Washburn University

From the SelectedWorks of mary k ramirez

April 21, 2012

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

Mary K Ramirez

Available at: https://works.bepress.com/mary_ramirez/7/
Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime

Professor Mary Kreiner Ramirez*
Washburn University School of Law
mary.ramirez@washburn.edu
Apr. 20, 2012

*Professor Ramirez teaches White Collar Crime, Criminal Law and Criminal Procedure, among other courses. She is a thirteen-year veteran of the Department of Justice, having worked as a Trial Attorney for the DOJ Antitrust Division, and as a Senior Trial Attorney with the U.S. Attorney’s Office for the District of Kansas.
Abstract

Recent financial scandals and the relative paucity of criminal prosecutions against elite actors that benefitted from the crisis in response suggest a new reality in the criminal law system: some wrongful actors appear to be 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 incumbency in power results in massive deadweight losses due to the distorted incentives they now face. 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 decline prosecution in these circumstances without considering its potential affirmance of crime. Otherwise, the profitability of crime promises massive future losses.
# Table of Contents

Abstract

Table of Contents

Introduction

I. The Financial Crisis

II. Discretion and the Prosecutor
   A. Sufficiency of Evidence
   B. Case-Specific, Non-Sufficiency Factors
   C. Guidance on Discretionary Decisionmaking
   D. Plea Bargaining
   E. Ambiguity in Declination Obscures Implicit Motivations
      1. Unlimited Discretion to Decline Prosecution
      2. Networks and Revolving Doors
      3. Unaccountable Discretion

III. Theories of Punishment and Affirmance

IV. Social Meaning and the Expressiveness of Law
   A. Contesting the Criminal Label
   B. Fair Play and the Negative Message of Inequality
   C. Modeling Subversion of the Rule of Law
   D. Expressing the Message of Affirmance in Elite Crime

Conclusion
“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.”

Introduction

Hindsight may be 20-20, but the facts leading up to the financial crisis in 2008 demonstrate hindsight was not required to stave off the calamitous events in the financial markets over the past five years. Whether government regulators, auditors, or credit rating companies should have stepped in to stem the financial blood-letting, the financiers in the industry knew better than to gamble with the nation’s economic health. Central to the American criminal justice system is an expectation that a known breach of the criminal laws will yield punishment. In the aftermath of the federal bailouts,

---


2 The financial crisis spans several years, culminating in the “profound events of 2007 and 2008” and continuing beyond those years with multiple bank failures, mortgage company bankruptcies, and real estate foreclosures, some of which continue even as this article is penned. See, e.g., Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report xv (2011) [hereinafter FCIC Report]. This article refers to the “financial crisis” broadly to reference this period, or at times the “financial crisis of 2008” because 2008 is the year in which the general public became aware of the magnitude of the crisis, beginning with the major bank collapses of Bear Stearns and of Lehman Brothers, the takeover of Merrill Lynch, and most pointedly, when Secretary of Treasury Henry Paulson went to the President and Congress to recommend a bailout for the major banking institutions, among others. See infra Part I; see, e.g., FCIC Report, supra, at 353.

3 Michiyo Nakamoto & David Wighton, Citigroup Chief Stays Bullish on Buyouts, Financial Times, July 9, 2007, http://www.ft.com/intl/cms/s/0/80e2987a-2e50-11dc-821c-0000779fd2ac.html#aaxzz1pEpr9eID (last visited Mar. 15, 2012). Citigroup Chief Charles Prince admitted that a significant disruptive event would eventually cause cheap credit-fuelled buyout liquidity to exit the market and “the party would end,” but that Citigroup would “keep dancing” until the music stopped. Id. “When the music stops, in terms of liquidity, things will be complicated. But as long as the music is playing, you’ve got to get up and dance. We’re still dancing.” Id.

4 See FCIC Report, supra note 2, at 344-52, 371-76.
expectations of CEO perp walks abounded, and still do. Yet, despite Congressional investigations revealing knowing fraud, and numerous fraud settlements worth billions, the Department of Justice has not criminally charged any of the key officers and managers of the financial institutions deemed “too big to fail” or even of those “too big” that were allowed to fail anyway.

5 See, e.g. The White House, President Barack Obama’s Remarks by the President in State of the Union Address, Jan. 25, 2012:

I’m asking my Attorney General to create a special unit of federal prosecutors and leading state attorney [sic] general to expand our investigations into the abusive lending and packaging of risky mortgages that led to the housing crisis. This new unit will hold accountable those who broke the law, speed assistance to homeowners, and help turn the page on an era of recklessness that hurt so many Americans.


6 See, e.g., FCIC REPORT, supra note 2, at xxii-xxiii.

Classic theories of punishment identify utilitarian\(^8\) and retributivist\(^9\) 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.\(^{10}\) The retributivist justifies punishment of the wrongdoer as just payment for his breach of society’s rules. Sometimes, however, 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. Each decision not to pursue criminality, is an exercise of discretion.

\(^8\) Jeremy Bentham, *Principles of Penal Law*, in *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.”).

\(^9\) Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 195-98, (W. Hastie trans., 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”).

\(^{10}\) 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)).
Reasons for exercising discretion against pursuing criminality may be varied.\(^{11}\)

For the prosecutor, a weak case, an overload of cases, resource considerations, or more compelling cases, to name a few, may factor into that discretionary decision.\(^{12}\) Beyond these reasons, lay other possibilities, such as community remedies, civil alternatives to

\(^{11}\) See generally T. KENNETH MORAN & JOHN L. COOPER, DISCRETION AND THE CRIMINAL JUSTICE PROCESS (1983). A victim may fail to report the crime, for instance, out of personal embarrassment, fear, or hopelessness. See id. at 18-21. The police or other governmental investigative arm may choose not to pursue a complaint or may decide to abandon investigation for a myriad of reasons including 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. 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); Eric Lichtblau et al., F.B.I. Struggling to Handle Wave of Finance Cases, N.Y. TIMES, Oct. 19, 2008, at A1 (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.


“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 cocitizens. 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.
criminal punishment, or perceived blameworthiness.\footnote{See Darryl Brown, \textit{Street Crime, Corporate Crime, & the Contingency of Criminal Liability}, 149 U. PENN. L. REV. 1295, 1297 (2001).} 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 casualty, 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 \textit{does} pay.\footnote{See \textsc{Michael Lewis}, \textsc{The Big Short} xiv-xv (2010). In the prologue to \textit{The Big Short}, Lewis reflected on the response to his first book, \textit{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. \textit{Id.} See also Geraldine Szott Moohr, \textit{The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement}, 46 AM. CRIM. L. REV. 1459, 1478-79 (2009) (observing that ideally, regulatory, civil enforcement and criminal prosecution “work in tandem to prevent business misconduct through a system of graduated penalties,” but in practice, regulatory agencies “are beset with inherent barriers to effective enforcement” and “civil actions do not provide effective remedies for or deterrence of business frauds,” leaving only criminal law “to monitor business practices and to respond to public pressure”). Professor Moohr asserts that resorting to criminal prosecutions “may divert the public and legislators from the task of devising more effective ways to control corporate misconduct,” however this concern ignores the very nature of the problem, in that the same corporate leaders engaged in financial wrongdoing are leaders in limiting the effectiveness of regulatory oversight and in weakening of civil litigation as a means of redressing misconduct. Moohr, \textit{supra}, at 1473-74, 1476, 1478-79. Indeed, criminal prosecution is the last resort for the very reasons she observes.} 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. The failure by regulators among others to seize early opportunities to shut down subprime misconduct arguably emboldened both groups, delivering tremendous financial rewards to them and affirming their actions with every dollar that they made.\footnote{See infra Part I & Part V(d).}
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. This article focuses upon affirming “elite crimes” (particularly corporate and financial elites) committed by those who may be perceived to be “above the law” due to the position held at the time the crime was

---

16 The rule of law is undermined when misconduct is reinforced through benefits gained to the perpetrator by shirking the rules. See, e.g., JOSEPH E. STIGLITZ, FREEFALL 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.


