCIC REPORT, supra note 3, at 56-58. Long-Term Capital Management (“LTCM”) is a hedge fund that experienced devastating losses on its $125 billion portfolio after Russia defaulted on part of its national debt, causing a panic in junk bonds and emerging market debt. See FCIC REPORT, supra note 3, at 57. LTCM had a high-risk leveraging strategy that borrowed $24 for every $1 of investors’ equity, so that when
derivatives trading.\textsuperscript{10} Congress was persuaded to place a moratorium on the CFTC’s ability to regulate OTC derivatives, and in December 2000, it “in essence deregulated the OTC derivatives market and eliminated oversight by both the CFTC and the SEC.”\textsuperscript{11} In 2004, Federal Bureau of Investigation (“FBI”) agents were asking for more investigators to address fraud in the mortgage industry; their pleas were ignored.\textsuperscript{12} In 2006, New York University economist Nouriel Roubini warned the audience at an International Monetary Fund meeting in Washington, D.C., of a coming crisis, and he was not alone.\textsuperscript{13} In August the capital market panicked, the fund lost 80\% of its equity ($4 billion) resulting in $120 billion in debt. \textit{Id.} at 56-57. LTCM also had derivative contracts worth about $1 trillion, and the concern was that because of the limited equity in the firm, it could fail if the fund’s counterparties attempted to liquidate their positions simultaneously. \textit{Id.} at 57. Behind-the-scenes emergency maneuvering by the Federal Reserve Bank of New York organized 14 of the largest financial institutions with large exposures to LTCM (later central players in the taxpayer bailout of those banks) to inject $3.6 billion into LTCM in return for 90\% of its stock. \textit{Id.} All but one (Bear Sterns declined to contribute) of the 14 institutions contributed between $100 million and $300 million. \textit{Id.}

\textsuperscript{10} \textit{See} FCIC \textit{REPORT, supra} note 3, at 46-48 (noting the “wave of significant losses and scandals [that] hit the market” between 1994 to 1998 after the CFTC exempted “certain nonstandardized OTC derivatives” from trading on a regulated exchange); \textit{Private-Sector Refinancing of the Large Hedge Fund, Long-Term Capital Managements: Hearing Before the H. Comm. on Banking and Financial Services, 105\textsuperscript{th} Cong., 2\textsuperscript{nd} Sess.} (Oct. 1, 1998) (prepared testimony of Federal Reserve Chairman Alan Greenspan, Federal Reserve Chairman).


\textsuperscript{12} As early as 2004, the FBI suspected fraud in the mortgage and subprime mortgage market, but did not pursue the investigation due to a lack of funding and staffing, after overall FBI staffing decreased between 2001 and 2007 and resources were shifted to post-September 11, 2001, national security priorities. \textit{See} Eric Lichtblau et al., \textit{F.B.I. Struggling to Handle Wave of Finance Cases}, N.Y. TIMES, Oct. 19, 2008, at A1 (reporting a loss of 625 agents (36\% of the FBI's 2001 levels)). Executives in the private sector also complained of “difficulty . . . in attracting the bureau's attention in cases involving possible frauds of millions of dollars.” \textit{Id.}

\textsuperscript{13} \textit{See} NOURIEL ROUBINI & STEPHEN MIHM, CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE 1-3 (2010). Roubini and Mihm identify a number of respected experts who issued warnings of coming disaster:

\begin{quote}
Robert Shiller [of Yale University], was far ahead of almost everyone in warning of the dangers of a stock market bubble in advance of the tech bust; more recently, he was one
2007, more warning bells sounded when credit markets tightened.\textsuperscript{14} Prior to their collapses, several of the banks showed stress.\textsuperscript{15} By the time Paulson approached the President of the United States, George W. Bush, in 2008 to sound the alarm, losses were in the trillions of dollars.\textsuperscript{16} The bailouts of banks, investment banks, mortgage companies, insurance companies, and others, all in an effort to save the U.S. financial

of the first economists to sound the alarm about the housing bubble. . . . In 2005 University of Chicago finance professor Raghuram Rajan told a crowd of high-profile economists and policy makers in Jackson Hole, Wyoming, that the ways bankers and traders were being compensated would encourage them to take on too much risk and leverage, making the global financial system vulnerable to a severe crisis. . . . Wall Street legend James Grant warned in 2005 that the Federal Reserve had helped create one of “the greatest of all credit bubbles” in the history of finance; William White, chief economist at the Bank for International Settlements, warned about the systemic risks of asset and credit bubbles; financial analyst Nassim Nicholas Taleb cautioned that the financial markets were woefully unprepared to handle “fat tail” events that fell outside the usual distribution of risk; economists Maurice Obstfeld and Kenneth Rogoff warned about the unsustainability of current account deficits in the United States; and Stephen Roach of Morgan Stanley and David Rosenberg of Merrill Lynch long ago raised concerns about consumers in the United States living far beyond their means. The list goes on.

\textit{Id.} at 3.


\textsuperscript{16} See Richard Frost & Kyung Bok Cho, \textit{Asian Stocks Rally, Treasuries Drop on Fannie, Freddie Takeover}, Bloomberg, Sept. 8, 2008, \url{http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aq8tCTiwjMnY&refer=home} (last visited Aug. 16, 2011) (reporting that “[m]ore than $17 trillion in global equity value has been wiped out since October as the collapse of the subprime debt market and a U.S. housing recession slowed global economies); HENRY M. PAULSON, JR., \textsc{On the Brink} 255-56 (2010)
markets, totaled $11 trillion by November 2009.\textsuperscript{17} One insurance company, responsible for insuring a large amount of derivative trading, received $182 billion alone.\textsuperscript{18}

While the financial markets careened toward disaster and narrowly escaped total collapse due to taxpayer-funded bailouts, unemployment skyrocketed to near Great Depression levels.\textsuperscript{19} Unemployment benefits were extended several times in an effort to address high long-term unemployment rates.\textsuperscript{20} Housing values fell to the point that over 25\% of all homes owned in the United States are worth less than the outstanding amount of the mortgages remaining on those homes.\textsuperscript{21}

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\textsuperscript{17} See David Goldman, CNNMoney.com's Bailout Tracker, CNNMONEY.COM, http://money.cnn.com/news/storysupplement/economy/bailouttracker/ (last visited Aug. 16, 2011) (tracking the various federal programs to bailout the economy, using sources from the Federal Reserve, Treasury, FDIC, CBO, and White House, as of Nov. 16, 2009; $11 trillion had been committed for bailouts, and of that amount, $3 trillion had been invested by that date); Steven A. Ramirez, \textit{Subprime Bailouts and the Predator State}, 35 U. DAYTON L. REV. 81 (2009).


\textsuperscript{19} See, e.g., Eleni Theodossiou & Steven F. Hipple, Bureau of Labor Statistics, \textit{Unemployment Remains High in 2010}, Monthly Labor Review Online, Mar. 2011, Vol. 134, No. 3, available at http://www.bls.gov/opub/mlr/2011/03/art1exc.htm (last visited Aug. 16, 2011) (reporting that” the number of long-term unemployed reached a record high” in the fourth quarter of 2010, and that the 9.6\% unemployment rate was the first improvement in the rate since the 2007-09 recession, “down from a 26-year high of 10.0 percent a year earlier”); STIGLITZ, supra note 15, at 63-66 (calculating that the economy lost 8 million jobs between December 2007 and October 2009, and that, given the number of new entrants to the job markets, 12 million jobs would be required to restore the economy to full employment).

\textsuperscript{20} See Carl Hulse, \textit{Senate is Set to Extend Aid to the Jobless}, N.Y. TIMES, July 20, 2010, at A1.

warned consumers that walking away from mortgage obligations was irresponsible only one month before it reportedly “refused to provide the terms of a deal it made with creditors” after vacating its new facilities. Foreclosures since the crisis have reached record numbers, with more waiting to be processed. Bankruptcies also hit record levels as businesses failed due to lack of ready credit, while the bailed-out banks hoarded funds due to the need for liquidity, favorable interest rates from the federal reserve.

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26 See Ramirez, supra note 17, at 97-99.
and the lucrative investment opportunities in the derivatives market.\textsuperscript{28} By 2010, courts began to realize that banks and their representatives had been using forged documents and fraudulent affidavits to foreclose on properties in thousands of cases.\textsuperscript{29} Rather than contrite, the CEOs of the bailed out companies gave themselves and their top managers generous bonuses for 2008, 2009, and 2010.\textsuperscript{30}

Emblematic of governmental disregard for the rampant financial abuses, at the SEC, beginning in May 2000 and continuing to 2008, regulators ignored repeatedly the persistent claims by a citizen whistleblower named Harry Markopolis, that Bernie Madoff was running a Ponzi scheme.\textsuperscript{31} Though Markopolis’ efforts to gain the attention of SEC

\textsuperscript{27} \textit{See Stiglitz, supra note 15, at 138 (2010)} (suggesting that the Federal Reserve’s decision to begin paying interest on bank reserves held in deposit at the Federal Reserve was “counterproductive” because it encouraged banks to keep the money at the Fed rather than lending it out to borrowers).

\textsuperscript{28} \textit{See Matt Wirz & Serena Ng, Subprime Bonds Are Back, WALL. ST. J., Apr. 1, 2011, at A1.} (reporting that banks, and even bailed-out insurance giant, AIG, have returned to investing in subprime and other residential mortgage bonds because the higher risk associated with those bonds also provides the opportunity for higher yields on the investments).

\textsuperscript{29} \textit{See, e.g., Joe Rauch & Clare Baldwin, BoA, Wells, Citi See Foreclosure Probe Fines, REUTERS, Feb. 25, 2011, \url{http://www.reuters.com/article/2011/02/26/us-banks-foreclosures-idUSTRE71P0A720110226} (last visited Aug. 16, 2011) (reporting that the biggest U.S. mortgage lenders in the United States “are being investigated by 50 state attorneys general and U.S. regulators for foreclosing on homes without having proper paperwork in place or without having properly reviewed paperwork before signing it”).}

\textsuperscript{30} \textit{See, e.g., Stephen Grocer, Banks Set for Record Pay, WALL. ST. J., Jan. 15, 2010, at A1; STIGLITZ, supra note 15, at 56; Eric Dash & Louise Story, Citigroup’s Top Executives to Forgo ’08 Bonuses, N.Y. TIMES, Jan. 1, 2009, at B1.} \textit{See also ROUBINI & MIHM, supra note 13, at 68-69} (explaining how the financial industry’s reliance upon bonuses as a compensation mechanism created the moral hazard of encouraging excessive risk-taking to incur short-term profits that would enhance bonuses).

\textsuperscript{31} \textit{See Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Mkts., Ins., and Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs., 111th Cong. 10 (2009) [hereinafter Hearing on Regulatory Failures] (statement of Harry Markopolos, Chartered Financial Analyst and Certified Fraud Examiner) at 5; David Gelles & Gillian Tett, \textit{From Behind Bars, Madoff Spins His Story}, FINANCIAL TIMES, Apr. 8, 2011, \url{http://www.ft.com/cms/s/2/a29d2b4a-60b7-11e0-a182-00144feab49a.html?ftcamp=traffic/email/regsnl/memmk#axzz1JMG01IMV} (last visited Aug. 16, 2011) (the firm was founded in 1960 and Madoff claims that the Ponzi scheme first began in the early 1990’s,}
investigators continued over a period of eight and a half years, and included his own undercover investigation and supporting documents to aid the SEC, Madoff was not investigated by the SEC until after he confessed spontaneously to his sons. By then, the losses had grown to an estimated $50 to 65 billion. Madoff, who in 2009, at age 70, pled guilty to eleven counts of fraud, money laundering, perjury, and theft, is serving a 150 year federal sentence. Madoff’s prosecution can hardly be claimed as a success story given the many years he operated his scheme unabated and the amount of financial losses to his victims.

Hindsight may be 20-20, but the facts above demonstrate hindsight was not required to stave off the calamitous events in the financial markets over the past five years. Some criminals will persist in obtaining their fortunes no matter the risks, while others are opportunistic players who jump in the game when the risk of punishment for their acts is diminished. There were some early opportunities to shut down subprime misconduct, and the failure to do so arguably emboldened both groups, delivering tremendous financial rewards to them and affirming their actions with every dollar that they made.

whereas Irving Picard, the trustee seeking to retrieve assets for Madoff’s victims, asserts that the fraud began as early as 1983).


33 Hearing on Regulatory Failures, supra note 31; see also Efrati, supra note 32; Gelles & Tett, supra note 31 (placing the value of the Ponzi scheme at $65 billion).

Classic theories of punishment identify utilitarian\(^{35}\) and retributivist\(^{36}\) justifications for punishing criminal wrongdoing. Deterrence, a utilitarian principle, suggests that by punishing the wrongdoer, he will learn that criminal behavior has consequences; moreover, others will see the criminal punished and also take away the message that crime doesn’t pay.\(^{37}\) The retributivist justifies punishment somewhat similarly, and more formalistically. The wrongdoer must pay for his crime because of the breach of society’s rules.

Sometimes, however, the wrongdoer is not punished. In fact, the wrongdoer is not criminally pursued. No charges are brought, no trial heard, no conviction assessed, and no punishment imposed. Indeed, for most crimes, this is the situation. A victim may fail

\(^{35}\) Jeremy Bentham, *Principles of Penal Law*, in *1 THE WORKS OF JEREMY BENTHAM* 383 (John Bowing ed. 1962) (“General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence that has been committed as an isolated fact, the likes of which would never recur, punishment would be useless. It would be only adding one evil to another.”).

\(^{36}\) Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 195-98, trans. W. Hastie (Clark, 1887) (rejecting criminal punishment as a means to promote further good to society, but rather, asserting that punishment must be meted out to one convicted of a crime because the individual has committed that crime); John Rawls, *Two Concepts of Rules*, *Philosophical Rev.* 7 (1955) (“retributionists have rightly insisted . . . that no man can be punished unless he is guilty [of having] broken the law”).

\(^{37}\) Deterrence as a theory of punishment seeks to alter human behavior by reminding individuals that breaches of the law will be punished. Nonetheless, it is difficult to create an empirical study to prove the efficacy of deterrence, since if it is effective, there is no means by which to identify those who might otherwise have breached the law. See Ted Honderich, *Punishment: The Supposed Justification Revisited* 79-82 (2006) (identifying various alternative explanations aside from deterrence as to why individuals may choose to *not* break the law). Nevertheless, Honderich identifies “bits of evidence of a different kind” to support the efficacy of deterrence. In 1944 the Danish police were deported by the German occupying forces, leaving behind only a local guard force that was unable to address the immense rise in property crimes – robberies, theft, fraud – although “there was no comparable increase in murder or sexual crimes.” Honderich, *supra*, at 82. The change in crime levels in 1944 Denmark might suggest that deterrence is more effective against certain economic crimes while having virtually no impact on crimes that tend to involve “strong passions or deep psychological problems.” Honderich, *supra*, at 82 (citing Howard Jones, *Crime and the Penal System* 140 (1956)).
to report the crime, the police or other governmental investigative arm may choose not to pursue a complaint or may decide to abandon pursuit, the prosecutor may determine not to seek or file charges. Each decision not to pursue criminality, is an exercise of discretion.

Reasons for exercising discretion against pursuing criminality may be varied. For the victim, personal embarrassment, fear, or hopelessness may underlie the decision. Lack of suspects or leads, other more pressing cases, lack of resources, lack of credibility of sources, discouragement, bad publicity, or simply lack of motivation are just a few of the myriad of reasons for failure to investigate. Finally, for the prosecutor, a weak case, an overload of cases, resource considerations, or more compelling cases, to name a few, may factor into the discretionary decision. Beyond these reasons, lay other


\[39\] See id. at 18-21.

\[40\] See, e.g., Carrie Johnson, SEC Enforcement Cases Decline 9%, WASH. POST, Nov. 3, 2006, at D3 (reporting on recent budget cuts and hiring freezes at the SEC); Lichtblau, supra note 12 (reporting on a loss of 625 agents (36% of its 2001 levels) for white collar crime investigations as the administration shifted its focus to antiterrorism). “[E]xecutives in the private sector say they have had difficulty attracting the [FBI’s] attention in cases involving possible frauds of millions of dollars.” Lichtblau, supra.

possibilities, such as community remedies, civil alternatives to criminal punishment, or perceived blameworthiness.42

Whatever the reason, one casualty of the decision not to pursue justice in the face of a crime, is the message that “crime doesn’t pay.” A minor message, perhaps, in minor crimes; however, if the crime costs billions of dollars or more, or involves abuse of economic power, the more likely message to both the wrongdoer and the rest of us, is one of “affirmance”: crime does pay.43 Indeed, even in those cases where the wealthy or powerful—governing elites—are pursued criminally, the discretionary decisions in plea negotiations may still be affirming if they lead to a result viewed as under-punishment for the crime.44

“In general, individuals who are plugged into especially powerful networks receive considerable advantages through the legal system administered by members of privileged networks, who went to the same universities, belong to the same congregations and clubs, vacation in the same locales, and so forth. The same cannot be said for their socially marginalized or dispossessed co-citizens. Well-connected insiders usually receive more indulgent treatment than poorly connected outsiders, even in the case of undeniable lawbreaking. The effect of this skewed distribution of leniency and severity on legal liability of government malefactors goes without saying.