18 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).
committed, to favorable socioeconomic status, or to political ties to power. Given the prominence of their acts and the costs to society, affirming crimes by these elites, is far more costly than mere failure to deter crimes such as auto theft.¹⁹

Part I of this article reviews the recent financial crisis, identifies some indicators of criminal conduct and its cost to the American and global economies. Setting forth the specific facts supporting a criminal case for the prosecution of particular individuals is beyond the scope of this article. The purpose of the review is merely to suggest that given what is known, one would expect some criminal actions by the Department of Justice.²⁰ The purpose of the article is to suggest relevant considerations that ought to be included in making an assessment about whether to pursue criminal charges.

Part II 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. Noticeably absent from this traditional list is any consideration of the cost

---

¹⁹ See, e.g., Gretchen Morgenson, Case on Mortgage Official is Said to Be Dropped, N.Y. TIMES, Feb. 20, 2011, at A20 (reporting that federal prosecutors have closed the criminal investigation of former chief executive of Countrywide Financial, Angelo R. Mozilo, who settled on insider trading charges by the SEC in October 2010 for $67.5 million, $45 million of which was paid by Countrywide and its successor in bankruptcy, Bank of America; Mozilo received total compensation of $521.5 million while heading up Countrywide from 2000 to 2008). In 2006, Countrywide’s revenues peaked at $11.4 billion. Id. Countrywide, which had 62,000 employees and assets of $200 billion during the housing boom, barely avoided bankruptcy, when Bank of America acquired it in 2008 with a value of $2.8 billion. Countrywide Financial Corporation, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/countrywide_financial_corporation/index.html?inline=nyt-org (updated Dec. 21, 2011) (last visited Apr. 2, 2012). Mozilo left when Bank of America acquired Countrywide. Id.

associated with allowing society’s wealthiest and best-connected citizens to escape prosecution.

Part III briefly discusses the punishment theories underlying criminal justice. Central to understanding affirmance is recognizing that it goes beyond concepts of retribution or deterrence. Affirmance focuses on the costs and consequences of failing to strip the powerful of their continued wealth and position. Offenders enjoy the rich desserts of their wrongdoing, rather than the “just desserts” of retribution. It is the flip side to deterrence because affirmance encourages both specific criminality and general criminality. It extends beyond both approaches to punishment, especially in the case of well-publicized wrongdoing of the elite class, because the accompanying infamy serves as advertisement for exponential future wrongdoing, while undermining the rule of law as wrongdoers remain in power and are often richly compensated from their crime.

Part IV 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. This meaning is central to the bloated effects of affirmance of elite crime. Whether the individuals’ actions through powerful corporations result in the death of customers or employees, the destruction of an ecosystem, or as considered in this article, the financial ruin of families or countries, under-punishment or failure to pursue criminal charges against these actors expresses meaning about the rule of law, 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 and cynicism.\textsuperscript{21}

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 affirming effect of that decision, particularly in elite crimes. Ignoring affirmance to gain politically expedient resolutions\textsuperscript{22} expresses a social meaning at odds with a cohesive criminal justice system, and thereby undermines the opportunity to positively shape society through law.\textsuperscript{23}


\textsuperscript{23} See Carolyn B. Ramsey, \textit{Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law}, 54 \textit{HASTINGS L.J.} 1641, 1642 (2003) (arguing 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, \textit{Democracy as the Rule of Law, in WHEN GOVERNMENTS BREAK THE LAW} 153, 157 (Austin Sarat & Nasser Hussain eds. 2010). In a democracy, the people define the rules of the game, but may also redefine those rules through voting, legislation, or even constitutional amendment. See id. Moreover, in a democratic society, the rules of the game must
I. The Financial Crisis

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

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.


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

---


30 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 2, 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 26, at 530-31.

31 See FCIC REPORT, supra note 2, 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 2, at 56-57. LTCM had a high-risk leveraging strategy that borrowed $24 for every $1 of investors’ equity, so that when the capital market panicked, the fund lost 80% of its equity ($4 billion) resulting in $120 billion in debt. 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. 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
derivatives trading.\textsuperscript{32} 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{33} 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{34} In 2005, The

\begin{footnotesize}


\textsuperscript{34} 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. See Lichtblau, supra note 11, 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.” Id. 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. 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, From Behind Bars, Madoff Spins His Story, FINANCIAL TIMES, Apr. 8, 2011, available at http://www.ft.com/cms/s/2/a29d2b4a-60b7-11e0-a182-00144feab49a.html?ftcamp=traffic/email/regsnl//memmk/#axzz1JMG01IMV (last visited Apr. 12, 2012) (the firm was founded in 1960 and Madoff claims that the Ponzi scheme first began in the early 1990’s, whereas Irving Picard, the trustee seeking to retrieve assets for Madoff’s victims, asserts that the fraud began as early as 1983). Though Markopolis’ efforts to gain the attention of SEC 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. See Amir Efrati, Top Broker Accused of $50 Billion Fraud, WALL ST. J., Dec. 12, 2008, at A1. By then, the losses had grown to an estimated $50 to 65 billion. Hearing on Regulatory Failures, supra; see also Efrati, supra; Gelles & Tett, supra (placing the value of the Ponzi scheme at $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. See Diana B. Henriques & Jack Healy, Madoff Goes to
*Economist* cover story reported on the worldwide rise in house prices as “the biggest bubble in history,” and urged Americans to “prepare for the economic pain when it pops.”  

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.  

In August 2007, more warning bells sounded when credit markets tightened.  

Prior to their collapses, several of the banks showed stress.  

By the time

---


36 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:  

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 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.  

Id. at 3.  


Paulson approached the President of the United States, George W. Bush, in 2008, financial markets were “on the brink” of collapse, and losses were in the trillions of dollars. To stave off implosion of the American financial markets, banks, investment banks, mortgage companies, insurance companies, and others, received billions of dollars in bailouts for their firms at taxpayers’ expense. One insurance company, responsible for guaranteeing a large amount of subprime mortgages, received $182 billion alone.

---


40 See Richard Frost & Kyung Bok Cho, Asian Stocks Rally, Treasuries Drop on Fannie, Freddie Takeover, BLOOMBERG, Sept. 8, 2008, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aq8tCTiwjJmY&refer=home (last visited Apr. 12, 2012) (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”); PAULSON, supra note 39, at 255-56.

41 See David Goldman, CNNMoney.com’s Bailout Tracker, CNNMONEY.COM, http://money.cnn.com/news/storysupplement/economy/bailouttracker/ (last visited Apr. 12, 2012) (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 extended by that date); Steven A. Ramirez, Subprime Bailouts and the Predator State, 35 U. DAYTON L. REV. 81, 89-90 (2009) (describing the $96 billion effort to bail out government sponsored entities, Fannie Mae and Freddie Mac, and the “Temporary Liquidity Guarantee Program” by which the FDIC guaranteed all bank debt); ANDREW ROSS SORKIN, TOO BIG TO FAIL 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 Christian Plumb, U.S. Drops Criminal Probe of AIG Executives, REUTERS, May 23, 2010, at 22, http://www.reuters.com/article/2010/05/23/us-aig-doj-idUSTRE64L09W20100523 (last visited Apr. 12, 2012). 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, at A15.
While the financial markets careened toward disaster and narrowly escaped total collapse due to taxpayer-funded bailouts, unemployment skyrocketed to near Great Depression levels. Unemployment benefits were extended several times in an effort to address high long-term unemployment rates. Spiraling unemployment rates left homeowners jobless just as low-interest teaser rates on the easy mortgage loans expired and were replaced by higher rates and monthly payments that exceeded the income levels of the mortgagors. 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 homeowners with homes valued below their outstanding mortgage owed. The Mortgage Bankers’ Association warned consumers that walking

---

42 See Plumb, supra note 41. Among those companies that received bailouts, some of it has been repaid. See Goldman, supra note 41.