An important exception to impunity for the rich and powerful occurs when a member of a socially influential network seriously injures a member of the same or another socially powerful network. (Bernie Madoff is a recent example.)”

Id.


43 See MICHAEL LEWIS, THE BIG SHORT xiv-xv (2010). In the prologue to The Big Short, Lewis reflected on the response to his first book, Liar’s Poker, which described his experience in the bond market as an associate working at Salomon Brothers on Wall Street from 1985-1988. While Lewis anticipated that the tale of reckless speculation in the bond market yielding lucrative salaries to associates but massive losses to investors would warn young people against careers in the financial markets, six months after the book was published he was inundated with letters from college students using his book “as a how-to manual” and asking him to share additional secrets about Wall Street. Id.

44 Financial scandals from the 1980’s bear this out. Michael Milken, attributed with creating the junk-bond market, plead guilty to six counts of securities fraud violations and agreed to over $500 million in fines and
This article argues that “affirmance” is as critical to appropriate criminal law
decision-making as any of the extant theories of punishment. Just as the belief that
punishment restores order to society or communicates messages that may deter future
wrongdoing, affirmance stands for the proposition that not pursuing or punishing elite
crime adequately can undermine the rule of law, diminish confidence in government,
and promote further costly criminality. Affirmance as discussed in this article focuses
upon “elite crimes” (particularly corporate and financial elites) committed by those who

a ten-year term of imprisonment; however, he served only twenty-two months in jail and walked away with a fortune. See, e.g., DAVID O. FRIEDRICHS, TRUSTED CRIMINALS 164-65 (3d ed. 2007).

45 The rule of law is undermined when misconduct is reinforced through benefits gained to the perpetrator by shirking the rules. See, e.g., STIGLITZ, supra note 15, at 135 (2010) (describing how the repeated bailouts of banks in the 1980s, 1990s, and 2000s “sent a strong signal to the banks not to worry about bad lending, as the government will pick up the pieces”). See also B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR (1953) (explaining that operant conditioning changes or establishes behavior by reinforcing an individual’s response to events or stimuli in the environment). A reinforcer, or operant, is an environmental response to an individual’s behavior that increases the probability of repeating the behavior; ultimately strengthening the behavior and its frequency. Id. at 3-50. Positive reinforcement occurs when a rewarding environmental stimulus or consequence follows an individual’s behavior. Id. Negative reinforcement occurs when the environmental consequence allows the individual to avoid an unpleasant consequence when the individual’s behavior occurs. Id. Reinforcement differs from punishment, which intends to weaken or eliminate a response, rather than increase a behavior’s frequency through gained benefits. Id. at 90.


47 Criminality is promoted in two ways. First, the risk of punishment is lessened, so that a moral hazard is created; the criminal actor pursues criminal conduct because no deterrent measures are expected so the actor reaps the gains from the criminal act, while the losses are borne by the victims. In the case of massive fraud or environmental destruction requiring taxpayers to bear the losses, the hazard extends even further because the failure to prosecute is widely viewed as undermining the rule of law. See generally GARY H. STERN & RONALD J. FELDMAN, TOO BIG TO FAIL: THE HAZARDS OF BANK BAILOUTS 6-7 (2004) (describing how insurance policies create a moral hazard because they may encourage risk-taking by the insured, since the losses will be borne by the insurer). Second, bad behavior is modeled for others, who may face greater risk of punishment but disregard that risk because of an expectation of fair play. See ALBERT BANDURA & EMILIO RIBES-INESTA, ANALYSIS OF DELINQUENCY AND AGGRESSION 24-28 (1976).
may be perceived to be “above the law” due to the position held at the time the crime was committed, to favorable socioeconomic status, or to political ties to power. As such, affirmance of these crimes by these elites, is far more costly than mere failure to deter crimes such as auto theft.

Part II briefly discusses the punishment theories underlying criminal justice. Central to understanding affirmance is recognizing that it goes beyond concepts of retribution or deterrence. Part III considers the social meaning behind the choices of who is punished and what crimes are punished. The converse is also considered—who is not punished and what ideas are expressed by decisions declining criminal investigation or punishment. Part IV surveys the numerous factors imbedded in prosecutors’ discretionary decisions, some explicit and others implicit in the process. These factors take into account competing demands for resources, case-specific sufficiency assessments, ethical obligations, and community interests in alternative non-criminal resolutions, among others. Part V evaluates the message of affirmance, as expressed through the discretionary decisions made regarding what to investigate, whether to pursue criminal charges, and the amount of punishment meted out to white collar individuals acting through powerful corporations. Whether the individuals’ actions result in the death of customers or employees, the destruction of an ecosystem, or the financial ruin of families or countries, under-punishment or failure to pursue criminal charges against these actors, affirms their behavior and further invites moral hazard. Affirmance of high
profile crimes results in high profile advertisement of criminal profitability, and thus incentivizes far more costly criminality.48

This article concludes by suggesting that prosecutors must exercise their discretion to decline prosecutions, accept plea bargains, or offer non-criminal alternative sanctions bearing in mind the affirmanse effect of that decision, particularly in elite crimes. Ignoring affirmanse to gain politically expedient resolutions49 expresses a social meaning at odds with a cohesive criminal justice system, and thereby undermines the opportunity to positively shape society through law.50 In past articles, I have proposed

48 See, e.g., Jean Eaglesham, Criminal Mortgage Probes Fizzle Out, WALL ST. J., Aug. 6-7, 2011, at B1 (reporting that three high-profile investigations into the subprime mortgage crisis have gone dormant or have been closed without any criminal prosecutions); Editorial, Lack of Criminal Charges Against Bankers Shows We’re Soft on Crime, ST. LOUIS POST-DISPATCH, July 28, 2011, http://www.stltoday.com/news/opinion/columns/the-platform/article_fb7a8fec-fac5-5042-a6c8-74094e1230aa.html (last visited Aug. 16, 2011) (“Americans [have] a gnawing sense that no justice was done, that the guys who wrecked everything got away with it”); Gretchen Morgenson & Louise Story, Behind the Gentler Approach to Banks by U.S., N.Y. TIMES, July 8, 2011, at A1 (observing that the federal prosecutors are moving away from criminal prosecutions in white collar cases to lesser alternatives such as deferred prosecutions or civil litigation); Colin Barr, Where are the Subprime Perp Walks?, FORTUNE, Sept. 15, 2009 (noting the lack of prosecutions of high profile subprime mortgage executives whose excesses led to the financial crisis in 2007).


50 See Carolyn B. Ramsey, Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law, 54 Hastings L.J. 1641, 1642 (2003) (arguing the the exercise of prosecutorial discretion shapes the law). Paul Horwitz observes there is a distinction “between the rule of law as an ideal, and the implementation of the rule of law,” and whatever the absolute state of the rule of law demands, “it still requires implementation in practical forms, and those mechanisms of implementation may vary depending on the context.” Paul Horwitz, Democracy as the Rule of Law, in WHEN GOVERNMENTS BREAK THE LAW 153, 157 (Austin Sarat & Nasser Hussain eds. 2010). In a democracy, the
that the Department of Justice create a Corporate Crimes Division to focus resources and expertise on fighting white collar crime with minimal political interference.51 I have also recommended judicial education to improve awareness about bias and group affinity in such cases to combat judicial discomfort with incarcerating white collar criminals.52 In this article, I turn to the prosecutor’s role, urging discretionary choices that encompass the role of affirmance in expressing the rule of law.

Affirmance raises concerns not typically addressed under the deterrence theory of punishment. When the richest and most powerful elements of society enjoy official affirmance of their crimes through non-prosecution, the rule of law erodes as all citizens now face added temptation to skirt laws and regulations. After all, if the privileged are above the law then the sway of the rule of law morally diminishes for all. Similarly, when the most powerful may act with impunity to enrich themselves at the expense of society in general, their continued control over society’s most concentrated sources of economic wealth (public corporations and large banks, for example) becomes downright hazardous in ways beyond the conception of mere deterrence. Criminality achieved through the abuse of positions within great economic organizations can crash capitalism, destroy ecosystems, and disperse great risks to human health and safety, so long as the people define the rules of the game, but may also redefine those rules through voting, legislation, or even constitutional amendment. See id. More significantly, for purposes of this article, is that in a democratic society, the rules of the game must ultimately be subject to popular control in order “to command the respect and obedience of the people who are subject to it.” Id. at 159-60. Affirmance, through prosecutorial discretion, undermines democratic society.

51 See Mary Kreiner Ramirez, Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority, 93 MARQ. L. REV. 971 (2010).

powerful individuals in control of such entities rake in great wealth. Despite the accrual of great wealth—even hundreds of millions of dollars—to these individuals, the deadweight loss to society may mount exponentially to billions or trillions of dollars, as shown again and again. Affirmance comprehends these enormous knock-on losses, as well as the loss of moral suasion inherent in the rule of law, in ways that extend beyond mere deterrence.

II. Theories of Punishment

Civil law holds individuals accountable for their actions by demanding that they pay for the harm imposed on others. In contrast, criminal law punishes individuals. It may also require payment or accountability, but at its core, it is society’s decision that the acts performed by the accused are sufficiently reprehensible to a well-ordered society that the actor should be punished and also labeled “a criminal.” Serious or very costly crimes usually result in incarceration. Serious criminal sanctions such as incarceration operate as society’s strongest condemnation of anti-social behavior.

In creating criminal laws, society must decide that certain conduct requires criminal punishment, and cannot be sufficiently addressed by civil penalties. Theories of punishment identify reasons a society punishes through criminal laws. The theories fall into two broad categories: retributive and utilitarian reasons. Retributive theories are

53 Henry M. Hart, Jr., The Aims of the Criminal Law, 23 Law & Contemp. Probs. 401, 404 (1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.”).

54 Id. at 410 (discussing why it is difficult to have only one theory of criminal law).

backward-looking asserting the need for affirmative punishment deserved by the individual for breaking societal rules. Under this label, several theorists have further expanded upon the type of message and need for the message; affirmative retribution, negative retribution, and assaultive retribution all focus on the message conveyed to the law-breaker.

Affirmance of the crimes of the rich and powerful conveys a message as well. The message acknowledges that despite the obvious and extensive harm imposed upon others, they act above the law and will not pay a price to society for disrupting its rules or imposing suffering on others. They are assured that they can take risks with other people’s lives or livelihoods, their money or their environment, and reap the great rewards in costs savings, hefty salaries, generous bonuses for short-term gains in profits, promotions, or corporate board appointments. When their crimes cause harm, it will not reach them personally; at best, the organizations they control suffer great losses—

56 HONDERICH, supra note 37, at 17. Honderich is critical of retributive theories of punishment as “conceptually inadequate” in part because they “fail to give an adequate or real reason for punishment” and “presuppose free will.” Id. at 201.

57 Michael S. Moore, The Moral Worth of Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179-182 (Ferdinand Schoeman, ed. 1987) (“The distinctive aspect of retributivism is that the moral desert of an offender is a sufficient reason to punish him or her . . . .”).

58 HONDERICH, supra note 37, at 20-21 (observing that negative retributive justice entails the ideas that one “who has obeyed the law must not be made to suffer even if this would have the good effect . . . of keeping him from committing offenses he is otherwise thought likely to commit,” and that “an offender’s penalty must not be increased over what is deserved for his action even if . . . a more severe penalty is needed as an example to deter others”).

59 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 80-82 (1883) (maintaining that it is “highly desirable that criminals should be hated, [and] that the punishments inflicted upon them should be so contrived as to give expression to that hatred); JEFFRIE MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 4 (1988) (criminals should be treated as “noxious insects to be ground under the heel of society”).
deadweight losses well in excess of any benefits they harvest. Even if some individual economic harm is incurred, the benefits will far outweigh those costs. Affirmance tells economically powerful elites that their harvesting of illicit profits may continue.

Utilitarian principles are forward-looking, seeking to maximize the utility of society through punishment of the individual, so that punishment is worthy only if the pain caused through punishment will result in greater benefit to society. Thus, through incapacitation, the law-breaker is imprisoned to protect society from his acts. Rehabilitation permits society to focus on the characteristics of the individual offender to teach the law-breaker to be a better person who is willing or able to follow the law. Specific deterrence aims to convey to the law-breaker that punishment will follow his breach of the laws, thereby improving society by influencing the future behavior of the

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60 See Steven A. Ramirez, Lessons from the Subprime Debacle: Stress Testing CEO Autonomy, 54 St. Louis U. L.J. 1, 29-30 (2009) (describing how the subprime mortgage crisis yielded millions for corporate managers, but cost trillions to firms and through the taxpayer bailout of those firms); George W. Dent, Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance, 44 House L. Rev. 1213, 1245-47 (2008) (discussing how CEO primacy in corporate governance permits numerous opportunities for corporate managers to personally benefit financially through legal and fraudulent means at the expense of the corporation and its shareholders); M.P. Narayanan et al., The Economic Impact of Backdating of Executive Stock Options, 105 Mich. L. Rev. 1597, 1600-01 (2007) (concluding that executive options backdating led to an average loss per firm of about $380 million, while the average potential gain to the executives benefitted in each firm from the practices was less than $500,000).

61 Bentham, supra note 35 (“General prevention ought to be the chief end of punishment as it is its real justification. If we could consider an offence that has been committed as an isolated fact, the likes of which would never recur, punishment would be useless. It would be only adding one evil to another.”). Bentham identified three ways to prevent crime through punishment: to incapacitate, to deter individuals and others, and to reform or rehabilitate. See Honderich, supra note 37, at 75 (2006).


63 Id. at 22-23.
individual to choose pleasure over pain. General deterrence punishes the individual law-breaker, so that society is reminded to avoid deviance and assured that breaking the rules incurs punishment.

Affirmance is also a utilitarian approach to criminal justice in that it too is forward-looking. Just as specific deterrence encourages the law-breaker to follow the law and thereby choose pleasure over pain, affirmance encourages the law-breaker to break the law because there is much pleasure and little or no pain. Likewise, just as general deterrence illustrates to others that lawlessness has a price, affirmance reminds others that criminal law is weak against the hands of the rich and powerful and thus encourages lawless complicity, or simply, lawlessness. Affirmance of elite crime with outsized payoffs (and outsized costs to society) tells elites and their successors that crime pays even though society may suffer deadweight losses that far exceed the profits of elites. Because they hold so much economic power, affirmance promises far more costs in the future. Traditional notions of deterrence fail to account for the impact of dangerously distorted incentives at the apex of our system. It further fails to account for the corrosion of the rule of law arising from high profile advertisement of the profitability of even very costly lawlessness among our governing elite. Unlike ordinary street crime, which is largely a zero-sum game, the power, position, and influence of economic elites inflicts massive knock-on costs to society generally.

Often the criminal prohibition of conduct and the assigned options for punishment may fit into several theories of punishment, so that by imprisoning one for a crime, such

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64 Id. at 20.

65 Id. at 21.
as sexual assault, society may convey the retributive idea that one must be punished for breaching societal rules, the utilitarian idea that the individual must be incapacitated to remove the danger he poses to the public, the rehabilitative idea that through mandatory counseling in prison, he will improve his life once freed from prison, and the specific and general deterrence ideas that his experience with imprisonment will encourage him to abstain from similar acts in the future and convince society to also abstain from engaging in such acts and thereby avoid similar punishment. 66 Thus, in the sexual assault example above, punishment conveys a message that women are valuable members in this society, and their right to be free from physical and emotional assault in the most intimate of settings is worthy of protection. If such conduct routinely went unpunished, rapists’ conduct would be affirmed, and in so doing, lawlessness toward women in particular, but likely violence in general would be encouraged. Moreover, the message of women’s diminished worth would be stark.

When criminal laws are created and potential penalties assigned to breaches of the law, society has (theoretically) considered what message to convey to the law-breaker so that the law-breaker and non-law-breaker alike can see that meaning is attached to our decision to punish. When society's criminals are prosecuted, we convey our disapproval, and the law-breaker and other would-be law-breakers can see we mean business. Law,

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66 See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 3 (2nd ed. 2008) (“different principles [of punishment] are relevant are different points in any morally acceptable account of punishment”).
and punishments for breaches of law, convey social meaning. As discussed below, failure to punish conveys meaning as well—and one of those meanings, is affirmation.

III. Social Meaning and the Expressiveness of Law

The construction of criminal laws to convey these purposes of punishment is so well-accepted in American society that when legislators create new criminal laws, they do not necessarily identify which theories of punishment are furthered by the new legislation. Instead, the social meaning is understood, so that by labeling an act as “criminal” society intends to convey its disapproval of the conduct, to apply the negative label of “felon” in perpetuity, and to subject the criminal actor to limitations on his liberty or other punishments as identified by the government on behalf of the society it governs. Criminal laws empower the government to label and punish individuals in a meaningful way, and constrain individuals from breaching these laws. The strength of a

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67 See Lawrence Lessig, The Regulation of Social Meaning, 62 U. Chi. L. Rev. 943, 951-52 (1995). Lessig defines “social meanings” as “the semiotic content attached to various actions or inactions, or statuses, within a particular context. If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning. . . . [Use of the term “social”] emphasize[s] its contingency on a particular society or group or community within which social meanings occur.” Id.

68 Because of the social meaning attached to labeling one a criminal, an alternative for those with political clout is to change the label from criminal to regulatory. See, e.g., MARSHALL B. CLINARD, ILLEGAL CORPORATE BEHAVIOR 22 (1979); EDWIN SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 13-14, 45-53 (Yale University Press 1983); G. Hoberg, North American Environmental Regulation, in Changing Regulatory Institutions in Britain and North America (G.B. Doern & S. Wilks, eds., 1998) (discussing changing labels to replace environmental “crime” with permits or licenses to pollute).

69 See Lessig, supra note 67, at 955. The passage of laws, criminal and non-criminal, are inherently political; the true question is whether laws are the result of social consensus or powerful interests. Laureen Snider, Researching Corporate Crime, in UNMASKING THE CRIMES OF THE POWERFUL: SCRUTINIZING STATES & CORPORATIONS 49, 55 (Steve Tombs & Dave Whyte eds., 2003). See also FCIC REPORT, supra note 3, at xviii (reporting that the Commission was not surprised that “an industry of such wealth and power would exert pressure on policy makers and regulators” to weaken regulatory constraints on [financial] institutions, markets, and products”). The Commission observed, “[f]rom 1999 to 2008, the financial sector
social meaning is that it is so accepted as a part of a culture that the understandings or expectations associated with the idea “appear natural or necessary.”

The lack of discussion regarding the purpose of punishing a particular criminal act highlights the invisibility of the social meaning attached to the criminal label due to society's accepted understanding of why we criminalize and punish. Lawrence Lessig, in *The Regulation of Social Meaning*, thus observes the following two points:

The more [understandings or expectations] appear natural, or necessary, or uncontested, or invisible, the more powerful or unavoidable or natural social meanings drawn from them appear to be. The *converse* is also true: the more contested or contingent, the less powerful meanings appear to be. Social meanings carry with them, or transmit, the force, or contestability, of the presuppositions that constitute them.

While many accept the retributivist idea that it is moral or just to punish those who violate the criminal laws and impose their criminality upon others, this *lex talonis* approach is not universally accepted. Likewise, while many accept the utilitarian theory that criminals must be punished to influence their future behavior and that of

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70 See Lessig, *supra* note 67, at 960.


73 HONDERICH, *supra* note 37, at 20-29 (2006) (highlighting the circularity of arguing that one deserves punishment for breaking the law because he broke the law). “Circular retributivism is an instance of the fallacy where the supposed reason is identical with the supposed conclusion.” *Id.* at 24.
society, that view is disavowed by the Kantian camp. Because punishment can be justified by more than one theory, the legal philosophers need not reconcile their differences. The retributivists accept criminal punishment pursuant to the justifications they find acceptable, while the utilitarians accept punishment for its prospective impact on society.

Professor Dan Kahan examined the connection between social influence, social meaning and deterrence from crime, concluding that law can shape “how individuals’ perceptions of each others’ values, beliefs, and behavior affect their conduct, including their decisions to engage in crime.” Thus, there is the broadly observed phenomena that while a community may generally support prosecuting and punishing one who would murder another individual, lynchings were permissible forms of community activity in

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74 Kant, supra note 36, at 195-97 (“Juridical punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means subservient to the purpose of another . . . .”).

75 Congress statutorily required that in determining the appropriate sentences under the U.S. Sentencing Guidelines, the Sentencing Commission was to take into account the purposes of sentencing. See 18 U.S.C. § 3553(a) (2000 & West Supp. 2002). Thus, in determining the particular sentence to be imposed, the courts must consider, among other things, “the need for the sentence imposed . . . [t]o provide just punishment for the offense; . . . afford adequate deterrence to criminal conduct; . . . [p]rotect the public from further crimes of the defendant; and . . . [p]rovide . . . educational [training], . . . vocational training, . . . medical care, . . . or other correctional treatment.” 18 U.S.C. § 3553(a)(2)(A)-(D). The Sentencing Commission recognized that, as to the competing philosophies underlying the purposes of punishment, different purposes have greater or lesser value with different defendants. See Steven Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 15-18 (1988) (stating that when faced with advocates of deterrence and those of “just deserts,” listing criminal behavior in rank order of severity and applying punishment, the Sentencing Commission focused on typical, or average, actual past practice in punishment).

76 But see Paul H. Robinson, Distributive Principles of Criminal Law: Who Should Be Punished and How Much? 50-58 (2008) (suggesting that the aggregated-effect studies of deterrence do not “demonstrate a capacity to reduce crime rates as would justify the deterrence orientation that dominates criminal rule-making”).

some parts of the United States, typically with no criminal charges brought against the perpetrators of the violence, despite thousands of complicit spectators attending these spectacles of lawlessness and disorder. The failure by law enforcement to pursue subsequently the instigators of the lynchings, criminal acts committed before the very community in which they lived, conveyed a clear social meaning to everyone in that community about the value of persons of color in the eyes of the law. That those crowds did not rise up against the neighbors who performed the lynchings demonstrated that this conduct was culturally bound up in the community, and that the law sanctioned punishing some without due process while absolving thousands without charges.

Though the days of lynching are largely over, the law continues to express the social meaning of a community through the manner of its enforcement. The use of racial incongruity as a basis for reasonable suspicion, in conjunction with Terry stops, permits law enforcement to express the message that neighborhoods have a color, where some individuals belong and others do not. For those who fail to discern this meaning, most often law-abiding minorities who are forced to suffer the indignity of a police encounter, potentially with a frisk, or even handcuffs, the lesson is hard-earned. The message to stay out of certain neighborhoods and away from certain people may be delivered less

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78 See, e.g., Leslie Friedman Goldstein, The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank (1876), 1 ALB. GOV’T L. REV. 365, 386-90 (2008) (describing the wide-spread anti-black violence in the anti-bellum South and the limits of the federal government’s capacity to curb such violence in the absence of state government will). See also Kahan, supra note 77, at 353-54. Professor Kahan identifies looting and riots as other mob activities that draw individuals without prior criminal records, or differing socio-economic backgrounds from those who live in the affected area. Id.

79 Terry v. Ohio, 392 U.S. 1 (1968) (holding that law enforcement may stop and question individuals under the lesser standard of reasonable suspicion).

80 Bennett Capers, Policing, Race, and Place, 44 HARV. C.R.-C.L. L. REV. 43, 72 (2009).
violently than in the past, but the “stops, coming from the state, suggest a public
discounting of worth, an asterisk on our protestations of equality, a caveat to our rhetoric
about applying strict scrutiny to the state’s use of racial distinctions.”

Discretionary enforcement of law that conveys a negative message of inequality
that some law-abiding citizens are less valued concurrently conveys the message that
some citizens are more valued. This hydraulic effect creates both suspicion pitting each
class against the other, and competition regarding who will be made master, and who will
bow to the legal code. Every citizen contact with the discretionary features of the
criminal justice system strengthens or erodes the meaning of a legally ordered society.

Perception of fairness in the law is critical to compliance with the law. Indeed,
the retributivist’s moral imperative to comply with law may be undermined by the
perception that one is being taken advantage of or playing the fool by complying with the
law. Thus for example, as Professor Kahan observes, one may conclude that one’s
adherence to the law is “more servile than moral,” when others fail to reciprocate in the
societal compact to pay their fair share of taxes.

81 Id. at 68 (“[L]aw-abiding minorities in predominantly white communities face disproportionate stops by
and encounters with the police, and law-abiding whites in minority communities face disproportionate
stops by and encounters with the police. The officers in effect function as de facto border control, deciding
who is scrutinized, stopped, questioned, or frisked.”).

82 See William J. Stuntz, Race, Class and Drugs, 98 Colum. L. Rev. 1795, 1835 (1998).

83 Brown, supra note 42, at 1306-07.

84 See Paul H. Robinson & John M. Darley, Justice, Liability and Blame: Community Views and
the Criminal Law 5-6, 201-03 (1995); Tom R. Tyler, Why People Obey the Law 25 (1990).

85 Kahan, supra note 77, at 358. Professor Kahan relies upon empirical studies suggesting “a strong
correlation between a person’s obedience [to law] and her perception of others’ behavior and attitudes
toward law [so that] a person’s beliefs about whether other persons in her situation are paying their taxes,
for example, plays a much more significant role in her decision to comply than does the burden of the tax
attempts to assure the injured taxpayer that it will crack down on the unrepentant tax cheat has been shown to have the unexpected effect of less compliance rather than more compliance, as the announcement confirms what the taxpayer already fears: that the taxpayer truly is carrying an unfair share of the tax load due to the unwillingness of other community members to contribute and the government’s failure to enforce the law.\(^86\)

This realization and reaction is activated by inherent evolutionary driven responses as well as reflecting norms and institutions that have emerged over the course of human history that demands fair play.\(^87\) With so many law breakers in the mix, the taxpayer derives the social meaning that only fools pay their taxes, and they will no longer play the fool.

Beyond the social meaning attached to why we punish, is the meaning attached to who gets punished and who does not.\(^88\) Animal behaviorists have observed in a number of species an evolutionary fair play at work.\(^89\) Animals recognize when one of its members refuse to observe the cultural rules of fair play of the clan and then they work to

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\(^86\) See Shefrin & Triest, supra note 46, at 212-13.

\(^87\) Joseph Henrich, et. al, Markets, Religion, Community Size, and the Evolution of Fairness and Punishment, SCIENCE, Mar. 19, 2010, at 1480-84 (reporting on research supporting that markets and participation in a world religion positively covaries with fairness in large-scale societies suggesting that modern societies are not solely the product of innate psychology).

\(^88\) See ROBINSON, supra note 76, at 2 (“each purpose of punishment when used as a distributive principle gives a quite different distribution of punishment”).

\(^89\) See DEWAAL, supra note 46. DeWaal recognizes that “one can’t derive the goals of society from the goals of nature,” but observes that “nature can offer information and inspiration.” Id. at 30.
communicate to the rebel to either conform or exit the group. \textsuperscript{90} Confidence is diminished when members of the group perceive that the rules are unfairly applied. \textsuperscript{91} Studying the same social behaviors in these empathetic animals exemplifies the survival value of “fair play” in evolution, as it developed early on the evolutionary scale, is widespread and prominent. \textsuperscript{92} In a larger, more complex society, research by social scientists supports the conclusion that world religions incorporate and encourage fair play that permits such societies to engage in market growth and other aspects of a complex society. \textsuperscript{93}

Members who disregard legal restrictions and are not punished become models of bad behavior that are then followed by others who no longer perceive a negative risk to misconduct. \textsuperscript{94} Social learning theory posits that modeling—learning by observation and imitation—occurs after the observer is exposed to a certain behavior. \textsuperscript{95} First, the observer must have the capacity to understand the significant features of the behavior, such as

\textsuperscript{90} See DeWAAL, supra note 46.

\textsuperscript{91} See DeWAAL, supra note 46; Frans DeWaal, How Animals Do Business, 2 SCIENTIFIC AMERICAN, Apr. 2005, at 72-79.

\textsuperscript{92} See DeWAAL, supra note 46, at 4-7. But see Henrich, et al., supra note 87 (reporting on study spanning fifteen diverse populations suggesting that modern prosociality regarding fair play and punishment “is not solely the product of innate psychology, but reflects norms and institutions,” such as larger-scale market integration and world religions, “that have emerged over the course of history”).

\textsuperscript{93} See Henrich, et. al, supra note 87. A marked indicator of higher intelligence in humans is empathy, a capacity to imaginatively project a subjective state upon another and vicariously experience another’s feelings. See DeWAAL, supra note 46, at 84-117. The capacity to understand others also creates an ability to harm or deceive another deliberately because cruelty relies on the propensity to imagine how one’s own behavior affects another. See id. at 211. Many animals exhibit their aptitude to empathize, which reveals identical social behaviors to humans and is an avenue to understanding our own human social behaviors, such as bonding, forming alliances, and conflict resolution. See id. at 122-25.

\textsuperscript{94} See BANDURA & RIBES-INESTA, supra note 47, at 24-28; Kahan, supra note 77, at 354.

\textsuperscript{95} See BANDURA & RIBES-INESTA, supra note 47, at 24-28.
consequences. Second, in order to reproduce the behavior, the observer must encode the observed information into long-term memory for later retrieval if they are capable of reproducing the behavior. Most importantly, the final factor in modeling behavior is the observer’s motivation, or reinforcement, where they anticipate a positive result, or reward for the observed behavior. Once modeling is encoded, and the negative reinforcement of a positive result or reward becomes engrained behavior, the risk is a breakdown of the social order, so that there is a loss of good behavior from previously law-abiding citizens. Thus, the threat of retribution for violation of the law is eclipsed by the modeling of bad behavior affirming that one can flaunt the legal threat and get away with it. Illegal conduct that appears occasional and isolated may become prevalent if prosecution is not vigorously pursued.

96 See id. at 24-28.
97 See id. at 24-28.
98 See id. at 24-28.
99 See FRANS DEWAAL, OUR INNER APE 203 (2005). DeWaal described a zookeeper who used bananas to lure an intransigent ape out into the zoo yard. Unfortunately, when the other apes observed this exchange, they realized that the difficult ape was being “rewarded” for his conduct with prized banana treats and the rest of the group refused to perform as expected without similar reward. Id.
100 See Brian Mullen, et al., Jaywalking as a Function of Model Behavior, 16 PERSONALITY & SOC. PSYCHOL. BULL. 302, 324, 327 (1990). Lawlessness is contagious so that a law-abiding individual is more likely to break the laws when in the presence of peers who break the law. See ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 104-07 (1973) (reviewing studies suggesting interdependence in violent crimes such as serial killings and kidnappings); Kahan, supra note 77, at 354-55 & n.24 (citing studies on increased instances of mob violence and looting).
For those benefitting from excessive fees generated through subprime mortgage lending and risky credit default swaps, disregard for longstanding rules and practices became so profitable that the greater risks taken to achieve those profits were ignored, while others took notice of this profit model, the positive rewards associated with it, and followed the model. Once the bad behavior became so wide-spread and the monumental financial costs of that behavior manifested in the financial crisis of 2007-2009, the federal government focused its attention on stopping the panic in the financial markets rather than punishing the initiators of the conduct. The urgency of the need for a financial fix was optimal for the initial wrongdoers, since the attention shifted from those at fault to those able to assist the fix. With so many actors misbehaving, it was easy for those who most benefitted financially the most to lay blame at the doors of

102 See Floyd Norris, Eyes Open, WaMu Still Failed, N.Y. TIMES, Mar. 25, 2011, at B1. In 2008, Washington Mutual (WaMu) became the largest bank failure in American history. Id. Although internal officers warned the CEO, Kerry K. Killinger, and the board of directors of impending disaster from risky lending practices and regulators were made aware of the problems as early as 2006, no efforts were made at the bank to reign in risk and regulators resisted taking any enforcement action until it was too late. Id. Norris observes that WaMu “had identified Countrywide Financial as a model to emulate, and any other course would have surrendered market share, not to mention immediate profits that financed huge paychecks for executives.” Id. See also STEVEN A. RAMIREZ, RECONSTRUCTING CAPITALISM, ch.7, 11-12 nn.38-47 (forthcoming 2012); Ramirez, supra note 60, at 24-25 (describing the reckless loan practices at Countrywide and the role that its CEO, Angelo Mozilo, played in the its demise).

103 See PAULSON, supra note 16, at 253-62 (describing his push for an immediate bailout and his insistence that Congress did not have the luxury of debating appropriate consequences for the financial industry due to the impending financial meltdown after the collapse of Lehman Brothers, which he declared as “the economic equivalent of war”).