43 See, e.g., Eleni Theodossiou & Steven F. Hipple, Bureau of Labor Statistics, 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 Apr. 12, 2012) (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 16, 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).


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.

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.

AIG recognized the income from these derivatives without creating any

47 See Roger Lowenstein, Walk Away From Your Mortgage!, N.Y. TIMES, Jan. 10, 2010, at MM15. In May 2010, the CBS news show, 60 Minutes, reported on “strategic defaults” in which borrowers walked away from mortgage obligations when the value of the property falls significantly below the obligations, also known as “being underwater” on one’s loan. 60 Minutes: Mortgages: Walking Away (CBS television broadcast May 9, 2010) http://www.cbsnews.com/video/watch/?id=6470184n&tag=related:photovideo (last visited http://moremoney.blogs.money.cnn.com/2010/04/30/homeowners-abandoning-houses-en-masse/).


50 See FCIC REPORT, supra note 2, at 50 (2011).

A key OTC derivative in the financial crisis was the credit default swap...
reserves for possible losses,\textsuperscript{51} 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. Yet, AIG told investors that it had no material exposure to subprime losses even though it posted $2 billion in collateral to Goldman Sachs to cover losses.\textsuperscript{52}

At the same time that the U.S. government was bailing out the largest banks in America from their high-risk gambles arising from trading in derivatives in the mortgage and sub-prime mortgage markets,\textsuperscript{53} calls to aid homeowners unable to meet their

---

\textsuperscript{51} See FCIC REPORT, \textit{supra} note 2, 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, the seller of the CDS is not required to put aside financial reserves in case of loss as regulated insurers must. \textit{Id.}

\textsuperscript{52} See FCIC REPORT, \textit{supra} note 2, at 268.

\textsuperscript{53} PAULSON, \textit{supra} note 39, 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 Morgan, all received $25 billion; Bank of American received $15 billion; Merrill Lynch, Goldman Sachs, and Morgan Stanley each received $10 billion; Bank of New York Mellon received $3 billion; and State Street Corporation received $2 billion. \textit{Id.} at 364-65. Among the basic terms that each bank CEO signed on to as a condition of the loans, was to “expand the flow of credit to U.S. Consumers and businesses; and to ‘work diligently, under existing programs, to modify the terms of residential mortgages, as appropriate.’” \textit{Id.} at 366. Subsequent events would reveal that the bankers did not diligently work to modify residential mortgage terms, and in some cases, seemed to actively delay or even undermine modification. \textit{See, e.g.}, State of Nevada v. Bank of America Corp., Case No. A-10-631557-BXXV (D. Ct. Clark County, Nevada, Dec. 17, 2010) (Complaint) (also available at
repayments were met with objections from the financial markets that doing so would create a moral hazard, that is, a disincentive to pay their mortgages because owners would hold out hope of a bailout. Moral hazard did not impede the flow of bailout funds to lenders.

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, and the lucrative investment opportunities in the derivatives market. In fact, as of this writing, the bailed-out banking sector sits on nearly $1.6 trillion in excess reserves.


57 See Ramirez, supra note 41, at 97-99.

58 See STIGLITZ, supra note 16, 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).

59 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
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. Rather than contrite, the CEOs of the bailed out corporations gave themselves and their top managers hefty bonuses and “retention grants.”

Not surprisingly, such catastrophic failures of capital management led to calls for criminal investigations into the practices of the financial corporations and the people who ran them. Those who benefitted from creating the subprime mortgage debacle faced residential mortgage bonds because the higher risk associated with those bonds also provides the opportunity for higher yields on the investments).


63 See, e.g., FCIC REPORT, supra note 2; Morgenson & Story, supra note 22; Taibbi, supra note 45.
civil and regulatory fines, yet no major players, nor their firms, have been criminally charged at this time.\textsuperscript{64} Although the financial crisis extended across the globe, and a number of 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.\textsuperscript{65}

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.\textsuperscript{66} Countrywide Financial originated more subprime loans that any other company.\textsuperscript{67} The fees from the easy mortgages granted by Countrywide yielded financial riches for Angelo Mozilo, the former CEO of

\begin{flushright}
\footnotesize
\begin{itemize}
\item \textsuperscript{65} One example is the now-defunct Countrywide Mortgage, absorbed by Bank of America during the crisis. Over 105 years after its founding 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. \textit{See} SIMON JOHNSON \& JAMES KWAK, 13 BANKERS 84-85 (2010). Indeed, in March 2009, Bank of America’s assets were 16.4 % of GDP. \textit{Id.} at 12.
\item \textsuperscript{66} See FCIC REPORT, \textit{supra} note 2 at xxii.
\end{itemize}
\end{flushright}
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.\footnote{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 firm’s announcement of a $388 million write down due to loan losses. \textit{See Ramirez, Lawless Capitalism, supra note 67, ch.7, 11-12 nn.38-47; Ramirez, supra note 67, at 25.}} 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.\footnote{Angelo Mozilo, the former CEO of Countrywide settled a suit accusing Mozilo and two other Countrywide executives of misleading investors brought by the SEC for $67.5 million. \textit{Nocera, supra note 64; No Charges Against Former CEO of Countrywide as Federal Probe Ends, supra note 64. \textit{See also Ramirez, Lawless Capitalism, supra note 67, at ch.7, 11-12 nn.38-47; Ramirez, supra note 67, at 24-25.}} Countrywide, once valued with assets of $200 billion, was acquired by Bank of America in 2008, valued at $2.8 billion.\footnote{See \textit{supra} note 19.}

Executives at the financial firms made millions in salary, perks, fees, and bonuses, while many of the companies they commanded yielded negative shareholder returns.\footnote{\textit{See} \textit{supra} note 19.}

Nearly $17 trillion in household net wealth vanished in the financial crisis, while over two dozen emergency programs were implemented “to stabilize the financial system and to rescue specific firms.” The Attorney General of the United States, Eric Holder, in assuring an audience that the Justice Department is still investigating the crisis, recently defended the lack of criminal prosecutions against banking and financial executives, by suggesting that “unethical and irresponsible conduct, . . . while morally reprehensible—may not necessarily have been criminal.” Morally reprehensible conduct, however, tends to be sanctioned by criminal law, particularly fraud.

The Justice Department appears to be operating under a new policy because even in the very recent past, business leaders went to jail despite a business-friendly administration. Most notably, the George W. Bush Administration addressed fraud by imposing prison sentences. The FCIC as well as Congress found evidence of fraud and

---

See, e.g., M.P. Narayanan et al., The Economic Impact of Backdating of Executive Stock Options, 105 MICH. L. REV. 1597, 1600-01 (2007) (finding that backdating option results in losses of $400 million per firm while executives gained $500,000).

72 See FCIC REPORT, supra note 2, at 375-76, 391 (in addition to the Troubled Asset Relief Program, included among the programs are the Federal Reserve’s Term Securities Lending Facility and Primary Dealer Credit Facility programs, at $483 billion and $156 billion, respectively; money market funding peaked at $350 billion, Commercial Paper Funding Facility peaked at $365 billion; and the Fed’s purchase of agency mortgage-backed securities of $1.25 trillion). Household net wealth lost both from the decline in housing prices as well as the declining value of financial assets. Id. at 391. See also Ramirez, supra note 67, at 1 (2009); Thomas Ferguson & Robert Johnson, Too Big to Bail: The “Paulson Put,” Presidential Politics, and the Global Financial Meltdown, Part I: From Shadow Financial System to Shadow Bailout, 38 INT’L J. POL. ECON. (Spring 2009).


74 See, e.g., Kamelia Angelova, Top 10 White-Collar Criminals in Jail, BUSINESS INSIDER, Jul. 16, 2009, http://www.businessinsider.com/white-collar-criminals-in-jail-2009-7. Former WorldCom CEO Bernard Ebbers, convicted of false financial reporting and fraud is serving 25 years; former Enron CEO Jeffrey Skilling, convicted on securities fraud and other crimes has an expected release date from federal prison in
made referrals to the Justice Department. This article maintains that given the enormous costs of the crisis, imply inexplicable that the Department of Justice remains so docile. The continued failure to impose criminal sanctions affirms white collar misconduct, threatening to lay the seeds for the next crisis.