104 Paulson resisted suggestions that any bailout legislation include compensation restrictions, asserting that banks would be unwilling to accept bailouts if such conditions were in the package, and he wanted to “encourage maximum participation” in the bailout so that the banks would unload the toxic assets. See PAULSON, supra note 16, at 260-61.
others—such as the credit-rating agencies and the regulators. Nevertheless, the failure to pursue these wrongdoers further affirms their misconduct.\textsuperscript{105}

The use of criminal sanctions may “refer[] to more than one meaning of the term \textit{use}.”\textsuperscript{106} Legislatures may authorize the use criminal sanctions in statutory language, but the use of such sanctions depends upon their application by administrators of the law.\textsuperscript{107} This article focuses not on the propriety of the rules, that is, criminal laws, but rather on their use or non-use by prosecutors and the consequential expressive message affirming criminal misconduct. The oft-stated maxim that “no one is above the law,” ignores the “unsavory details . . . about the specific, content of laws or about who makes them, interprets them, and applies them for what purposes.”\textsuperscript{108} If laws are perceived as being applied unfairly so that persons of wealth or power are permitted operate above the law, the rule of law is undermined.\textsuperscript{109}

\textsuperscript{105} See, e.g., Nocera, \textit{supra} note 5 (reporting the extreme and persistent measures taken by an IRS agent to investigate an individual, prosecuted for two “liar’s loans” after he came to the IRS Special Agent’s attention because he appeared in a documentary film in which he ran across the Sahara in 111 days causing the agent to wonder about his sources of income).


\textsuperscript{107} See \textit{id}.

\textsuperscript{108} See Holmes, \textit{supra} note 41, at 123.

\textsuperscript{109} The “rule of law” is a general notion defined in a myriad of ways, some of which are contradictory. See Horwitz, \textit{supra} note 50, at 153-56. Horwitz cites numerous examples by authors both acknowledging the differences in definition, as well as contrasting authors’ definitions. \textit{Id.} at 154 n.4, 155-156. This article recognizes that at a minimum, the “rule of law” encompasses Richard Fallon’s summary of five elements generally present in modern definitions of the rule of law: the capacity of legal rules to be understood, efficacy, stability, the supremacy of legal authority, and \textit{the availability of impartial legal procedures.”} See Richard H. Fallon, Jr., \textit{“The Rule of Law” as a Concept in Constitutional Discourse}, 97 COLUM. L. REV. 1, 8-9 (1997) (emphasis added). Fallon described these concepts as follows:

(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
Elites tend to attract attention. Their profits also reflect their degree of power. Huge payoffs amplify the message of lawlessness for profit. Declining to prosecute elites for crimes that lead to out-sized profits is bound to publicize the profitability of crime in a way that does not apply in the case of ordinary street crime. Thus, the affirmance of elite crimes uniquely threatens the rule of law.

IV. Discretion and the Prosecutor

The nature of criminal law is such that it is impossible to define rules to cover every possible combination of facts that might be defined as a crime. Indeed, scholars have long recognized that legal systems compromise between the certainty of rules and the discretion of “informed” officials based upon particular facts. Consequently, the

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(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, “people should be ruled by the law and obey it.”

(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.

(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.

Id. at 8-9. This article would extend the fifth element’s “impartial justice” to go beyond employing fair procedures by courts to including fair practices by prosecutors that are impartial to the political or financial status of the citizens.

110 Moran & Cooper, supra note 38, at 10 (1983) (“It is now firmly believed by those who work in the process, and by those who observe it, that strict adherence to the rules of law, precisely as they are narrowly laid down, certainly as it relates to the criminal law, would be socially intolerable. This is to say that society, not the criminal justice system, would not stand for full enforcement of the laws. Here is clearly a basis for a high degree of discretion in the process.”).

prosecutor is given broad discretion in making criminal charging decisions.\textsuperscript{112} “So long as there is probable cause to support the charges, prosecutors can decide how many counts to bring, the severity of the crime to charge, and which suspects to use as witnesses and which to charge as defendants.”\textsuperscript{113} Many factors impact the prosecutor’s decision. Some factors are explicit and often set forth in prosecutorial guidelines, ethical rules, or court opinions; other factors are implicit, possibly even unrecognized factors such as racial bias or relationships among supervisors and suspects. These latter implicit factors are often not readily identifiable in a particular instance (although a trend may be discernible), but the explicit factors provide easy cover for any decision the prosecutor might make. When wealth or power are implicit factors, the prosecutor cannot ignore the affirmance effect.

Every prosecutor must consider the sufficiency of the evidence in assessing whether a crime should be charged and what crime can be proved beyond a reasonable doubt. Depending upon the size of a particular prosecutor’s office, charging guidelines may be expressly stated or informally applied, but these constraints are not typically statutorily-bound.\textsuperscript{114} Further, because the probable cause standard required to charge a crime is less than the proof beyond a reasonable doubt standard required to convict a defendant charged with a crime, prosecutors may vary considerably in their charging

\textsuperscript{112} Wayne R. Lafave et al., Criminal Procedure 680 (4th ed. 2004) (“The notion that the prosecuting attorney is vested with a broad range of discretion in deciding when to prosecute and when not to is firmly entrenched in American law.”).

\textsuperscript{113} See Erwin Chemerinsky & Laurie L. Levenson, Criminal Procedure: Adjudication 29 (2008).

\textsuperscript{114} See Marc L. Miller & Ronald F. Wright, Criminal Procedures: Prosecution and Adjudication 164-84 (3rd ed. 2007).
models. Three decision-making models that have been identified as governing prosecutorial choices along the charging continuum, are the legal sufficiency model, system efficiency model, and trial sufficiency model.\textsuperscript{115}

Prosecutors fitting the legal sufficiency model make charging decisions based upon the minimum level of proof necessary to meet the elements of the crime charged. The success of this model relies upon the expectation that many cases will plead before trial, thanks to plea bargaining, and thus most cases will not be tested by the high burden of proving the charged crime beyond a reasonable doubt.\textsuperscript{116} The risk of a type II error, that is, failing to reject a criminal charge when the defendant is not guilty, is highest with this model.\textsuperscript{117} The costs of such an error are borne by the defendant to a large extent (cost of defense, potential loss of reputation or employment, loss of liberty if defendant loses at trial or plea bargains to gain a plea discount in charges or punishment), but also by the public generally (cost of prosecuting and punishing the wrong person, failure to identify, prosecute and punish the actual wrongdoer, undermining support for the rule of law).

Prosecutors employing a trial sufficiency model evaluate cases more closely to assess the weight of evidence and the likelihood of success at trial. This more cautious

\begin{footnotesize}
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\item \textsuperscript{115} See Joan E. Jacoby, \textit{The Charging Policies of Prosecutors, in The Prosecutor} 75 (William F. McDonald ed., 1979).
\item \textsuperscript{116} Id.
\item \textsuperscript{117} “There are two types of mistakes that can be made when deciding whether or not to accept a hypothesis. A type I error is rejecting a true hypothesis, that is, one there is really no good reason for rejecting. A type II error is accepting a false hypothesis: that is, accepting it as true when it should really have been rejected. When hypothesis testing there is a trade-off between the two types of error. The best combination to choose depends on the losses arising from making the two types of error; in economic decisions these are frequently asymmetrical.” The Oxford Dictionary of Economics, \texttt{http://www.enotes.com/economics-encyclopedia/type-and-ii-errors} (last visited Aug. 16, 2011).
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approach promotes a high rate of success for the prosecutor in that only those cases that are likely to result in conviction or plea bargain are charged. Here, the risk of a type I error is greatest in that an early decision not to charge risks permitting the guilty to go free, unchallenged. Inevitably, prosecutors screening cases with a view toward trial sufficiency are less likely to pursue those whose guilt is more difficult to prove.\textsuperscript{118}

The third model, system efficiency, falls in the middle of the continuum, relying on early screening to weed out difficult cases of proof, and incorporating a strong dose of plea bargaining, to some degree less than the legal sufficiency model.\textsuperscript{119} This mixed model is often employed in urban communities where prosecutors face heavy case loads.\textsuperscript{120} Plea bargaining facilitates system efficiency but at the inherent cost of those with less bargaining power (the poor and marginalized), and to the inherent benefit of those with more status and resources.

In affirming white collar crimes committed by the rich or powerful, sufficiency of evidence is a likely place to hang the prosecutor’s hat. If a corporation is involved, there may be many actors who have touched on a part of the activities, making relevant decisions or approving those decisions. The complicated relationships of a large corporation regarding who has the authority to hire, fire, promote, and compensate the various actors assures that an investigation into potentially fraudulent activity will also


\textsuperscript{119} See Jacoby, supra note 115, at 75.

require the time- and resource-consuming tasks of assessing whether all of the actors conspired to breach the law, whether some actors recognized that their activities supported lawlessness, or whether all actors believed their conduct was lawful because it was approved by others who held expertise and should have been expected to alert them of likely misconduct. Communicating this complexity and cutting through it to present a case to a jury takes skill, patience, and resources.

Complexity in financial transactions complicates both their investigation and any eventual jury trial. The prosecution’s ability to locate evidence of wrongdoing may require sorting through thousands of documents and hundreds of witnesses in numerous locations. Once pieced together, the prosecutor must organize the information in a cohesive and straight-forward manner to a jury to gain a conviction. Moreover, for lower-level employees in the corporate food chain, who were involved in the misconduct, complexity adds cover to their claims that they were just doing their jobs unaware of the law-breaking. Complexity in structured transactions typically require expertise, such as forensic accountants or other experts, adding another layer of resource demands and another courtroom obstacle as the obscurity of the experts’ industry-laden language confuses jurors and the battle of the experts creates doubt.

In addition to the sufficiency question, other considerations come into play in exercising prosecutorial discretion. The U.S. Department of Justice sets forth its policies in the U.S. Attorney’s Manual for exercising prosecutorial discretion to charge or decline prosecution. In those cases which meet the trial sufficiency standard, the prosecutor may decline prosecution because: “(1) No substantial Federal interest would be served by

prosecution; (2) The person is subject to effective prosecution in another jurisdiction; or (3) There exists an adequate non-criminal alternative to prosecution.”

A number of civil alternatives to criminal prosecution have evolved, especially in the white collar crime arena. Although alternative measures have the ability to obtain some measure of compensation from the wrongdoers, that compensation may come from the corporate treasury rather than personal funds, it may refund direct losses of those willing to take legal action but not sanction the misconduct, or in the case of governmental civil actions, it may impose fines without requiring admission of wrongdoing. Each of these instances may exact something from the elites or their companies, but it leaves their reputation and often their ill-gotten riches intact. Given that the benefits of the elite

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122 See id.

123 Private parties may bring civil actions for tortious conduct or other civil violations of law, or may bring *qui tam* actions on behalf of the government under the False Claims Act, when the defendants have defrauded the government. False Claims Act, 31 U.S.C. §§ 3729, 3730. Many white collar criminal federal statutes provide for or have civil counterparts. See, e.g., Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1963, 1964; Sherman Act, 15 U.S.C. § 1 (antitrust laws); United States v. Stringer, 531 F.3d 119 (9th Cir. 2008) (discussing overlapping civil and criminal parallel investigations for violations of securities laws); Clean Air Act; 42 U.S.C. § 7413; Water Pollution Control Act, 33 U.S.C. § 1155; Clean Water Act, 33 U.S.C. § 1251-1376. Consequently, government agents may choose to file civil suits rather than criminal charges. See J. Kelly Strader, UNDERSTANDING WHITE COLLAR CRIME 5-7, 365-66 (2d ed. 2006). Many administrative agencies have authority to press administrative proceedings to address individual or corporate misconduct and often, parallel criminal prosecutions are possible; however, a skilled defense attorney may be able to avoid such risks through a global settlement that resolves the risk of criminal charges using tools such as deferred prosecution or non-prosecution agreements. See Jerold H. Israel, Ellen Podgor, Paul D. Borman, and Peter J. Henning, WHITE COLLAR CRIME—LAW AND PRACTICE 670 (3rd ed. 2009); U.S.A.M., supra note 41, at §§ 9-22.000. Civil asset forfeitures, state license revocation proceedings, professional disciplinary proceedings, and self-regulatory organization enforcement proceedings are additional alternatives (or parallel processes) to criminal prosecution. See id., at 643-47, 676-77, 679-80.

124 See, e.g., SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304 (S.D.N.Y. Mar. 21, 2011) (order accepting settlement but criticizing SEC’s practice of agreeing to consent judgments that do not require defendants to admit or deny the allegations of the complaint). “Only one thing is left certain: the public will never know whether the S.E.C.’s charges are true, at least not in a way that they can take as established by these proceedings.” Vitesse Semiconductor, 771 F. Supp. 2d at 309.
crimes are the wealth or power acquired, the civil alternatives further affirm the lawlessness and remind others that the criminal law does not always sanction their misconduct. The U.S. Attorney’s Manual policies are intended to guide the exercise of prosecutorial discretion, but do not create a “right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States,”\textsuperscript{125} and may in fact, be modified by United States Attorneys “in the interests of fair and effective law enforcement within the district.”\textsuperscript{126} Thus, prosecutors hold discretion in exercising discretion.

The ABA Standard for Criminal Justice offers further guidance regarding the charging decision and is explicit in its instruction regarding the need to allow the prosecutor broad exercise of discretion.\textsuperscript{127} ABA Standards for Criminal Justice provides the following standards for prosecutors:

(a) “A prosecutor should not institute or move forward on a case where the charge is not supported by the evidence or where there is insufficient evidence to support a conviction;”

(b) A prosecutor “may for good cause consistent with the public interest decline to prosecute notwithstanding . . . sufficient evidence” to support a conviction;

\textsuperscript{125} See U.S.A.M. §9-27.150 (explaining that the principles have been “developed purely as [a] matter of internal Departmental policy and is being provided to Federal prosecutors solely for their own guidance in performing their duties”).

\textsuperscript{126} See U.S.A.M. § 9-27.149 (requiring approval by the Assistant Attorney General and the Deputy Attorney General if there is “[a]ny significant modification or departure contemplated as a matter of policy or regular practice”).

\textsuperscript{127} ABA, STANDARDS FOR CRIMINAL JUSTICE, 3-3.9(a)-(d).
(c) “A prosecutor should not be compelled by [a] supervisor to prosecute in a case where [the prosecutor] has a reasonable doubt about the guilt of the accused;” and

(d) A “prosecutor should give no weight to personal or political advantages or disadvantages” to the prosecutor or which may “enhance his or her record of prosecutions.”

The second factor imports affirmance considerations in that it permits declining prosecution “for good cause consistent with the public interest.” Affirmance is very much about the public interest. The public interest in having an equitable rule of law, applicable to all, is central to democratic ideals. Thus, while sufficiency of evidence alone may not require prosecution, instances where it would appear that the government is permitting great harm to society through lawlessness by the favored wealthy and powerful surely undermines the public interest. Permitting those few to reap great rewards from their criminality while imposing such oppressive harm on society, creates a moral hazard of repeated lawlessness by that group while undermining the rule of law to all. The public has a deep, abiding interest in decisions declining to prosecute or failing to pursue criminal investigations of elite crime. Prosecutors, thus, are ethically bound to consider affirmance because it is central to the public’s interest.

In addition to the above factors informing the discretion of prosecutors, a long list of factors is typically part of the decision-making process. Prosecutors consider the following, among others: the nature of the crime; the gravity of the offense; the history.

128 ABA, STANDARDS FOR CRIMINAL JUSTICE, 3-3.9(a)-(d).

129 See, e.g., Morgenson & Story, supra note 48 (reporting on declinations policies in the Department of Justice); supra, note 49.
of the defendant, including the defendant’s age, background, and prior offenses or contact with law enforcement; economic realities such as administrative costs, and other available resources; the need for the defendant’s cooperation; the impact on victims, law enforcement, and the community; and punishment goals and civil alternatives. Finally, considerations of mercy, excuse, or justification may factor into a prosecutor’s charging decision. As discussed above, investigations and prosecutions of elite crimes are often resource-intensive. The decision to pursue a single case may take years to investigate, incur thousands of dollars in expenses, consume weeks of court time, and


131 See Bumgarner, supra note 120 (observing that the exercise of prosecutorial discretion to decline prosecution in favor of mercy can be an agent of goodness when there is a sympathetic defendant such as in cases where a parent has accidentally killed a child and neither deterrence or retribution are sufficient reasons to punish). Needless to say, mercy is an unlikely issue in elite crimes.

132 Excuse defenses may be raised by defendants in cases where the prosecution is able to establish all elements of the criminal offense, however “conviction is deemed inappropriate because of a lack of responsibility on the part of the defendant.” LAFAVE ET AL., supra note 112, at 447-48; see, e.g., Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. REV. 1511 (1992). Excuse defenses include insanity, intoxication, infancy, and duress. LAFAVE ET AL., supra note 112, at 448.

133 Justification defenses, such as self-defense or necessity, are raised when the harm caused by the defendant “is outweighed by the need to avoid an even greater harm or to further a greater societal interest.” 1 PAUL ROBINSON, CRIMINAL LAW DEFENSES §24(a) (1984); LAFAVE ET AL., supra note 112, at 447; see, e.g., Tony Dillof, Unraveling Unknowing Justification, 77 NOTRE DAME L. REV. 1547 (2002); Joshua Dressler, New Thought About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking, 32 UCLA L. REV. 61 (1984).

yield uncertain results due to the high burden of proof and complexity of issues and evidence. Consequently, the economic reality is often that pursuing an elite crime may draw those resources from dozens of other cases. Moreover, the suspects are often pillars of their communities, with no criminal felony record, active in charitable organizations, and generous with the resources of the corporate entities they run. They are gainfully employed (unless they’ve been asked to resign), and they are able to marshal significant personal resources—and often corporate resources—to their defense. All of these factors may weigh heavily in favor of declining prosecution.

On the other hand, the nature of the offense is often a breach of trust or abuse of power (such as fraud), and is motivated by greed or power rather than need or misfortune. More importantly, the gravity of the harm and the impact on the community can be extensive. When Enron finally collapsed under the weight of its criminality, it had caused power outages in Northern California, emptied pension funds, and decimated


136 See, e.g., Alicia Mundy, Forest Chief Prevails over U.S., WALL ST. J., Aug. 6-7, 2011, at B1 (reporting that Forest Labs CEO enlisted the aid of the corporation, the U.S. Chamber of Commerce, and the Pharmaceutical Research and Manufacturers of America trade association, among others in successfully convincing the U.S. Department of Health and Human Services to drop efforts to force his resignation after the corporation plead guilty to misdemeanors for actions committed while he was CEO)

137 See, e.g., Jason Leopold, Enron Linked to California Blackouts, WALL ST. JNL., May 16, 2002 (reporting that numerous former Enron traders have admitted manipulation the California energy market that touched off its energy crisis).

138 See, e.g., David Henry et al., The New Pinch from Pensions, BUS. WK., Aug. 5, at 44 (observing that the dramatic drop in stock market value wiped out surpluses in many pension funds, requiring larger contributions to meet future commitments).
the Houston community. In the BP Deepwater oil rig explosion, eleven people died from the explosion, millions in communities surrounding the Gulf of Mexico where the explosion occurred were subjected to contaminated water, loss of businesses in the fishing and travel industries, and destruction of aquatic life and environs. In the financial crisis of 2007-2009, the global economy crashed, unemployment sky-rocketed, and millions lost their homes to foreclosures.

“[T]he power to be lenient is the power to discriminate.” Given the vast numbers of crimes that are available to charge, “the substantive criminal law amounts to ‘an arsenal of weapons to be used against such persons as the police or prosecutor may deem to be a menace to public safety.’” The standards described above were developed to guide the prosecutor’s discretion but tend to focus on circumstances discouraging the prosecutor from abusing prosecutorial power by prosecuting upon less than sufficient evidence. Nonetheless, “there are—as a practical matter—no comparable checks upon his discretionary judgment of whether or not to prosecute one against whom sufficient

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139 See, e.g., Adam Liptak, Finding Untainted Jurors in the Age of the Internet, N.Y. TIMES, Mar. 1, 2010, at A12 (relating the widespread harm to the Houston economy by Enron’s collapse as making it difficult to find untainted jurors in the criminal cases against Jeffrey K. Skilling, the company’s former chief executive officer).


142 LAFAVE ET AL., supra note 112, at 683.

143 Id.; Thurman Arnold, Law Enforcement—An Attempt at Social Dissection, 42 YALE L.J. 1, 17 (1932).
evidence exists.” Moreover, such discretionary power may hinge “unjustifiably on the relative weakness or strength of the networks to which perpetrator and victim belong.” Little guidance or limits exist regarding a decision to refrain from prosecuting the powerful.

By permitting the prosecutor so many factors to consider in exercising the discretion to charge or not to charge, an ambiguous reality emerges in which the decision not to charge can be based on any one or more of the factors, so that any underlying attitudinal aversion to attacking the powerful through criminal charges cannot be adequately detected or isolated. When civil alternatives to criminal prosecution are factored into the decision to prosecute, further ambiguity arises since those with strong networks may advance construction of any number of civil alternatives to punishment, especially in the corporate and white collar arena where regulatory action is often a potential alternative offered to support the decision against criminal prosecution.

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145 See Holmes, supra note 41, at 126.

146 See Lessig, supra note 67, at 1010-12.

147 See, e.g., Mundy, supra note 136 (reporting that after Forest Laboratories Inc.’s guilty plea to misdemeanors for health care fraud, CEO Howard Soloman was able to avoid debarment by the U.S. Department of Health and Human Services—a move that would have excluded him from jobs in the health care industry that do business with the U.S. government—by hiring a lobbyist for $80,000 to argue against the exclusion, and by marshalling support from the U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America, among others).

148 See U.S.A.M., supra note 41, §§ 9-22.000, 9-28.200 (Principles of Federal Prosecution of Business Organizations, General Considerations of Corporate Liability, respectively). In addressing general considerations for corporate criminal liability, the U.S. Attorneys’ Manual states the following: “In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for
Prosecutors are permitted to forge forward with virtually no limit on discretion not to charge since the party not charged will not challenge the decision; and parties favoring charges against another generally lack standing to raise the issue in litigation. The U.S. Supreme Court has recognized prosecutorial freedom in exercising discretion, placing limits on that discretion in extremely limited circumstances. Indeed, the only parties able and available to challenge charging decisions are those who challenge their own charges claiming an abuse of prosecutorial discretion to charge a crime: vindictive prosecution in violation of due process; or selective or discriminatory enforcement in violation of the equal protection clause of the fifth and fourteenth amendments.

example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in USAM 9-28.1000. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in USAM 9-28.1100. See also Jay Martin, Ryan D. McConnell & Charlotte A. Simon, Plan Now or Pay Later: The Role of Compliance in Criminal Cases, 33 U. Hous. Int’L L.J. ___ (2011) (forthcoming) available at http://www.sequenceinc.com/fraudfiles/wp-content/uploads/2011/03/SSRN-id1737971.pdf at 41, 47 (last visited Aug. 16, 2011) (describing the use of DPAs and NPAs by the DOJ as a “break from the binary choice of indict or decline” that also limited some of the collateral consequences of corporate indictments and convictions); Letter from Benczkowski, to Congressmen Stupak & Dingell, supra note 130.

See, e.g., In re Dean, 527 F.3d 391, 395-96 (5th Cir. 2008) (denying standing of victims to challenge plea).

The U.S Supreme Court has concluded that “a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution.” Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Some states provide procedures by which an individual may initiate the criminal process. See, e.g., Neb. Rev. Stat. § 29-404; Ohio Rev. Code §§ 2935.09 & 2935.10 (2006); Wis. Stat. § 968.02(3).

See, e.g., United States v. Goodwin, 457 U.S. 368 (1982) (affording prosecutors wide latitude in reevaluating charging decisions, even after defendant has exercised his constitutional right to request a jury trial); Blackledge v. Perry, 417 U.S. 21 (1974) (presuming vindictive prosecution where state responded to defendant’s successful exercise of his statutory right to appeal by bring a more serious charge against him prior to the trial de novo); Bordenkircher v. Hayes, 434 U.S. 357 (1978) (finding no presumption of vindictiveness when prosecutor threatens to increase charges if defendant rejects plea offer).

See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (defendant may demonstrate that prosecutorial discretion of a law is “directed so exclusively against a particular class of persons . . . with a mind so
Beyond such specific and identifiable instances of review of prosecutorial discretion for violations of constitutional protections, the Court has expressed a reluctance toward further inquiry because “factors such as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.” Mandamus is thus deemed an inappropriate remedy in this context because of the longstanding acceptance of the notion that a prosecutor has discretion in deciding when to prosecute.

Some courts identify the separation of powers doctrine as another reason to decline interfering with prosecutorial discretion. Yet, reliance on the separation of powers reasoning as a justification for refusing to interfere in the prosecutor’s exercise of discretion has been criticized by some scholars for ignoring the many Supreme Court decisions claiming entitlement to judicial review of the exercise of executive discretion, and for accepting that prosecution is exclusively an executive function.

unequal and oppressive [that it effects] a practical denial” of equal protection of the law); Wayte v. United States, 470 U.S. 598 (1985) (discretion is broad, but not unfettered; the defendant must show not just the discriminatory effect but also the discriminatory purpose of punishment).

Wayte v. United States, 470 U.S. 598, 607-08 (1985). In Wayte, the Court further elaborated on its conviction that “the decision to prosecute is particularly ill-suited to judicial review. . . . Judicial supervision in this area, . . . entails systematic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.” Id.

LAFAVE ET AL., supra note 112, at 686-87. See, e.g., United States v. Friday, 525 F.3d 938, 960 (10th Cir. 2008); United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965).

In exercising discretion, prosecutors consider numerous factors, some explicit and others implicit in the process. These factors take into consideration case-specific sufficiency assessments, ethical obligations, competing demands for resources, and community interests in alternative non-criminal resolutions, among others. Legal limitations upon such decisions are few, and courts will seldom interfere with the process and only in narrow circumstances. Most significantly, the decision not to investigate or prosecute is even less susceptible to interference. Consequently, no mechanism exists to require the prosecutor to reflect upon the affirmation effect of declining prosecution. Nevertheless, the social meaning of such declinations persists in elite crimes, affirming the misconduct and undermining the rule of law.

V. Expressing the Message of Affirmance

In one of the earliest cases imposing imprisonment sentences on individuals engaged in economic crimes,157 “the court described the defendants’ conduct as a ‘shocking indictment of a vast section of our economy’ that ‘flagrantly mocked the image of the economic system of free enterprise which we profess to today as a free-world alternative to state control and eventual dictatorship.’”158 The U.S. Attorney General

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156 The historical accounts suggest that the U.S. Constitution did not compel executive control over prosecutors. See, e.g., Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 15-16 (1994).


characterized the defendants’ conduct even more starkly, as “a serious threat to
democracy.”\footnote{Ball & Friedman, supra note 106, at 198 (citing a television interview with Attorney General Robert
Kennedy (quoted in J. Fuller, The Gentlemen Conspirators 176 (1962)).}

When a case is not pursued criminally, the general public cannot fairly
assess whether the cost of moving forward with a criminal prosecution is outweighed by
the benefits of a decision to drop the case, move forward with a civil case instead, or
impose a regulatory fine, given the multitude of considerations factoring into the decision
to prosecute.

In instances where a corporation negotiates a deferred prosecution agreement,\footnote{The deferred prosecution agreement permits a corporation to resolve a criminal investigation by agreeing
to similar terms that might be included in a corporate criminal sentence, including terms such as restitution,
fines, additional auditing measures, termination of responsible individuals, and probation. See U.S.A.M.,
supra note 41, §§ 9-22.010 to 9-22.200 (pretrial diversion program); Martin, et al., supra note 148
(discussing the prevalence of deferred prosecution agreements and non-prosecution agreements since 2002
and providing a table listing the numerous corporations that have obtained a DPA or NPA since 2005);
Steven R. Peikin, Outside Counsel; Deferred Prosecution Agreements: Standard for Corporate Probes,
Specialized Guidelines for Corporate Defendants, 23 J. CORP. L. 121 (1997). DPAs were developed to
avoid the criminal process in resolving investigations of individuals involved in minor crimes, deter future
criminality, provide restitution for victims, and conserve prosecutorial and judicial resources. Warin &
Schwartz, supra, at 123. The DPAs offer corporations the opportunity to avoid the collateral consequences
of a criminal conviction, while offering the prosecution the opportunity to set fines and collect restitution
outside the limits of the judicial process and the opportunity to gain the corporation’s cooperation. See
Mary Kreiner Ramirez, The Science Fiction of Corporate Criminal Liability: Containing the Machine
from resource savings. Id. at 953.} a
non-prosecution agreement, or a civil alternative to criminal charges, it would be difficult
to prove that but for political connections or a well-financed legal team, these negotiated
deals demonstrate certitude that criminal charges could have, or more to the point, \textit{should have} been brought against individuals.\footnote{Early studies of white collar crime included both civil liability as well as criminal liability cases. CLINARD, supra note 68, at 22; SUTHERLAND, supra note 68, at 13-14, 45-53. \textit{But see} Leonard Orland,}
corporation for criminal conduct but not against any individual actors there is at least some confidence in asserting that individual liability should also exist; a corporation cannot act except through its agents, so someone has broken a criminal law. Another possibility is that charges are brought against or a plea negotiated with a corporate entity associated with the parent entity, but the plea appears to grossly understate the criminality or under-punish because it includes a low fine amount, or requires a non-participating

Reflections on Corporate Crime: Law in Search of Theory and Scholarship, in CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY 127, 129 (edited by Leonard Orland 1995) (criticizing the empirical work of Edwin Sutherland and Marshall Clinard and his associates for including adverse adjudications by civil courts and non-criminal administrative agencies against corporations and classifying them as crimes). These early sociological studies of white collar crime refused to accede to the labels placed by legislators designating certain fraudulent actions as “crimes” while others were labeled “violations.” See Snider, supra note 69, at 51. Snider observes:

The underlying assumption of the critique . . . of Sutherland’s . . . views, is that “crime” is a real thing that legislators, informed by science and law, discover. If they haven’t discovered a particular act, it is therefore not crime. Sutherland argued against only one half of this equation, pointing out that power (not to mention self-interest, political lobbying, media-generated moral panic, and a myriad of other factors) sometimes prevented legislators from criminalizing the harmful acts of business. Thus the fact that anti-competitive practices and false advertising were proscribed, albeit through regulatory or administrative statute and not criminal law, was sufficient to indicate the “real” intentions of legislators, and to justify studying these acts as criminal.

Id. at 51. See also FCIC REPORT, supra note 3, at xviii, 52-56 (2011) (concluding that the financial industry, which had contributed generously to political campaigns from 1999 to 2008, was able to use its wealth and power to weaken key regulatory constraints); Mary Kreiner Ramirez, Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002, 34 LOY. U. CHI. L.J. 359, 372n.72 (2003) (describing the difficulty in reaching a consensus as to what conduct should be included in the term “white collar crime”).

162 KATHLEEN F. BRICKLEY, CORPORATE CRIMINAL LIABILITY §§ 3:01-3:11, at 89-126 (2d ed. 1984) (describing theories by which corporate criminal liability may be imputed through the acts of a corporation’s agents).

163 See, e.g., Nate Raymond, Rakoff Blasts SEC Settlements Again Because Defendants Admit No Wrong, N.Y. L.J., Mar. 24, 2011 (reporting that district court judge in 2009 had previously rejected an SEC proposed consent judgment with Bank of America Corp. because the agreed fine of $33 million was too low (“neither fair, nor reasonable, nor adequate”), but later accepted a revised agreement of $150 million in 2010, despite the fact that the fine was still small); SEC v. Bank of America Corp., 09 Civ. 6829 (JSR) (S.D. N.Y., Sept. 14, 2009) (finding the proposed consent judgment inadequate because a $33 million fine is a “trivial penalty for a false statement that materially infected a multi-billion dollar merger, and that it is
subsidiary to enter a plea rather than the initial corporate target, or includes additional misconduct as covered in the plea for which no charges are filed. Although a plea is not even “remotely” fair in that the court is left with “the distinct impression that the proposed Consent Judgment was a contrivance designed to provide the S.E.C. with the façade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry—all at the expense of the sole alleged victims, the shareholders.”; Noeleen G. Walder, A Reluctant Judge Rakoff Defers to SEC in Accepting BofA Deal, N.Y.L.J., Feb. 23, 2010, http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202444069184&shreturn=1&hblogin=1 (last visited Aug. 16, 2011).

164 See, e.g., Kurt Eichenwald, HCA to Pay $95 Million in Fraud Case, N.Y. TIMES, Dec. 15, 2000, at C1 (reporting that “[a]lthough the [fraudulent] practices involve widespread criminal actions in HCA’s hospital system, the guilty pleas will be formally entered by two inactive subsidiaries”). By permitting the subsidiaries to plead guilty, HCA avoided debarment from government contracting, which would have effectively put the corporation out of business. Id. See also Ramirez, supra note 160, at 949-50 (describing provisions applicable to healthcare providers and suppliers that could lead to exclusion or debarment from federally funded programs); Amy Schofield & Linda Weaver, Health Care Fraud, 37 A. M. CRIM. L. REV. 617, 621 (2000).

165 See Massey Firm to Plead Guilty in Mine Deaths, CHARLESTON GAZETTE, Dec. 23, 2008 [hereinafter Massey Firm to Plead Guilty] (reporting on global settlement by Massey Energy Co. that resolved over 1300 violations of the Federal Mine Safety and Health Act at Massey energy subsidiaries). One of the oft-cited purposes of a plea agreement is to provide certainty. See MORAN & COOPER, supra note 38, at 60 (1983). Another justification for plea agreements is a mutually beneficial exchange in terms of lesser charge bargaining or sentencing bargaining for the defendant and conservation of resources for the government. See, e.g., U.S.A.M. § 9-27.400:

The basic policy is that charges are not to be bargained away or dropped, unless the prosecutor has a good faith doubt as to the government’s ability readily to prove a charge for legal or evidentiary reasons. There are, however, two exceptions.

First, if the applicable guideline range from which a sentence may be imposed would be unaffected, readily provable charges may be dismissed or dropped as part of a plea bargain. . . .