II. 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 criminal


75 See, e.g., Phil Angelides, Will Wall Street Ever Face Justice?, N.Y. TIMES, Mar. 2, 2012, at A25, available at http://www.nytimes.com/2012/03/02/opinion/will-wall-street-ever-face-justice.html (both the FCIC and the Senate Permanent Subcommittee on Investigations referred potential violations to the Justice Department; for example, the FCIC report contains evidence about Clayton Holdings—and others have relied on this evidence to support claims of fraud and misrepresentation, but the Justice Department has failed to devote appropriate resources or attention to this case or others, in stark contrast to the massive efforts to address the savings-and-loan debacle of the late 1980s); FCIC Report, supra note 2, at xi, 169-70, 187.

76 See, e.g., Interview of Gretchen Morgenson by Chris Martenson, http://www.chrismartenson.com/blog/gretchen-morgenson-wall-street-really-does-enjoy-different-set-rules-rest-us/72774 (Mar. 23, 2012) (quoting N.Y. Times columnist Gretchen Morgenson: “There were 1,100 criminal referrals in the S&L crisis and there were 839 convictions. That is a sizable number and far, far, far more than we have seen. I mean I think I can name one senior level person at a mortgage company who is in jail at the moment.”).

77 MORAN & COOPER, supra note 11, at 10 (“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.”).
have long recognized that legal systems compromise between the certainty of rules and the discretion of “informed” officials based upon particular facts.\(^{78}\) Consequently, the prosecutor is given broad discretion in making criminal charging decisions.\(^{79}\) “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.”\(^{80}\) 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, relationships among supervisors and suspects, or the socio economic status of the offender and her perceived ability to finance a defense. These latter implicit factors are often not readily identifiable in a particular instance (although a bias may be discernible), but the explicit factors provide easy cover for any decision the prosecutor might make. When wealth or power are implicit factors discouraging prosecution, the prosecutor cannot ignore the affirmance effect.

A. Sufficiency of the Evidence

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


\(^{79}\) 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.”).

\(^{80}\) See Erwin Chemerinsky & Laurie L. Levenson, Criminal Procedure: Adjudication 29 (2008).
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 models. Three decision-making models that have been identified as governing prosecutorial choices along the charging continuum, are the legal sufficiency model, trial sufficiency model, and system efficiency model.\(^{82}\)

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 resolve in a plea bargain before trial, and thus will not be tested by the high burden of proving the charged crime beyond a reasonable doubt.\(^{83}\) The risk of a type II error, that is, proceeding with a criminal charge when the defendant is not guilty, is highest with this model.\(^{84}\) 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.

---

\(^{81}\) See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION 164-84 (3rd ed. 2007).


\(^{83}\) Id.

\(^{84}\) “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, http://www.enotes.com/econ-encyclopedia/type-and-ii/errors (last visited Aug. 16, 2011).
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 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.85

The third model, system efficiency, falls in the middle of the continuum, relying on early screening to weed out difficult cases of proof, yet incorporating a strong dose of plea bargaining to some degree less than the legal sufficiency model.86 This mixed model is often employed in urban communities where prosecutors face heavy case loads.87 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.88

---


86 See Jacoby, supra note 82, at 75.


In affirming white collar crimes committed by the rich or powerful, sufficiency of evidence is a likely place to hang the prosecutor’s discretion 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 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.\textsuperscript{89}

Complexity in financial transactions complicates both the 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 objective elements” influencing plea bargaining, such as the “race of the defendant and the victim,” the “socio-economic and immigration status of the defendant,” and “whether the defendant is represented by a public defender or private attorney,” to name a few; Frank Easterbrook, \textit{Plea Bargaining as a Compromise}, 101 YALE L.J. 1969 (1992) (identifying efficiencies typically identified by prosecutors that incentivize plea bargains); F. Andrew Hessick & Reshma Saujani, \textit{Plea Bargaining and Convicting the Innocent}, 16 BYU J. PUB. L. 189, 194-97 (2002) (identifying subjective factors that influence prosecutorial discretion in plea bargaining).

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 mortgage 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.  

Finally, cases such as fraud typically require a high level of mens rea, such as knowing or intentional misrepresentations. The complexity in the organization, from documents to employee relationships, can undermine successful prosecution as the prosecutor must often rely upon circumstantial evidence to prove the mental element of the crime.

B. Case-Specific, Non-Sufficiency Factors

In addition to sufficiency considerations informing the discretion of prosecutors, several case-specific and defendant-specific factors impact the decision-making process. Prosecutors consider the nature of the crime; the gravity of the offense; the history 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.\textsuperscript{91} Considerations of mercy,\textsuperscript{92} excuse,\textsuperscript{93} or justification\textsuperscript{94} may also persuade a prosecutor to decline prosecution rather than risk acquittal or jury nullification.\textsuperscript{95}

Some of these factors tend to favor the elite white collar offender. The nature of financial crimes involve no overt violence, so direct harm is financial and not physical. The history of such offenders and their ties to the community typically feature well-educated, middle-aged suspects with no criminal felony record, who are often pillars of their communities, active in charitable organizations, and generous with the resources of


\textsuperscript{92} See Bumgarner, supra note 87 (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).

\textsuperscript{93} 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.” Wayne R. LaFave, Criminal Law 447-48 (4th ed. 2003); 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, supra, at 448.

\textsuperscript{94} 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, supra note 93, at 447; see, e.g., Tony Dillof, Unraveling Unknowing Justification, 77 NOTRE DAME L. REV. 1547 (2002); Joshua Dressler, New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking, 32 UCLA L. REV. 61 (1984).

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. If the financial scheme was complicated, law enforcement may require the cooperation of the defendant to unravel the scheme to restore order and potentially provide restitution to as many victims as possible. All of these factors may weigh heavily in favor of declining prosecution, and choosing non-criminal alternatives.

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 yield uncertain results due to the high burden of proof and complexity of issues and evidence.

96 See, e.g., Russell Hubbard, Scrushy’s Charitable Donations Continue as Trial Approaches, BIRMINGHAM NEWS, Nov. 18, 2003 (reporting on the potential influence in the Alabama community by the millions of dollars given by the Richard M. Scrushy Charitable Foundation, including 38 organizations in 2003 while its founder, and former CEO of HealthSouth Corp., was facing a jury trial on 85 criminal counts), available at http://www.al.com/specialreport/birminghamnews/index.ssf?healthsouth/healthsouth146.html (last visited Apr. 12, 2012). Scrushy was acquitted of the accounting fraud charges in 2005, but convicted in 2006 for paying $500,000 in campaign contributions to then-Alabama governor, Don Siegelman, for a seat on a hospital regulatory board; Scrushy was resentenced to 70 months imprisonment for that crime in January 2012. See Pearson, supra note 74.

97 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)

98 See, e.g., Mary Kreiner Ramirez, Just in Crime: Guiding Economic Crime Reform after the Sarbanes-Oxley Act of 2002, 34 LOY. U. CHI. L.J. 359, 400 n.219 (2003) (describing Michael Milken’s assistance in the bankruptcy settlement of Drexel, Burnham, & Lambert, unraveling the junk bond market he created while working there, and the consequent reduction in his time served on the sentence of imprisonment from 10 years to about 22 months).
Consequently, the economic reality is often that pursuing an elite crime may draw those resources from dozens of other cases. 99

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, 100 emptied pension funds, 101 and decimated the Houston community. 102 In the financial crisis of 2008, the global economy crashed, unemployment sky-rocketed, and millions lost their homes to foreclosures. 103

99 See also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-76 (2004) (recognizing that prosecutors may also have personal incentives to avoid resource-intensive criminal trials such as lightening their workloads so that they have personal time with families, or enhancing their job successes through negotiated deals that count as wins for the government while avoid the risks of losing at trial and potential associated personal embarrassment, and the costs of preparation necessary to enhance their chances of winning a criminal jury trial).

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

101 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).

102 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).

103 See, e.g., FCIC REPORT, supra note 2, at xv-xvi.
C. **Guidance on Discretionary Decisionmaking**

The operation of federal criminal law is key to combating complex financial crime carried out on a nationwide, even global scale. While there are innumerable federal crimes that are relevant to white collar crime, at its broadest level, federal law gives federal prosecutors wide powers to combat fraud—particularly mail fraud,\(^{104}\) wire fraud,\(^{105}\) bank fraud,\(^{106}\) and securities fraud.\(^{107}\) 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.\(^{108}\) 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.”\(^{109}\)

The first two considerations encompass dual sovereignty, federal priorities, and allocation of limited resources. Although federal laws may be applicable to certain crimes and therefore utilized to bring defendants to justice, often state laws are available to prosecute offending conduct. Dual sovereignty may permit dual prosecutions, but the Department of Justice has a long-standing policy discouraging dual prosecutions and successive federal prosecutions where a prosecution would be based on “substantially the

\(^{104}\) 18 U.S.C. § 1341.


\(^{107}\) 18 U.S.C. § 1348; 17 C.F.R. 240.10b-5 (outlawing fraud in connection with the purchase or sale of securities); 15 U.S.C. § 78ff (imposing up to 20 years imprisonment for violations of rules such as § 10b-5).


\(^{109}\) See id.
same act(s) or transaction(s)” unless there is “a substantial federal interest” that is “demonstrably unvindicated” despite prior state prosecution.110 Moreover, given the breadth of federal laws, the DOJ must prioritize to effectively allocate limited prosecutorial resources.111 Focusing on cases that will serve key federal interests that have not been otherwise vindicated rations those resources. In this regard, a listed item under the DOJ’s strategic goal to “prevent crime, enforce federal laws, and represent the rights and interests of the American people,” is the effort to “combat public and corporate corruption, fraud, economic crime, and cybercrime.”112 Thus, despite the heavy demand of resources to pursue corporate corruption, fraud, and economic crime, the DOJ has identified specifically a substantial public interest in such crime-fighting efforts and its role in representing the interests of the American people. Given the cost to the American public imposed due to fraud in the financial markets during the financial crisis, the return on investment of resources to root out criminal actors is very much in the interests of the public.

110 See U.S. ATTORNEYS’ MANUAL, supra note 12, § 9-2.031. In addition to the above conditions, approval to move forward with a federal prosecution requires approval by the appropriate Assistant Attorney General. Id. The policy is commonly referred to as the “Petite policy,” due to the Supreme Court’s reference to the policy in Petite v. United States, 361 U.S. 529 (1960). Id. Although there is generally no statutory bar to prosecuting an individual in both federal and state court for the same acts or transaction, Congress has expressly prohibited by statute dual prosecutions where there is a “state judgment of conviction or acquittal on the merits” for a narrow set of offenses. Id. (citing 18 U.S.C. §§ 659, 660, 1992, 2101, 2117; 15 U.S.C. §§ 80a-36, 1282).


112 Id. (Goal 2.5).
American people. Moreover, the visible nature and widespread impact of these financial frauds demands prosecutorial attention lest their ubiquitous nature by elite actors imposes the greater cost of undermining the rule of law, driving a stake in the heart of the American people.

With respect to the third consideration, a number of non-criminal alternatives to prosecution have evolved, especially in the white collar crime arena. 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. Many white collar criminal federal statutes provide for or have civil counterparts. Consequently, government agents may choose to file civil suits rather than criminal charges. 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

113 See supra, Part I; see, e.g., FCIC REPORT, supra note 2, at 389-401. In Part V, The Aftershocks, the subtitles of the contents sum up the extensive impact of the financial crisis, especially the losers and winners: Households: “I’m not eating, I’m not sleeping”; Businesses: “Squirrels storing nuts”; Commercial real estate: “Nothing’s moving”; Government: “States struggled to close shortfalls”; The financial sector: “Almost triple [securities industry profits over] the level of three years earlier”. *Id.* at 389, 400.


criminal charges using tools such as deferred prosecution or non-prosecution agreements.\textsuperscript{118} 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.\textsuperscript{119} Although these alternatives 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.

\textsuperscript{118} See Gretchen Morgenson & Louise Story, \textit{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). 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. \textit{See} U.S. ATTORNEYS’ MANUAL, supra note 12, §§ 9-22.010 to 9-22.200 (pretrial diversion program); Jay Martin et al., \textit{Plan Now or Pay Later: The Role of Compliance in Criminal Cases}, ___ U. INT’L L.J. ___ (2010) available at http://www.sequenceinc.com/fraudfiles/wp-content/uploads/2011/03/SSRN-id1737971.pdf at 41, 47 (last visited Apr. 12, 2012) (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, \textit{Outside Counsel; Deferred Prosecution Agreements: Standard for Corporate Probes}, N.Y. L.J., Jan. 31, 2005, at 4; F. Joseph Warin & Jason C. Schwartz, \textit{Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants}, 23 J. CORP. L. 121 (1997). 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. \textit{See} Mary Kreiner Ramirez, \textit{The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty}, 47 ARIZ. L. REV. 933, 944-45, 952-53 (2005). Both parties benefit from resource savings. \textit{Id.} at 953. 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 example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in \textit{USAM 9-28.1000}. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in \textit{USAM 9-28.1100}.” \textit{U.S. ATTORNEYS’ MANUAL, supra}, § 9-22.200.

\textsuperscript{119} See ISRAEL ET AL., supra note 117, at 643-47, 676-77, 679-80.
or in the case of governmental civil actions, it may impose fines without requiring admission of wrongdoing.\textsuperscript{120}

Each non-criminal alternative may exact some recovery of assets from the elites or their companies, but their personal reputations and often their ill-gotten riches remain substantially intact.\textsuperscript{121} Moreover, a small portion of the spoils may be used to further protect their interests in the form of lobbying for preferred legislation,\textsuperscript{122} supporting favored politicians who share their views and are willing to promote their interests, and hiring legal teams to defend their interests before any hostile legal actions can take hold.

\textsuperscript{120} 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.

\textsuperscript{121} See, e.g., supra note 19.

\textsuperscript{122} See, e.g., PBS Frontline, Mr. Weill Goes to Washington: The Long Demise of Glass-Steagall, http://www.pbs.org/wgbh/pages/frontline/shows/wallstreet/weill/demise.html (last visited Mar. 3, 2012) (on file with author) (recounting efforts by Sandy Weill, then-head of Travelers Insurance Company, to lobby Congress, the Federal Reserve, Treasury Secretary Robert Rubin, and then-President Bill Clinton to support and pass legislation that would repeal portions of the Glass-Steagall Act and the Bank Holding Company Act that impeded an intended merger between Travelers and Citicorp (parent company of Citibank). In 1998 and 1999, having gained authority from the Federal Reserve to merge the companies into Citigroup (the biggest corporate merger in history at that time) by promising to divest itself of the Travelers insurance business within the next two years if Congress did not pass legislation allowing Citigroup to retain the insurance business, Weill and John Reed of Citicorp intensely lobbied for regulatory change; in the 1997-98 election cycle, the finance, insurance, and real estate industries targeted $150 million in political campaign donations to Congressional banking committee and other financial services committee members, and spent more than $200 million on lobbying efforts. \textit{Id}. Congress passed the Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 stat. 1338 (Nov. 12, 1999), repealing those provisions of Glass-Steagall and Bank Holding Company Act. \textit{Id}. Treasury Secretary Rubin resigned his post to join Citigroup in October 1999 as a director and chair of Citigroup’s executive committee, days after Clinton administration agreed to support the legislation on October 22, 1999. \textit{Id.}; Mara der Hovenesian, \textit{Citigroup’s Rubin Resigns}, BLOOMBERG BUSINESSWEEK, Jan. 9, 2009, http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db2009019_851357.htm (last visited Mar. 3, 2012) (Rubin reportedly earned about $115 million in his advisory role over the ten years with Citigroup).
Given that the benefits of the elite crimes are the wealth or power acquired, the civil alternatives further affirm the lawlessness and remind others that the criminal law does not always penalize 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,” and may in fact, be modified by United States Attorneys “in the interests of fair and effective law enforcement within the district.” 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. ABA Standards for Criminal Justice promotes