Second, federal prosecutors may drop readily provable charges with the specific approval of the United States Attorney or designated supervisory level official for reasons set forth in the file of the case. This exception recognizes that the aims of the Sentencing Reform Act must be sought without ignoring other, critical aspects of the Federal criminal justice system. For example, approvals to drop charges in a particular case might be given because the United States Attorney’s office is particularly over-burdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office.

Id. (emphasis added). One key difficulty in prosecuting white collar crimes is that the evidence to support such charges is often found by piecing together information gleaned from hundreds of documents, e-mails, invoices, and interviews. See Ramirez, supra note 51, at 1007-08 (2010) (proposing a Corporate Crimes Division of the Department of Justice to centralize expertise and resources necessary to address complex
often superior to declination in terms of expressing community disapproval,\textsuperscript{166} criminal prosecution is the most powerful tool society has to address very costly antisocial behavior.

Each of the above possibilities potentially carries the perception that the government is not seeking adequate accountability from a powerful wrongdoer.\textsuperscript{167} Perhaps then, one need not choose any one of the above instances over another. Elites who violate the law and benefit greatly from those violations without incurring personal punishment model bad behavior for others. Perception becomes reality in the long run. Observers perceiving a lack of fair play, will assess for themselves whether the costs

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  \item \textsuperscript{166}The U.S. Attorney’s Manual offers instruction for plea bargaining. See \textit{id.} at §9-27.430, providing that with certain narrow exception, when a prosecution is concluded pursuant to a plea agreement, the prosecutor should require the defendant to plead guilty to a charge “\textquoteleft\textquoteleft[t]hat is the most serious readily provable charge consistent with the nature and extent of \textquoteleft\textquoteleftthe defendant’s\textquoteleft\textquoteleft criminal conduct.” The Principles of Federal Prosecution of Business Organizations also directs federal prosecutors to “seek a plea to the most serious, readily provable offense charged.” Memorandum from Paul J. McNulty, Deputy Attorney General, U.S. Dep’t of Justice, to Heads of Department Components, United States Attorneys, \textit{Principles of Federal Prosecution of Business Organizations}, Section § XIII (Dec. 12, 2006) available at \url{http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf} (hereinafter McNulty Memorandum) (last visited Aug. 16, 2011); Dep’t of Justice, Press Release #06-828, \textit{U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud} (Dec. 12, 2006).

  \item \textsuperscript{167}See, \textit{e.g.}, Raymond, \textit{supra} note 163 (reporting on remarks by U.S. District Court Judge Jed Rakoff regarding the practice in SEC civil settlements alleging “terrible wrongs” but allowing defendants to avoid admitting or denying guilt: “The disservice to the public inherent in such a practice is palpable.”); SEC v. Vitesse Semiconductor Corp., 10 Civ. 9230 (S.D. N.Y. 2011); SEC v. Vitesse Semiconductor, 10 Civ. 9239 (Jsr), NYLJ 1202487374133, at *1, *9 (Mar. 21, 2011).
\end{itemize}
outweigh the benefits of adhering to the rule of law.\textsuperscript{168} Ironically, those who follow the law may actually be placed at a competitive disadvantage relative to those who break the law because they forgo corrupt profits.\textsuperscript{169} Incentives come into play, as the inequality in profits and market power due to illegitimate practices causes the bad actors to drive out the good.\textsuperscript{170} Once this realization dawns, then rejection of the social order ensues as each actor pursues misconduct due to competitive pressures.\textsuperscript{171} Crime becomes socially acceptable, even socially compelled, much like the lynch mobs of the past.\textsuperscript{172}

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\textsuperscript{168} See ANDREW ROSS SORKIN, TOO BIG TO FAIL 14, 123 (2009) (describing Lehman Brothers’ temptation to over-leverage “like everyone else on Wall Street” by borrowing money to increase the returns on risky investments, despite the knowledge of the great riskiness of the undertaking). Both Lehman Brothers and Merrill Lynch modeled their investment risk-taking after Goldman Sachs. \textit{Id.} at 28, 144.
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\textsuperscript{169} See WILLIAM BLACK, THE BEST WAY TO ROB A BANK IS TO OWN ONE 2 (2005) (explaining that CEO “control frauds” manipulate the external controls over CEO power by “shop[ping] for accommodating accountants, appraisers, and attorneys”).
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\textsuperscript{170} See \textit{id.} at 40; BLACK, supra note 169, at 4 (2005) (explaining why federal regulators left insolvent S&Ls open while pursuing and closing the apparently most profitable S&Ls—they were the firms committing fraud); NATIONAL COMMISSION ON FINANCIAL INSTITUTION REFORM, RECOVERY AND ENFORCEMENT, ORIGINS AND CAUSES OF THE S&L DEBACLE: A BLUEPRINT FOR REFORM, A REPORT TO THE PRESIDENT AND CONGRESS OF THE UNITED STATES 76 (1993); FCIC REPORT, \textit{supra} note 3, at xxx, 147-50 (2011) (describing the carelessness with which Moody’s corporation assessed risk in rating structured financial products). “[I]ssuers [of the credit default obligations (CDOs)] could choose which rating agencies to do business with, and because the agencies depended on the issuers for their revenues, rating agencies felt pressured to give favorable ratings so that they might remain competitive.” FCIC REPORT, \textit{supra}, at 150. The revenues from structured products, including mortgage-backed securities and CDOs were lucrative; from 2000 to 2006, Moody’s “revenues surged from $602 million to $2 billion and its profit margin climbed from 26% to 37%.” \textit{Id.} at 148. In 2006, Moody’s rate 30 mortgage-related securities as triple-A (its highest rating) \textit{every} day; in early 2010, only 6 private-sector companies received the triple-A rating from Moody’s. \textit{Id.} at xxv.
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\textsuperscript{171} See, e.g., House of Cards (CNBC Original Documentary 2009) (interview of mortgage broker admitting that if he had required full documentation from loan applicants when others were requiring no documentation, his business would have folded because customers would have gone elsewhere).
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\textsuperscript{172} See, e.g., Peter Coy, Paul M. Barrett, & Chad Terhune, Mortgage Mess: Shredding the Dream, \textit{Business Week}, Oct. 25, 2010, \url{http://www.businessweek.com/print/magazine/content/10_44/b4201076208349.htm} (last visited Aug. 16, 2011) (reporting on rampant fraudulent conduct in mortgage loans and foreclosures, as well as the
The discretion prosecutors exercise on whether to bring a case also pertain on whether to settle a case pursuant to a plea bargain. The prosecutor has discretion to offer a plea, but that discretion is limited in that acceptance of the plea is subject to court approval.  Resolving a case through a plea agreement may leave some feeling the government could do more. Given the uncertainty inherent in trial litigation, if the outcome of the trial is anything less than guilty, e.g., a hung jury or an acquittal, the government has lost the opportunity to recover any part of the losses, and in the case of a mistrial would have to assess whether a retrial is available and worth the additional resources given the outcome of the first trial. Even if the government wins at trial, the defendant could delay the outcome through appeals. Negotiated deals yield certainty and finality, and conserve limited resources. Moreover, the resolution is usually considered a “win” for the government.

Defendants may consider such resolutions as “wins” too. A settlement diminishes costly litigation expenditures. Moreover, an agreement may eliminate the ability for private litigants to use a criminal conviction as a basis for civil litigation recovery, since

involvement by many in the mortgage lending business, including large banks). In reporting on the reaction of need to address the crisis quickly, the authors observed: “The longer it drags on, the more the foreclosure crisis corrodes Americans’ faith in their financial and legal systems. A pervasive sense of injustice is bad for the economy and democracy as well.” Id. See also Norris, supra note 102 (reporting that the regulators looked the other way, investigators were ignored by their bosses, internal auditors were pushed aside, and the board passed resolutions but “did nothing to stop the rot”).


174 See, e.g., Jim Carlton, *Ex-EPA Official Faults Probe of BP Alaska Oil Spill*, WALL ST. J. (Nov. 19, 2008) at A6 (reporting on former FBI special agent-in-charge of investigation of two BP oil spills in 2006, and his concern that the investigation had been quashed mid-investigation by the Department of Justice after BP agreed to a plea to a misdemeanor and a substantially lower fine than recommended by the EPA to settle the charges).
the government may resolve the criminal cases without requiring an admission of guilt.\textsuperscript{175} Otherwise, a criminal conviction could preclude retrial on factual issues in subsequent civil cases, since the burden of proof in a civil trial is always less than the “guilty beyond a reasonable doubt” burden of proof required in a criminal trial. Civil litigation by private litigants may expose the defendants to great losses, so defendants have incentives to force private litigants to their burden of proof on all elements of their cases. Resolving litigation early in an investigation, moreover, will likely lead to halting or limiting the government’s investigation. Thus, private litigants will not only be unable to use the “guilty” outcome of a criminal trial to their advantage, but they will also have to bear the costs of any additional investigation of the wrongdoing. If the government loses the criminal trial, the verdict is not available to the defendant to use against private litigants because the burden of proof is lower in civil trials.

Large organizations or powerful corporations are able to use their size and resources to protect themselves and their employees from criminal prosecutions for decisions made by individuals on behalf of the corporations, even when those decisions result time and again in death or great financial calamity, or harm to the corporation.

\textsuperscript{175} If the parties are in agreement and the court is amenable, this can be accomplished in several ways depending upon the jurisdiction, such as a through a plea of \textit{nolo contendere}, an \textit{Alford} plea, or a global civil settlement that resolves the criminal charges. North Carolina v. Alford, 400 U.S. 25 (1970) (court may accept guilty plea where defendant maintains innocence, provided there is strong evidence of actual guilt, strong factual basis for criminal charge, defendant was advised by competent counsel, and defendant intelligently concluded that he should plead guilty to second degree murder to avoid risk of death penalty if convicted for first degree murder); Mary Kreiner Ramirez, \textit{supra} note 160, at 950 n.100 (2005) (describing the use of global settlements to resolve criminal, civil, and regulatory violations).
itself.\textsuperscript{176} This is especially true when there is an established regulatory presence or perception that civil litigation is sufficient to address wrongdoing.\textsuperscript{177}

Prosecutors too often even permit mortal wrongdoing to stand.\textsuperscript{178} The tragic deaths of workers in consecutive mining tragedies\textsuperscript{179} and the BP Deepwater Horizon oil rig explosion\textsuperscript{180} in 2010 continue to express society’s tolerance for worker-related deaths due to employer failures to meet established federal safety guidelines. In the case of a 2010 mine explosion that killed 29 miners, the only criminal charges brought thus far are obstruction of justice charges against the security chief from the Massey Energy

\textsuperscript{176} See, e.g., M.P. Narayanan, \textit{supra} note 60 (finding that backdating options results in losses of $400 million per firm while executives gained $500,000).

\textsuperscript{177} See \textit{Cullen, supra} note 1, at 292 (2d ed. 2006). Thus, for health and safety violations in the United States, the Food and Drug Administration and the Occupational Health and Safety Administration have been the primary governmental vehicles for expressing societal expectations in the workplace and in consumer goods. \textit{Id.} at 292-93, 298.

\textsuperscript{178} \textit{Cullen, supra} note 1, at 298 (reporting on a study of workplace deaths resulting from willful violations of health and safety laws between 1982 and 2002, and concluding that “the data reviewed by the Times shows that the likelihood that anyone will go to jail when a worker dies as a result of a willful safety violation is less than one out of 100.”).

\textsuperscript{179} See Ian Urbina, \textit{No Survivors Found After West Virginia Mine Disaster}, \textit{N.Y. Times} (April 10, 2010) at A1 (reporting that 29 mine workers died as a result of an explosion at the Massey energy operated mine due to an unsafe build-up of methane gas that impeded rescue efforts); Associated Press, \textit{Two Workers Are Killed In Kentucky Mine Collapse}, \textit{N.Y. Times} (April 30, 2010) at A15 (reporting numerous safety violations including that “[s]tate and federal records show more than 40 closing orders for the mine over safety violations since January 2009”).

\textsuperscript{180} See Blum & Fitzgerald, \textit{supra} note 140 (reporting that federal prosecutors are considering involuntary manslaughter or seaman’s manslaughter charges against BP Plc managers who worked both on the rig and onshore for decisions made before the Gulf of Mexico Oil well explosion in 2010, that killed 11 workers and caused the biggest offshore spill in U.S. history.); Joel Achenbach & Jerry Markon, \textit{Obama Administration Moves to Distance Itself from BP on Oil Spill Response}, \textit{Wash. Post}, June 1, 2010, available at \url{http://www.washingtonpost.com/wp-dyn/content/article/2010/05/31/AR2010053103511.html} (last visited Aug. 16, 2011) (observing that Attorney General Eric Holder’s planned visit to the Gulf coast to meet with federal and state prosecutors “could signal that the environmental calamity might become the subject of a criminal investigation).
Company subsidiary that operated the Upper Big Branch Mine in West Virginia and a charge against a foreman accused of lying to federal officials. Government reports on the coal mine disaster identified numerous safety violations by Massey Energy, the owner of the mine, that traded the safety of the miners. The explosion occurred less than two years after another Massey Energy subsidiary pled guilty to nine misdemeanors for safety violations and one felony count for falsifying safety records in a mine fired that resulted in the deaths of two miners. Notably, the only felony charge was not for the death or illegal operation of the mine, but rather for the failure to report safety violations.

181 See Associated Press, West Virginia: Mine Official Accused of Lying, N.Y. TIMES, Mar. 1, 2011, at A16 (the security chief allegedly lied to FBI investigators looking into the mine explosion, and destroyed thousands of security documents).


183 See Sabrina Tavernise, Report Faults Mine Owner for Explosion that Killed 29, N.Y. TIMES, May 10, 2011, at A11 (citing reports’ conclusion that explosion was preventable if minimal safety standards had been followed).

184 See Massey Firm to Plead Guilty, supra note 165; News Release, U.S. Attorney’s Office for the S.D. of West Virginia, Largest Settlement in Coal Industry History, Dec. 23, 2008. The global settlement provided that Massey Energy Co. subsidiary, Aracoma, would plead guilty to the charges, pay a $2.5 million criminal fine and a $1.7 million civil settlement to resolve over 1300 violations of the Federal Mine Safety and Health Act at Massey Energy subsidiaries Aracoma and Hernshaw Mine since the January 2006 fire. See Massey Firm to Plead Guilty, supra note 165; News Release, Largest Settlement in Coal Industry History, supra. The original proposed civil fine of $2.8 million was reduced by about 40% as part of the global settlement. See Massey Firm to Plead Guilty, supra note 165. The agreement also precluded the federal government from criminal charges against Massey Energy Co., its subsidiaries, officers or employees of Massey Energy or its subsidiaries, except that the agreement did not preclude additional criminal charges against Aracoma employees. See Massey Firm to Plead Guilty, supra note 165; Letter from Charles T. Milller, U.S. Attorney, S.D. of West Virginia, by Hunter P. Smith Jr., Assistant U.S. Attorney, to Robert D. Luskin, Attorney for Defendant (Dec. 15, 2008) (United States v. Aracoma Coal Company Plea Agreement setting forth terms of global settlement, with charging Information, and Stipulation of Facts, as attached exhibits), available at http://www.justice.gov/usao/wvs/press_releases/2008/dec08/aracoma_executed_plea_agreement.pdf (last visited Aug. 16, 2011). The 2008 guilty plea by Aracoma was at least the fourth subsidiary of Massey Energy to plead guilty to criminal violations of federal environmental or safety laws within a five year
With respect to the Deepwater Horizon oil rig explosion and massive oil spill in the Gulf of Mexico that drew worldwide attention, the President’s National Oil Spill Commission Final Report and comments from sources close to the federal criminal investigation have led to speculation that criminal charges may be forthcoming against some of the BP managers both on the oil rig and onshore. The former head of the Department of Justice, Environmental Crimes Section, David Uhlmann, has cited excerpts released from the President’s National Oil Spill Commission final report, in predicting that criminal charges in the case are inevitable given the well-publicized negligent conduct of BP, Transocean, and Halliburton. Yet, at least one expert has noted that “given the wide latitude [that prosecutors] have, . . . they could go either way.”

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185 See Blum & Fitzgerald, supra note 140.