124 See U.S. ATTORNEYS’ MANUAL, supra note 12, § 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”).

125 See U.S. ATTORNEYS’ MANUAL, supra note 12, § 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”).

126 ABA STANDARDS FOR CRIMINAL JUSTICE, 3-3.9(a)-(d).
standards for prosecutors, addressing sufficiency, public interest, and ethical concerns in exercising discretion.\textsuperscript{127}

One ABA standard implicitly imports affirmanence considerations in that it permits declining prosecution “for good cause consistent with the public interest.” By recognizing public interest considerations rightly factor into exercising discretion, the ABA standards implicitly support affirmanence considerations, but fail to affirmatively call attention to them. 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, the public interest is undermined in instances where it would appear that by failing to prosecute, the government is affirming conduct imposing great harm on society through lawlessness by the favored wealthy and powerful. 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

\textsuperscript{127} \textit{ABA Standards for Criminal Justice}, 3-3.9(a)-(d) provides the following:

(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;
(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.”
or failing to pursue criminal investigations of elite crime.\textsuperscript{128} Prosecutors, thus, are ethically bound to consider affirmance because it is central to the public’s interest.

D. Plea Bargaining

The discretion prosecutors exercise on whether to prosecute also pertains to 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.\textsuperscript{129} Resolving a case through a plea agreement may leave some feeling the government could do more.\textsuperscript{130} Given the uncertainty inherent in trial litigation, if the outcome of the trial is anything less than guilty, \textit{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.\textsuperscript{131} Moreover, the resolution is usually considered a “win” for the government.

\textsuperscript{128} See \textit{e.g.}, Morgenson & Story, \textit{supra} note 118 (reporting on declinations policies in the Department of Justice); \textit{supra}, note 49.

\textsuperscript{129} See \textit{Fed. R. Crim. P. 11}.

\textsuperscript{130} See \textit{e.g.}, Jim Carlton, \textit{Ex-EPA Official Faults Probe of BP Alaska Oil Spill}, \textit{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).

\textsuperscript{131} One of the oft-cited purposes of a plea agreement is to provide certainty. See Moran & Cooper, \textit{supra} note 11, at 60. Another justification for plea agreements is a mutually beneficial exchange in terms of
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 the government may resolve the criminal cases without requiring an admission of guilt.\textsuperscript{132}

\textsuperscript{132} If the parties are in agreement and the court is amenable, this can be accomplished in several ways depending upon the jurisdiction, such as through a plea of nolo contendere, an Alford plea (where permitted), 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

\textit{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. \textit{See Ramírez, supra} note 89, at 1007-08 (2010) (proposing a Corporate Crimes Division of the Department of Justice to centralize expertise and resources necessary to address complex litigation associated with corporate and white collar criminality); Darryl K. Brown, \textit{The Problematic & Faintly Promising Dynamics of Corporate Crime Enforcement}, 1 OHIO ST. J. CRIM. L. 521, 527-28 (2004) (discussing the difficulty in detection of criminal activity, the complexity of financial records, and the comparatively overwhelming resources of corporate conglomerates as compared to government resources to fight corporate crime). Thus the hallmark of a white collar crime case is that it will be time-consuming to try. When compared to a simple drug bust or violent offense that can be tried in a day or disposed of by plea agreement without dropping charges, most major corporate and white collar crime prosecutions are likely to significantly reduce the total number of cases disposed of by the office. Thus, this exception to the rule has the potential to swallow the rule. \textit{See U.S. ATTORNEYS’ MANUAL, supra, §§ 9-22.000, 9-28.200 (Principles of Federal Prosecution of Business Organizations, General Considerations of Corporate Liability, respectively).}
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.

Although a plea is often superior to declination in terms of expressing community disapproval, criminal prosecution is the most powerful tool society has to address very costly antisocial behavior.

---

133 The U.S. Attorney’s Manual offers instruction for plea bargaining. See U.S. ATTORNEYS’ MANUAL, supra note 12, 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 “[t]hat is the most serious readily provable charge consistent with the nature and extent of [the defendant’s] 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, Principles of Federal Prosecution of Business Organizations, § XIII (Dec. 12, 2006) available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf (hereinafter McNulty Memorandum) (last visited Apr. 12, 2012); Press Release 06-828, Dep’t of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006).
E. Ambiguity in Declination Obscurs Implicit Motivations

"[T]he power to be lenient is the power to discriminate."134 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.’"135 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 evidence exists.”136 Moreover, such discretionary power may hinge “unjustifiably on the relative weakness or strength of the networks to which perpetrator and victim belong.”137

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 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. 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 Amy Schofield & Linda Weaver, Health Care Fraud, 37 AM. CRIM. L. REV. 617, 621 (2000) (describing provisions applicable to healthcare providers and suppliers that could lead to exclusion or debarment from federally funded programs); Massey Firm to Plead Guilty in Mine Deaths, CHARLESTON GAZETTE, Dec. 23, 2008 (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).

134 LAFAVE ET AL., supra note 79, at 683.

135 Id.; Thurman Arnold, Law Enforcement—An Attempt at Social Dissection, 42 YALE L.J. 1, 17 (1932).


137 See Holmes, supra note 12, at 126.
Little guidance or limits exist regarding a decision to refrain from prosecuting the powerful.

1. **Unlimited Discretion to Decline Prosecution**

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.\(^{138}\) The U.S. Supreme Court has recognized prosecutorial freedom in exercising discretion, placing limits on that discretion in extremely limited circumstances.\(^{139}\) 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;\(^{140}\) or selective or discriminatory enforcement in violation of the equal protection clause.\(^{141}\) Beyond such specific and identifiable instances of review of prosecutorial discretion for violations of constitutional protections,

\(^{138}\) See, e.g., In re Dean, 527 F.3d 391, 395-96 (5th Cir. 2008) (denying standing of victims to challenge plea).

\(^{139}\) 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).

\(^{140}\) 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 bringing 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).

\(^{141}\) 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 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).
courts have identified the separation of powers doctrine in declining interfering with
prosecutorial discretion.¹⁴² The Supreme 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.”¹⁴³ 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.

2. **Networks and Revolving Doors**

One cannot ignore the impact of the “revolving door” of private business leaders
who cycle through government leadership positions and back into private businesses after

---

¹⁴² LAFAVE ET AL., supra note 79, 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). 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.. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIRCUIT REV. 1, 12-13 (2009); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 210 (1969) (criticizing the court’s reasoning in United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), and observing that “more than a hundred Supreme Court decisions spread over a century and three-quarters will have to be found contrary to the Constitution” if the judiciary is barred from reviewing executive decisions). See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15-16 (1994) (historical accounts suggest that the U.S. Constitution did not compel exclusive executive control over prosecutors).

¹⁴³ 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.
relatively short terms. Prosecutors, like most government agents, do not expect to spend their entire careers in the government sector. If one is a political appointee, the length of service is marked, and the employee may wish to return to a prior position or move forward into the private sector utilizing their government service-gained expertise. Conflict-of-interest rules may place some restraints on the employee or former employee. Often such rules have a limited time period, but they will not necessarily provide the transparency necessary for public confidence, especially when the discretionary activities encompass a broad range of considerations, such as prosecutorial discretion provides. Moreover, if government leaders choose to appoint industry

144 See, e.g., Richard W. Painter, Bailouts: An Essay on Conflicts of Interest and Ethics When Government Pays the Tab, 41 McGeorge L. Rev. 131, 140-43 (2009) (reviewing a history of revolving door appointments from the banking industry, including the two ethics waivers Henry Paulson received as Secretary of the U.S. Treasury Department, allowing him to participate in matters affecting Goldman Sachs, his former employer).