In response to Uhlmann’s prediction, one Los Angeles expert in environmental law observed that “prosecutors have wide discretion about whether to bring criminal charges.” Weber & Anderson, supra. Moreover, in addition to concluding that the companies “took a series of very hazardous steps which appeared to be motivated by economic concerns,” the commission also blamed government regulators, “which could mitigate culpability of the companies.” Id. See also National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling, Report to the President (released 01/11/2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (last visited Aug. 16, 2011).
on the charging decision.\footnote{187 Weber & Anderson, supra note 186; see Blum & Fitzgerald, supra note 140.} The pursuit of criminal charges in these tragic recent cases may signal a shift by the current Department of Justice to finally address the recklessness of the corporations, through the actions of its agents. As Professor Jane Barrett at the University of Maryland observed, “[c]harging individuals would be significant to environmental-safety cases because it might change behavior.”\footnote{188 See Blum & Fitzgerald, supra note 140.}

Without action by the government, those who run the mega-corporations will continue to make short-term profit decisions that risk massive harm on others, be it the lives of employees or the worldwide environment if the perception takes hold that criminal prosecution is not likely, or is likely only against the corporation.\footnote{189 See, e.g., Morgenson & Story, supra note 49.} Tony Hayward, the BP CEO at the time of the explosion and oil spill, expressed frustration at the distraction that the oil leak had become in his life, even as thousands suffered from the short-sighted misconduct of BP employees.\footnote{190 See Terry Macalister & Richard Wray, Tony Hayward to Quit BP, THE GUARDIAN, Jul. 26, 2010, available at http://www.guardian.co.uk/business/2010/jul/26/tony-hayward-to-quit-bp (last visited Aug. 16, 2011).} While BP agreed with the U.S. government to place $20 billion in an escrow account to cover losses, Hayward’s insensitivity to the disaster became a liability; he agreed to step down from the CEO post for a payment of one-year’s salary of 1.045 million pounds in lieu of notice.\footnote{191 See id.; Press Release, BP CEO Tony Hayward to Step Down and Be Succeeded by Robert Dudley (Jul. 27, 2010), http://www.bp.com/genericarticle.do?categoryId=2012968&contentId=7063976 (last visited Aug. 16, 2011).}
Today, many corporations have become conglomerates wielding both political and economic power. Multinational corporations have driven the wave of globalization, promoting NAFTA and other free-trade agreements that permit the free flow of goods and services, while allowing these entities to take advantage of favorable legal conditions. With threats of corporations that are “too big to fail” or reports that

192 “The threat of social meltdown arises not from excessive growth of the state and its regulatory role, but from its capture by groups able to translate market power into political power: socialism for big investors, capitalism for everyone else.” Nancy Folbre, Risks, Radiation and Regulation, N.Y. TIMES, Mar. 18, 2011, Economix, http://economix.blogs.nytimes.com/2011/03/18/risks-radiation-and-regulation/ (last visited Aug. 16, 2011); RICHARD D. HARTLEY, CORPORATE CRIME 14 (2008); MARSHALL BARRON CLINARD, CORPORATE CORRUPTION 4-5 (1990). Clinard connected the contributions of corporations and industry political action committees (PACs) to the democratic process. Id. at 6-7. McCain-Feingold was bipartisan legislation designed to address the concern over the political influence wielded by these large conglomerates through political campaign contributions. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 207-155, 116 Stat. 81 (2002). In Citizens United v. Federal Election Comm’n, the Supreme Court effectively gutted the legislation, stating that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. 876, 909 (2010) (5-4). In January 2011, Public Citizen, a national, non-profit advocacy organization, released a report on the effects of the Citizens United decision on the 2010 election cycle. See 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process available at http://www.citizen.org/12-months-after (last visited Aug. 16, 2001). Among its findings are the following facts:

• Spending by outside groups jumped to $294.2 million in the 2010 election cycle from just $68.9 million in the 2006 cycle. The uncharacteristically high spending in 2010 presages blockbuster spending in the upcoming 2012 elections;
• Nearly half of the money spent ($138.5 million, or 47.1 percent) came from only 10 groups;
• Groups that did not provide any information about their sources of money collectively spent $135.6 million - 46.1 percent of the total spent by outside groups during the election cycle; and
• Of 75 congressional contests in which partisan power changed hands, spending by outside groups favored the winning candidate in 60 contests.


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charges against a corporation could bring a substantial loss of jobs to thousands of innocent employees, there is significant temptation for the prosecutor to hide behind the numerous and noncontentious discretionary factors available to a prosecutor in choosing not to charge criminal conduct or to enter into a deferred prosecution agreement.

http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform/ (last visited Aug. 16, 2011) (announcing proposals to “crack down on illegal overseas tax evasion, close loopholes, and make it more profitable for companies to create jobs here in the United States,” and to ensure that companies are not rewarded “for moving jobs off our shores or transferring profits to oversees tax havens”).


See, e.g., Elizabeth K. Ainslie, Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution, 43 AM. CRIM. L. REV. 107, 107 (2006). Arthur Andersen, formerly one of the “Big Five” accounting and auditing firms in the United States in 2002, was criminally investigated for destroying Enron-related documents. Id. Arthur Andersen was charged with a single-count indictment for obstruction of justice, and was convicted by a federal jury in Houston, Texas. Id. After its conviction, the firm surrendered its accounting licenses and thus ended its accounting and auditing functions. See JEROLD H. ISRAEL, ET AL., supra note 123, at 345. The Fifth Circuit affirmed the convictions, but it was reversed and remanded by a unanimous Supreme Court. Arthur Andersen LLP v. United States, 544 U.S. 696, 697-98 (2005) (holding that the jury instructions failed to properly convey the elements of “corrupt persuasion” for a conviction under 18 U.S.C. § 1512(b)). The Department of Justice subsequently moved to dismiss the charges against the firm. See Move by Ex-Andersen Partner Could Affect Enron Case, N.Y. TIMES, Nov. 24, 2005, at C9. It was the criminal indictment, however, and not the conviction that sealed the firm’s fate. See Lawrence D. Finder & Ryan D. McConnell, Devolution of Authority: The Department of Justice’s Corporate Charging Policies, 51 ST. LOUIS U.L.J. 1, 3 n.8 (2006) (discussing the fallout from the prosecution of Arthur Andersen). Although the criminal investigation of Arthur Andersen involved a limited number of employees in the Houston office of the nationwide firm, the demise of the firm reportedly led to the loss of 28,000 U.S. jobs. See Ainslie, supra, at 107-08; Finder & McConnell, supra, at 3. The Enron-related conviction of Arthur Andersen in June 2002 came on the heels of a large 2001 settlement with the SEC for the firm’s accounting and auditing work for Waste Management Corporation and an SEC suit against five Arthur Andersen officers and the lead partner for its work with the Sunbeam Corporation; neither of these investigations was centered on the Houston office. Ainslie, supra, at 107.

See supra Part IV (Discretion and the Prosecutor).
The top executives who manage these corporations sit in particularly powerful seats because they direct the financial heft of the corporations they govern. In the financial crisis of 2007-2009, financial institutions were bailed out by the federal government before regulators had an opportunity to assess the viability of the institutions and before investigators could assess whether fraudulent conduct had lead to the crisis. Professor Bill Black, a senior regulator during the Savings and Loan debacle of the late 1980s, examined the risk of moral hazard, or adverse incentives, in the financial markets. Nobel Laureate Joseph Stiglitz has also pointed to the moral hazard that attaches to bank bailouts. Ordinarily, a bank or lending institution that has insufficient funds to pay its depositors or creditors would be placed in conservatorship so that it could be financially reorganized. Typically, one consequence would be that management is replaced and shareholders may lose all of their interest, a risk recognized by the shareholders when purchasing shares. In his book, Freefall Professor Stiglitz asserts that the 2007-09 government bailout of the financial industry, like the bailouts of the 1980s, 1990s, and 2000s, sends a signal to the banks that they need not worry about risk

198 See Ramirez, supra note 60, at 1.


200 See BLACK, supra note 169, at 6 (“Moral hazard is the temptation to seek gain by engaging in abusive, destructive behavior, either fraud or excessive risk taking. This is not unique to S&Ls; it is in the nature of the corporation.”).

201 STIGLITZ, supra note 15, at 16-17, 39.

202 Id. at 116-17.

203 Id. at 121.
management because the government will “pick up the pieces.”

This assurance permits the least prudent bankers to continue or to repeat their reckless practices.

The moral hazard, that the bankers’ incentives to act responsibly are weakened if they know they will be bailed out by the government because they are too big to fail, risks not only the need for future bailouts that will be even greater in magnitude than the generous bailouts in 2007-09, but also risks “our sense of fairness and social cohesion in the long run.”

Stiglitz observed that even those operating in the financial markets objected to the bailouts as favoring the mega-institutions, at the expense of other institutions which may have been more pragmatic in their investment strategies.

Indeed the whole market may become distorted as the bailed out banks benefit from lower costs of capital due to the recognition of “tacit government support.”

In 2008, the financial markets were “on the brink” of collapse, as characterized by Hank Paulson, U.S. Treasury Secretary at that time. To stave off implosion of the American financial markets, the bankers and executives at banks, financial companies, and insurance giant AIG, received billions of dollars in bailouts for their firms at the

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204 Id. at 135. In the bank bailouts of 2007-09, the government opted to avoid conservatorship for those too big to fail. Id. Earlier bailouts by the Federal Reserve after the collapse of LTCM and later, Enron, gave rise to a new term by analysts to describe the behavior, “the Greenspan put.” This term was shorthand for “investors’ faith that the Fed would keep the capital markets function no matter what.” See FCIC REPORT, supra note 3, at 60-61 (2011).

205 STIGLITZ, supra note 15, at 118, 135; see FCIC REPORT, supra note 3, at 61 (2011).


207 Id. at 39, 118.

208 Id. at 118.

209 See PAULSON, supra note 16, at 254.
taxpayers’ expense. To the dismay of the taxpayers, many of whom were victims of the financial industry’s reckless conduct, the leaders of these bailed-out corporations gave themselves hefty bonuses and “retention grants.”

Not surprisingly, such catastrophic failures of capital management led to calls for criminal investigations into the practices of the corporations and the people who ran them. Those who benefitted from creating the subprime mortgage debacle faced civil and regulatory fines, yet no major players, nor their firms, have been criminally charged at this time. Although the financial crisis extended across the globe, and a number of

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210 See SORKIN, supra note 168, at 396-99 (2009) (even prior to the Troubled Asset Relief Program (TARP) adopted by Congress in 2008 to bail out the financial markets and despite the fact that it was an insurance company, AIG received $85 billion from the Federal Reserve, pulling it from the brink of bankruptcy). In all, AIG received a total of $182 billion in federal bailout money. See Plumb, supra note 18. Whether the bailout of AIG was a consequence of its political ties, or a necessity because its bankruptcy would have left so many major banks and other financial institutions “holding the worthless mortgage investments, including Goldman Sachs,” Treasury Secretary Hank Paulson’s former company, and subject to cascading bankruptcies, remains a subject of debate. See Carol D. Leonnig, AIG Founder Wielded Personal Influence in Washington, WASH. POST, Oct. 1, 2008, A15.


212 See, e.g., FCIC REPORT, supra note 3 (2011); Morgenson & Story, supra note 48; Matt Taibbi, Why Isn’t Wall Street in Jail?, ROLLING STONE, Mar. 3, 2011, at 44.

corporations failed or were bailed out, corporations at the center of the crisis are
illustrative of the rampant extreme recklessness and misconduct yielding outrageous
fortunes to some at the expense of millions. One is the now-defunct Countrywide
Mortgage, absorbed by Bank of America during the crisis. Bank of America was also a
major beneficiary of the bailout. The other is the insurance giant, AIG, given nearly $200
billion in bailout funds.

The subprime mortgage crisis, in which “lenders made loans that they knew
borrowers could not afford” and in which “lenders put borrowers into higher cost loans so
[lenders] would get bigger fees, often never disclosed to borrowers,” fueled a speculative
housing bubble in which borrowers were expected to default causing massive losses to
investors in mortgage securities. Countrywide Financial originated more subprime
loans that any other company. The fees from the easy mortgages granted by
Countrywide yielded financial riches for Angelo Mozilo, the former CEO of


Bank of America was founded in 1904, by an Italian immigrant as the Bank of Italy. MARQUIS JAMES & BESSIE R. JAMES, BIOGRAPHY OF A BANK – THE STORY OF BANK OF AMERICA N.T. & S.A. HARPER & BROTHERS 16 (1954). Over 105 years later and numerous mergers, acquisitions, and name changes, Bank of America had assets of $2.3 trillion in September 2009, absorbing both Countrywide and Merrill Lynch after the 2008 global financial meltdown. See JOHNSON & KWAK, supra note 203, at 84-85, 180 (2010). Indeed, in March 2009, Bank of America’s assets were 16.4 % of GDP. Id. at 12.

See FCIC REPORT, supra note 3, at xxii (2011).

See RAMIREZ, RECONSTRUCTING CAPITALISM, supra note 213, at ch.7, 11-12nn.38-47; Ramirez, supra note 60, at 24-25.
Countrywide, whose income included $102 million in 2006, a total of $229 million in 2007, and a retirement benefit package of $58 million in 2008.\textsuperscript{217} Mozilo settled a civil suit brought by the SEC for $67.5 million, in which Mozilo and two other Countrywide executives were accused of misleading investors, but no criminal charges were brought.\textsuperscript{218}

Millions of Americans lost their homes to foreclosure as low-interest teaser rates once the easy mortgage loans expired and were replaced by higher rates and monthly payments that exceeded the income levels of the mortgagors, or the spiraling unemployment rate left mortgage holders jobless and thus without income.\textsuperscript{219} As foreclosures flooded the real estate market with bargain-priced homes for sale, the buyers retreated to wait out the shift as real estate prices dropped, leaving over a quarter of all mortgage holders with homes valued below the outstanding mortgage due.\textsuperscript{220}

At the same time that the U.S. government was bailing out the largest banks in America from their high-risk gambles trading in derivatives in the mortgage and sub-prime mortgage markets,\textsuperscript{221} calls to aid mortgage owners unable to meet their repayments

\textsuperscript{217} For 2006, Mozilo’s compensation included salary plus a bonus of $20.5 million; in 2007, he earned $102 million in salary, $30 million in Options compensation, and $127 Million in sales of Countrywide stock, sold immediately prior to the firms announcement of a $388 million write down due to loan losses. See Ramirez, Reconstructing Capitalism, supra note 102, ch.7, 11-12 nn.38-47; Ramirez, supra note 60, at 25.

\textsuperscript{218} See Nocera, supra note 213; No Charges Against Former CEO of Countrywide as Federal Probe Ends, supra note 213.

\textsuperscript{219} Stiglitz, supra note 15, at 16; Taibbi, supra note 220.

\textsuperscript{220} See Braverman, supra note 21.

\textsuperscript{221} Paulson, supra note 16, at 364, 368. On Monday, Oct. 13, 2008, nine banks agreed to receive $125 billion to address massive undercapitalization in the banking system: Citigroup, Wells Fargo, and JP
were met with objections from the financial markets that doing so would create a moral
hazard,\(^\text{222}\) that is, a disincentive to pay their mortgages because owners would hold out
hope of a bailout.\(^\text{223}\)

American Insurance Group (“AIG”) was the world’s largest insurance company,
and one of its units, AIG Financial Products Corporation (“AIG FP”), “dominated in
dealing in OTC derivatives,” accumulating a one-half trillion dollar position in credit
default swaps.\(^\text{224}\) AIG recognized the income from these derivatives without creating any

\(^{222}\) See Richard Eskow, Foreclosures and Guilt: The “Home Loan Moral Hazard Scorecard,” Campaign for
home-loan-moral-hazard-scorecard (“scorecard” comparing the moral hazard of bankers versus borrowers

\(^{223}\) STIGLITZ, supra note 15, at 16.

\(^{224}\) See FCIC REPORT, supra note 3, at 50 (2011).

A key OTC derivative in the financial crisis was the credit default swap. . . . The
purchaser of a CDS transferred to the seller the default risk of an underlying debt. The
debt security could be any bond or loan obligation. The CDS buyer made periodic
payments to the seller during the life of the swap. In return, the seller offered protection
against default or specified ‘credit events’ such as a partial default. If a credit event such
as a default occurred, the CDS seller would typically pay the buyer the face value of the
debt.
reserves for possible losses,225 basically insuring subprime mortgages through these derivatives. When borrowers began defaulting on subprime mortgages, financial institutions holding the credit default swaps sought to have AIG post collateral under the terms of the credit default swaps. When the housing bubble burst, AIG Financial Products had guaranteed billions of dollars worth of subprime mortgages for which it could not pay.

That AIG sat in the eye of the financial crisis storm was unsurprising given that the company and its former CEO, Hank Greenberg, had avoided criminal punishment for past financial practices.226 On the very day Hank Greenberg was being deposed by the New York State Attorney’s General office regarding previous questionable accounting practices at AIG, AIG settled a $4.3 billion lawsuit it had filed against Greenberg, for

225 See FCIC REPORT, supra note 3, at 50 (2011). Although a CDS is often compared to insurance, two key distinctions are first, that it can be used to speculate on the losses of others’ property or interests because the purchaser of the CDS need not have a property interest in the underlying debt (somewhat akin to being able to insure your neighbor’s car and then hoping the car will crash so that you may cash in on the insurance policy), and second, that because the CDS seller risk is unregulated as part of the derivatives market, unlike the regulated insurance market, the seller of the CDS is not required to put aside financial reserves in case of loss. Id.