146 President Barack Obama extended the time frame from one year to two years. See Paltrow, supra note 20 (reporting that the extended two year conflict-of-interest period for U.S. Attorney General Eric Holder and DOJ Criminal Division Chief Lanny Breuer expired in the spring of 2011).

147 See, e.g., Paltrow, supra note 20 (reporting that while U.S. Attorney General Eric Holder and DOJ Criminal Division Chief Lanny Breuer were partners at Covington & Burling, the firm’s clients included Bank of America, Citigroup, JPMorganChase, Wells Fargo, and Freddie Mac, and provided legal opinion
leaders who may have violated the laws they are now hired to oversee, it is difficult to believe that such employees will not consider their own risk of liability in making decisions about pursuing regulatory investigations or recommendation actions against others in the industry who engaged in similar conduct to the appointee.\textsuperscript{148}

3. \textbf{Unaccountable Discretion}

Prosecutors are not required to identify their reasons for declining prosecution.\textsuperscript{149} Information obtained through grand jury proceedings is secret and only available to the public in limited circumstances.\textsuperscript{150} 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

\textsuperscript{148} See, \textit{e.g.}, Andrew Ross Sorkin, \textit{Revolving Door at S.E.C. is Hurdle to Crisis Cleanup}, \textit{N.Y. TIMES}, Aug. 1, 2011, at B1 (reporting that Adam Glass, who joined the SEC two years ago and is now co-chief counsel, previously served as outside counsel to a major New York hedge fund that made billions shorting the subprime mortgage market, and in one widely reported derivative deal (termed “Abacus”), the hedge fund was permitted to select some of the transactions that formed the basis of Abacus, intending to short the deal—that is, betting that the deal would fail; the firm paid $550 million to settle the case with the SEC, without admitting or denying guilt).

\textsuperscript{149} See, \textit{e.g.}, Letter from Brian A. Benczkowski, Assistant Deputy Attorney General, U.S. Dep’t of Justice, Office of Legislative Affairs, to Congressmen Bart Stupak & John D. Dingell (April 3, 2008) (responding to their inquiry about BP plea agreements by advising “about relevant Department of Justice policy” and explaining the many considerations that factor into the exercise of prosecutorial discretion in negotiating plea agreements, but refusing to “disclose non-public information about . . . prosecutorial decisions” in the case).

\textsuperscript{150} See, \textit{e.g.}, \textit{Fed. R. Crim. P. 6(e)}. The purpose of secrecy is not to shield the prosecutor, but rather to protect against witness tampering or influencing grand jurors, encouraging testimonial forthrightness, reducing likelihood of flight by those being investigated, and protecting those who are investigated but exonerated from negative consequences. See \textit{WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 8.5(a)} (5th Ed. 2009).
criminal charges cannot be adequately detected or isolated. When civil alternatives to
criminal prosecution are factored into the decision, 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.

Today, many corporations have become conglomerates wielding both political and
economic power. Multinational corporations have driven the wave of globalization,
promoting free-trade agreements that permit the free flow of goods and services, while allowing these entities to lobby for and take advantage of favorable legal conditions.\(^1\)\(^5\)

With threats of corporations that are “too big to fail”\(^1\)\(^6\) or claims that charges against a corporation could bring thousands of job losses to innocent employees,\(^1\)\(^7\) there is

---

United on Elections and the Integrity of the Legislative Process, [http://www.citizen.org/12-months-after](http://www.citizen.org/12-months-after) (last visited Apr. 12, 2012). 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.


\(^1\)\(^5\) See FCIC REPORT, supra note 2, at xviii, 52-56 (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); HARTLEY, supra note 154, at 14 (regarding favorable legal conditions); U.S. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTORS, INTERNATIONAL TAXATION: LARGE U.S. CORPORATIONS AND FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS 4 (Dec. 2008) (reporting that 83 of the 100 largest U.S. corporations have subsidiaries in tax havens or international financial privacy jurisdictions). See, e.g., Press Release, Remarks by the President on International Tax Policy Reform (May 4, 2009), available at [http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform/](http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform/) (last visited Apr. 12, 2012) (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 overseas tax havens”).

\(^1\)\(^6\) See SORKIN, supra note 41; STIGLITZ, supra note 16, at 40 (2010); JOHNSON & KWAK, supra note 65; ROGER LOWENSTEIN, THE END OF WALL STREET 252, 247 (2010).

\(^1\)\(^7\) 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 ISRAEL ET AL., supra note 117, 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)
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.\textsuperscript{158} Certainly when charges are brought against a 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.\textsuperscript{159} so someone has broken a criminal law. In instances where a corporation negotiates a deferred prosecution agreement, 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

(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. \textit{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. \textit{See} Lawrence D. Finder & Ryan D. McConnell, \textit{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. \textit{See} Ainslie, \textit{supra,} at 107-08; Finder & McConnell, \textit{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, \textit{supra,} at 107. Thus, by the time Arthur Andersen was charged with accounting fraud related to Enron, the firm had demonstrated actionable misconduct in on other accounts and in other locations, suggesting a deficit in executive ethical leadership implicating a broader firm culture of misconduct.

\textsuperscript{158} \textit{See} Ramirez, \textit{supra} note 118, at 974-76 (observing that removing management that engaged in, or failed to stem, misconduct is one means of salvaging a firm and protecting investors and innocent employees).

\textsuperscript{159} 1\textsc{kathleen f. brickey, 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).
deals demonstrate certitude that criminal charges could have, or more to the point, *should have* been brought against individuals.  

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 affirmance effect of declining prosecution.

---


The underlying assumption of th[e] 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* Ramirez, *supra* note 98, 372n.72 (describing the difficulty in reaching a consensus as to what conduct should be included in the term “white collar crime”).

52
Nevertheless, the social meaning of such declinations persists in elite crimes, affirming the misconduct and undermining the rule of law.

III. **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.\(^{161}\) 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.\(^{162}\) The theories fall into two broad categories: retributive and utilitarian reasons.\(^{163}\) Retributive theories are backward-looking asserting the need for affirmative punishment deserved by the

---

\(^{161}\) 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.”).

\(^{162}\) *Id.* at 410 (discussing why it is difficult to have only one theory of criminal law).

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.

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.

---

164 See Joshua Dressler, Understanding Criminal Law, § 2.03, at 16-17 (4th ed. 2006); HONDERICH, supra note 10, 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.

165 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 . . . .”).

166 HONDERICH, supra note 10, 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”).

167 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”).

168 Bentham, supra note 8 (“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 10, at 75 (2006).

Rehabilitation permits society to focus on the characteristics of the individual offender to teach the law-breaker to be a better member of society 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 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.

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 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

170 Id. at 22-23.
171 Id. at 20.
172 Id. at 21.
174 HONDERICH, supra note 10, at 20-29 (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.
175 KANT, supra note 9, 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 . . . .”).
differences. The retributivists accept criminal punishment pursuant to the justifications they find acceptable, while the utilitarians accept punishment for its prospective impact on society.

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

---

176 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).

177 But see supra 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”).

178 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 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. 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”). 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
disapproval, and the law-breaker and other would-be law-breakers can see the seriousness society places on such misconduct. Affirmance is also a utilitarian approach to criminal justice in that it too is forward-looking, but rather than a theory of punishment, affirmance is a theory of anti-punishment or failure to punish. 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 forces of the rich and powerful and thus encourages lawless complicity, or simply, lawlessness.

Affirmance raises concerns not fully addressed under the deterrence theory of punishment. When the richest and most powerful elements of society enjoy 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.179 Similarly, when the most powerful may act with impunity to enrich themselves at the expense of society in
toward women in particular, but likely violence in general would be encouraged. Moreover, the message of women’s diminished worth would be stark. But see Robinson, supra note 177, at 3-6 (asserting the “dangerousness of the unarticulated ‘laundry list’ approach” of general purposes of punishment).