226 In 2003, AIG settled a civil action with the SEC for a $10 million fine, based upon aiding an Indiana cell phone distributor in hiding $11.9 million in losses and then lying to the SEC about its role. SORKIN, supra note 168, at 155. In 2004, AIG settled civil and criminal charges for its role in shifting bad loans off the books of PNC Financial Services. Id. The firm entered into a deferred prosecution agreement with the Department of Justice and agreed to a thirteen-month probationary period for AIG Financial Products Corp. (one of its operating units). Id. In 2005, AIG Financial Products Corp. was involved in another accounting scandal for inflating AIG’s cash reserves by $500 million, resulting in the resignation of its CEO, Maurice Raymond “Hank” Greenberg. Id. at 153, 160. Although considered by New York’s Attorney General, no criminal charges were filed against Greenberg or AIG. Id. at 160. In February, 2008, AIG was required to adjust loss estimates for November and December 2007 from $1 billion to more than $5 billion. Id. AIG and Greenberg are noted for their strong financial support of political candidates and the ready access it has provided them, as well supporting favorable legislative initiatives, and opposing unfavorable regulations. See Leonnig, supra note 210 (reporting that Greenberg’s Starr Foundation “gave $500,000 to support a November 2006 report by the Committee on Capital Markets Regulation that [recommended] fewer criminal prosecutions of businesses.”).
about $860 million, so that it could announce that Greenberg was returning to AIG as its chairman emeritus. 227 AIG needed Greenberg’s relationships with wealthy investors to shore up its financial distress and hopefully buy the company some time as it faltered under the weight of AIG Financial Products’ credit default swaps obligations. 228

The AIG Financial Products Corporation was founded in 1987, in a deal between Greenberg and Howard Sosin, who fled investment firm Drexel Burnham Lambert for the deeper pockets of AIG, leaving before Drexel Burnham pled guilty to violations of federal securities laws in 1988, agreeing to a $650 million fine, and ultimately collapsing in bankruptcy due to Michael Milken’s “epoch-defining” junk bond scandal. 229 Sosin brought thirteen Drexel employees with him to AIG Financial Products, where they operated a high leveraged unit with similar success to the prior Drexel operation. 230

Notably, Joseph Cassano, who headed up AIG Financial Products Corp. and is credited with pushing AIG into underwriting credit default swaps, 231 was one of those thirteen employees who had previously worked for Drexel Burnham Lambert during

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227 See SORKIN, supra note 168, at 272, 280.

228 Id. at 280.

229 See SORKIN, supra note 168, at 155-56; FRIEDRICH, supra note 44, at 164-65. Milken plead guilty to six felony charges for securities fraud and conspiracy. FRIEDRICH, id. at 164.

230 See SORKIN, supra note 168, at 155-56.

231 See id. at 157-58. By February 2008, AIG’s outside auditors, PricewaterhouseCoopers, concluded that Cassano was not “open and forthcoming” in the valuation of risk taken on by AIG FP, and AIG was required to revise its 2007 estimates of losses in November and December from $1 billion to more than $5 billion. Id. at 160-61. Although AIG’s CEO Martin Sullivan wanted to fire Cassano, he agreed to keep Cassano on as a consultant at $1 million per month. Id. at 161-62.
Michael Milken’s reign of the junk bond market. After Sosin left AIG Financial Products in 1993, Cassano remained and was promoted to chief operating officer. Cassano eventually took the helm as CEO, earning a reported $280 million during his eight year tenure at AIG Financial Products. In December 2007, Cassano had assured investors that “it is very difficult to see how there can be any losses” in the CDS portfolios, without revealing that AIG had posted $2 billion in collateral to Goldman Sachs to cover losses. Nor did Cassano inform those investors that AIG’s had overstated its earnings by $3.6 billion. Cassano was forced to resign in 2008 after the catastrophic billions of dollars of losses from the sub-prime mortgage derivatives began to hit and gave rise to the need for the company to report a multibillion dollar loss.

232 See Sorkin, supra note 168, at 155-56.


235 See AIG – American International Group Investor Meeting, Dec. 5, 2007, Final Transcript, at 8, available at http://www.scribd.com/doc/16785264/AIGTranscript20071205T13301 (last visited Aug. 16, 2011). Cassano made a similar statement at the prior investor meeting on August 9, 2007, insisting that the credit default swaps were not a problem: “It is hard for us, without being flippant, to even see a scenario within any kind of realm or reason that would see us losing $1 in those transactions. . . . We see no issues at all emerging. We see no dollar of loss associated with any of [the CDO] business.” See FCIC REPORT, supra note 3, at 268. Despite those assurances, the following day AIG posted $450 million in cash to Goldman Sachs in response to its prior collateral calls. Id. at 265-66, 268

236 See FCIC REPORT, supra note 3, at 272.

237 See id. at 272.

238 See Voreacos & Smith, supra note 234.
Rather than facing criminal charges, AIG received the benefit of a $182 billion bailout from the federal government in 2008 and 2009 despite a record of financial misconduct, and Cassano was given a $1 million monthly consulting fee upon resigning as CEO and walked away with millions in earnings. The federal probe of AIG and Cassano’s role in the financial crisis resulted in the unusual announcement that no criminal charges would be brought against AIG executives. Reports of the New York Attorney General’s investigation into the financial crisis and its aftermath indicate that New York Federal Reserve Chairman Geithner visited with NY Attorney General Cuomo and discussed AIG. Although Cuomo’s investigation into the crisis continued, no charges were filed against AIG prior to Mr. Cuomo’s departure from the office for his newly elected position as Governor of New York.

In 2010, a new scandal emerged as banks—some of which had been given government bailouts—used forged or fraudulent documents in courts to support home foreclosures. A group of banks had collectively created an organization, known as

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239 See Nocera, supra note 213; Matthew Karnitschnig et al., US to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up, WALLST. J., Sept. 17, 2008, at A1.

240 Efreti, supra note 213 (reporting that federal prosecutors had focused the investigation on Joseph Cassano, head of AIG’s London-based Financial Products unit).

241 See, e.g., Morgenson & Story, supra note 48.

242 See id.

243 See 60 Minutes: The Next Housing Shock, supra note 22 (reporting on Docx, a company hired to sign fraudulent mortgage ownership documents prepared for use by banks in home foreclosures—because the original documents were unavailable—on behalf of numerous banks, including Wells Fargo, HSBC, Deutsche Bank, Citibank, U.S. Bank, and Bank of America); Rauch & Baldwin, supra note 29 (reporting that the biggest U.S. mortgage lenders in the United States “are being investigated by 50 state attorneys general and U.S. regulators for foreclosing on homes without having proper paperwork in place or without having properly reviewed paperwork before signing it”); Gretchen Morgenson, A Swift Deal May Not Be a Sound One, N.Y. TIMES, Mar. 12, 2011.
Mortgage Electronic Registration Systems (MERS), and used it as the designated mortgagee in home loans rather than the actual beneficial owners of the loans.\textsuperscript{244} By doing so, the banks avoided additional filing fees required to lawfully record mortgage assignments or transfers.\textsuperscript{245} As Professor Christopher Peterson observed, the mortgage finance industry set about to create an entirely new national system of public land title recordkeeping without seeking legislative reform.\textsuperscript{246} Instead, “the mortgage finance industry circumvented the state and national debate that normally precedes significant

\textsuperscript{244} See Christopher L. Peterson, \textit{Foreclosure, Subprime Mortgage Lending and the Mortgage Electronic Registration System}, 78 U. Cin. L. Rev. 1359, 1361-62, 1368-70 (2010) (describing the creation of MERS, its role in the mortgage industry, and its questionable legal role with respect to recording mortgages and bringing foreclosures). MERS, created by a Mortgage Bankers Association of America member companies, is listed as the mortgagee (MERS claims it is a nominee) on the publicly filed documents and any transfers of the ownership of the mortgage loan are recorded internally in a computer data system, rather than with the county property recorder’s office. Peterson, at 1361-62, 1368. “Sixty percent of all new mortgage loan originations are recorded under MERS’s name, and more than half of the nation’s existing residential loans are recorded under MERS’s name.” \textit{Id.} at 1373-74. In addition to avoiding further fees to the recorder’s office, MERS has also attempted to bring foreclosure proceedings in its name, rather than the true owner’s name. \textit{Id.} at 1362-63, 1372-73. \textit{See also} Richard Eskow, \textit{Pictures of MERS, Part 1: Corporate Documents Illustrate the Mortgage Shell Game}, HuffPost Business, Oct. 20, 2010, \url{http://www.huffingtonpost.com/rj-eskow/pictures-of-mers-part-1-c_b_769181.html} (last visited Aug. 16, 2011) (listing a who’s who of MERS owners, including AIG-UG, Bank of America, Citimortgage, Fannie Mae, Freddie Mac, GMAC, HSBC, Merrill Lynch, Nationwide, Washington Mutual (JP Morgan), and Wells Fargo).


When loans began to fail, banks realized that the failure to properly document the transfers left them potentially without recourse in the foreclosure process. Consequently, forged documents and fraudulent affidavits in support of foreclosure actions were created and submitted to courts in support of foreclosures. Despite unquestionably fraudulent conduct, federal regulators investigating the misconduct in foreclosures have agreed to consent orders against the fourteen largest mortgage servicers, who agreed to address problems in fraudulent loan documentation and understaffed and undertrained foreclosure operations, without admitting or denying any wrongdoing. As one critic from the National Consumer Law Center observed, “These consent orders are worse than doing nothing. . . . They give the appearance of doing something while giving banks control of the process.” Indeed, such agreements are worse than nothing. They affirm unlawful conduct, encourage others to follow unlawful actions, and undermine the rule of law by once again expressing the message that the wealthy and powerful remain above it.

VI. Conclusion

247 Id. at 1405.

248 Id. at 1367-68, 1375-80.

249 See 60 Minutes: The Next Housing Shock, supra note 22.

250 See Alejandro Lazo & E. Scott Reckard, Changes Ordered in Home Seizures, CHI. TRIB., Apr. 14, 2011, at 21 (reporting that regulators from the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Corp. assured critics that their settlement “wouldn’t interfere with a wider-ranging investigation conducted by state attorneys general and other federal agencies, including the Justice, Treasury and Housing departments and the Federal Trade Commission”); Morgenson, supra note 243.

251 See Lazo & Reckard, supra note 257 (quoting Alys Cohen, staff attorney for the National Consumer Law Center).
The affirmance effect appears evident in the subprime mortgage lending, the financial market crisis of 2007-2009, the generous fees and bonuses awarded for creating a financial Armageddon, the fraudulent loan documentation to support foreclosures, and the failure to pursue criminal charges against any of the major actors or their legions of supporters in the legal, accounting, and credit rating fields, despite evidence of financial fraud. In contrast, foreclosures continue unabated, except to the extent that bankers do not want to write down the losses and reveal the extent of their financial plight further, while social programs such as healthcare are cut under public pressure to balance a federal budget devastated by the cost of the bailout. With such lop-sided consequences, it is easy to predict that leaders in the financial industry will continue to

252 A full assessment of whether elements of the financial crisis of 2007-2009 in fact warrant criminal prosecution or strongly suggest an error of prosecutorial discretion is beyond the scope of this paper. This paper seeks to highlight the risks that prosecutorial discretion has been inappropriately exercised in connection with that crisis. In a forthcoming article, entitled, Where Have All the Prosecutors Gone? When Will we Ever Learn?, I explore in depth the exercise of discretion by the Department of Justice in connection with the financial crisis of 2007-2009. See generally U.S. Senate Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs STAFF OF S. COMM. ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (Comm. Print Apr. 13, 2011); FCIC REPORT, supra note 3; In re Lehman Brothers Holdings Inc., Chapter 11 Case No. 08-13555 (Bnkr. S.D.N.Y. Mar. 11, 2010) (report of Anton R. Valukas, Examiner).

253 See Robert Lenzner, US Banks Reporting Phantom Income on $1.4 Trillion Delinquent Mortgages, Forbes.com, Jan. 12, 2011, http://blogs.forbes.com/robertlenzner/2011/01/12/us-banks-reporting-phantom-income-on-1-4-trillion-delinquent-mortgages/ (last visited Apr. 6, 2011) (observing that accounting rules permit banks to allow “phantom” interest that is not actually collected to accrue on non-performing mortgages and be reported as income until those properties are foreclosed upon, which averages about 16 months). Once the property is foreclosed, the anticipated interest income comes off the books, but the banks must acknowledge the loss. Id.


probe for opportunities to further violate laws in the pursuit of fortune\textsuperscript{256} or use their fortunes to decriminalize and shape laws to their favor,\textsuperscript{257} that others will follow in their path, and that those not in the top 1% who take in nearly one-quarter of all U.S. income and hold 40% of U.S. wealth,\textsuperscript{258} will continue to lose faith in the rule of law.

Social meaning in law has evolved so certain individuals, and white collar fraudsters in particular, understand they face little risk of criminal punishment for acts that fall into the definition of criminality. When the criminal actors can move the question of exercising prosecutorial discretion to charge by highlighting the costs to society of punishing corporations or their leaders, or by characterizing the pursuit of justice as a political act of retribution rather than a reasoned decision to deter future conduct, the impact of such influence upon prosecutorial discretion can be obfuscated by the traditional factors deemed appropriate for consideration in exercising discretion. Allowing money or politics to influence discretionary charging decisions, whether real or perceived, conveys social meaning that undermines effective government, models bad behavior, and reinforces rewards creating a moral hazard for future wrongdoing. Before prosecutors refrain from charging, they need to factor in the idea of “affirmance” in

\textsuperscript{256} See Steven A. Ramirez, *Dodd-Frank as Maginot Line*, 14 CHAP. L. REV. 109 (forthcoming 2011) (asserting that the Dodd-Frank Act, created to address the financial banking crisis and mortgage collapse of 2008, will not prevent future financial crises); *The 7.30 Report: Troubles Ahead for World Economy*, ABC (Austl.) (July 27, 2010), http://www.abc.net.au/7.30/content/2010/s2965891.htm (last visited Aug. 16, 2011) (interview with Nobel laureate Joseph Stiglitz) (predicting another financial crisis because the core problems of the crisis, too-big-to-fail banks, excessive risk-taking, and lack of transparency, were not addressed, and because the banks used their political power to protect derivative activity that generates large profits, but puts America at risk).

\textsuperscript{257} See FCIC REPORT, supra note 3, at xviii (2011) (concluding that the financial industry “played a key role in weakening regulatory constraints on institutions, markets, and products”).

\textsuperscript{258} Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%, Vanity Fair*, May 2011.
exercising prosecutorial discretion so that an offensive approach to such criminality is constructed and conveys a new social understanding for those in politically or financially powerful positions.\textsuperscript{259} Prosecutorial discretion is broad, but there is a need to compel the government to impose criminal punishment upon these law-breakers so that they are constrained by the law to the benefit of society because these laws and the enforcement of them have meaning. Moreover, failure to enforce some laws can undermine the confidence in all laws.\textsuperscript{260} Prosecutors must recognize the social compact formed by law abiding citizens who obey and respect the laws and expect nothing less of the rest of society.\textsuperscript{261}

Affirmance of the crimes of the powerful means they retain the power to impose tremendous costs into the future through their continued control of massive firms, and the incentives facing others holding such power. A petty thief may steal again when not prosecuted, but it is a zero-sum game in which the gain to the thief is approximately equal to the loss to the victim. In contrast, a bank CEO can engage in fraud that can result in deadweight losses so great that they threaten to crash the global financial system. A petty thief that evades prosecution has virtually no impact on the rule of law, but a

\textsuperscript{259} See Lessig, supra note 67, at 961-63.

\textsuperscript{260} “Basically, if you are a market participant you play by the rules, and if you are an honest person you want the rules to be better even if it’s not to your advantage[,] that’s really what you need for a democracy to work well.” National Public Radio, \textit{Morning Edition} (March 9, 2010) (interview with George Soros, billionaire investor) (commenting on the need for increased financial market regulation), audio clip available at http://www.npr.org/blogs/thetwo-way/2010/03/soros_would_make_it_harder_for.html (last visited Aug. 16, 2011).

\textsuperscript{261} See Lessig, supra note 67, at 955-56; Kahan, \textit{supra} note 77, at 358 (individuals may wish to uphold the law but do not want to be taken advantage of; “When others refuse to reciprocate, submission to a burdensome legal duty is likely to feel more servile than moral.”).
CEO that evades prosecution through prosecutorial declination is an advertisement capable of tempting millions into skirting the law. Today, America flirts with financial and corporate elites that behave as if they are above the law, and a public that holds the legal system in contempt. As such, affirmance may lead to future economic lawlessness and catastrophes. There is a substantial likelihood that in connection with the financial crisis of 2007 to 2009, a systematic declination of prosecution by the Department of Justice amounts to an affirmance of those crimes that invites continued lawlessness in the financial sector and beyond.