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 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.

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 the offenders’ criminal profits enhance their economic power, affirmance promises far more costs in the future. Traditional notions of deterrence fail to account for the impact of dangerously distorted

---

180 Although this article’s focus is on the financial crisis of 2008, tragedies such as the Deepwater Horizon BP oil rig explosion and massive oil spill in the Gulf of Mexico in 2010 drew worldwide attention both for the well-publicized negligent conduct of BP, Transocean, and Halliburton, the depth of the harm, killing 11 workers in the explosion and causing environmental destruction in the Gulf of Mexico and communities on its shores, as well as the financial costs for clean-up and losses to businesses in the vicinity. See, e.g., 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 (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (last visited Apr. 12, 2012). The commission concluded that the companies took a series of hazardous steps which appeared to be motivated by economic concerns, and noted regulatory failures in oversight. Id.
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. Law, and punishments for breaches of law, convey
social meaning.\textsuperscript{181} As discussed below, failure to punish conveys meaning as well—and
one of those meanings, is affirmation.

IV. \textbf{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,\textsuperscript{182} 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.\textsuperscript{183} Criminal laws empower the government to label and punish individuals in a

\begin{footnotesize}
\footnote{181}{See Lessig, \textit{supra} note 151, at 943, 951-52. 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.” \textit{Id.}}

\footnote{182}{See, \textit{e.g.}, MICHELLE ALEXANDER, \textit{THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF
COLORBLINDNESS} 2, 4 (2010) (discussing the loss of voting rights, employment opportunities, and other
elements of disempowerment arising from criminal conviction, in the specific context of race).}

\footnote{183}{See HART, \textit{supra} note 178, at 6. Because of the social meaning attached to labeling one a criminal, an
alternative for those entities with financial means is to invest in lobbying politicians to deem common
corporate misconduct as “regulatory violations,” thereby avoiding the “criminal” label. See, \textit{e.g.}, CLINARD,
\textit{supra} note 160, at 22; SUTHERLAND, \textit{supra} note 160, at 13-14, 45-53; George Hoberg, \textit{North American...}
meaningful way, and constrain individuals from breaching these laws. The strength of a 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.”

A. Contesting the Criminal Label

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.

---

*Environmental Regulation, in Changing Regulatory Institutions in Britain and North America* 305 (G. Bruce Doern & Stephen Wilks, eds., 1998) (discussing changing labels to replace environmental “crime” with permits or licenses to pollute).

184 See Lessig, *supra* note 151, 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. Snider, *supra* note 160, at 49, 55. See also FCIC REPORT, *supra* note 2, 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 expended $2.7 billion in reported federal lobbying expenses; individuals and political action committees in the sector made more than $1 billion in campaign contributions.” *Id.* at xviii, 55.

185 See Lessig, *supra* note 151, at 960.

186 Lessig, *supra* note 151, at 960-61 (emphasis added).
At common law, traditional felony crimes, such as murder and rape, were described as “*malum in se,*” that is, “wrong in itself.” Such crimes were recognized as inherently evil. Other offenses, typically misdemeanors at common law, were described as “*malum prohibitum,*” or “prohibited evil.” The term describes offenses that are illegal not because they are inherently immoral, but rather because the law expressly defines the offense as illegal. Regulatory offenses are often described as malum prohibitum because they “regulate” society rather than prohibit immoral conduct. Many regulatory offenses are consequently not treated as criminal offenses, but rather as violations of law. If a criminal label is attached to such an offense, it may be a misdemeanor, and the punishment is likely to be a fine or perhaps minimal jail time.

Crimes such as drug dealing are arguably regulatory in nature, in that they regulate society. Most illicit drugs outlawed by current U.S federal criminal laws, were not criminalized initially. Nevertheless, drug dealing is a felony under federal law and after thirty years of the “war on drugs,” carries a social meaning of inherent immorality today. Likewise, corporations were not subject to criminal laws at first because they are

---


188 *Id.*

189 Coca-Cola was named after one of its key original ingredients—cocaïne. MARK PENDERGRAST, FOR GOD, COUNTRY, AND COCA-COLA: THE DEFINITIVE HISTORY OF THE GREAT AMERICAN SOFT DRINK AND THE COMPANY THAT MAKES IT 29-30 (2000).

190 *See* ALEXANDER, *supra* note 182, at 49. In 1982, only 2% of the U.S. population believed that drugs were the most important problem in the United States, but with the “war on drugs” came a dramatic increase in funding to fight the war (from $33 million in 1981 to $1,042 million in 1991), and drug offense related incarcerations soared from roughly 41,000 people in 1980 to about 500,000 people 30 years later. *Id.* at 49, 59.
legal entities rather than humans. Yet, unlike drug crimes, the prosecution of corporations and their corporate leaders for economic crimes has been persistently attacked as anti-business and as waging class warfare. The white collar defense bar has been persistent in its criticism of the extent of federal prosecution of corporations and their executives, with some notable success. The Principles of Federal Prosecution of Business Organizations requires prosecutors to consider the potential impact of a prosecution on investors and employees, and to consider non-criminal alternatives to prosecution for both the corporation and the individual. Drug dealers do not warrant such consideration.

---

191 See, e.g., DAVID O. FRIEDRICHs, TRUSTED CRIMINALs: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 57-58 (2d ed. 2004) (describing the historical development of the N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493-94 (1909) (rejecting the common law view that corporations are not subject to criminal laws).

192 See, e.g., supra note 157 (discussing Arthur Andersen case); John S. Baker, Reforming Corporations Through Threats of Federal Prosecution, 89 CORNELL L. REV. 310, 338 (2004) (“As the trial of Arthur Andersen indicates, however, ‘white-collar’ guilty pleas are suspect . . . [because] it is difficult to know how many guilty pleas reflect actual guilt as opposed to perjured pleas proffered to lessen the time, expense, and anxiety of the ordeal.”).

193 See, e.g., Baker, supra note 192, at 351 (asserting that executives who “took actions on behalf of corporations [and their executives] that appeared to be ‘very bad,’ even though not criminal,” are “easily demonized” because the “media obsession” with “their luxurious lifestyles make it easy to caricature them as greedy people who achieved their elite status through wrongdoing rather than hard work”).

194 See U.S. ATTORNEYS’ MANUAL, supra note 12, §§ 9-28.300 (prosecutors should consider “collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution”); § 9-28.1100 (civil and regulatory alternatives may be appropriate in certain cases: “Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct.”). Non-Criminal Alternatives to Prosecution are also a consideration under the Principles in deciding whether to prosecute individuals, §§ 9-27.250 (“In weighing the adequacy of such an alternative in a particular case, the prosecutor should consider the nature and severity of the sanctions that could be imposed, the likelihood that an adequate sanction would in fact be imposed, and the effect of such a non-criminal disposition on Federal law enforcement interests.”).
Even in the face of a potential global financial meltdown triggered by the reckless practices of investment banks, mortgage brokerages, and insurance giant AIG, Treasury Secretary Paulson resisted efforts to impose regulations that would limit future misconduct.\textsuperscript{195} Key provisions of the Dodd-Frank Act\textsuperscript{196} imposed to protect against future misconduct have been vigorously attacked as anti-business, and have been resisted from within the government as well as from the strongest players in the financial markets.\textsuperscript{197} Whether the success of contesting the regulation and prosecution of elite actors in the financial market meltdown is a consequence of a persuasive message, or sheer financial control of the message and electoral funding, is disputed. Nevertheless, in a political climate where being a politician tough on crime has been a consistent winner, the pullback from pursuing fraud claims against the corporate titans who personally benefitted from the reckless policies they employed at the major financial institutions, is discordant.

\textbf{B. \hspace{20pt} Fair Play and the Negative Message of Inequality}

Perception of fairness in the law is critical to compliance with the law.\textsuperscript{198} Indeed, the perception that one is foolish for complying with the law, when others flagrantly

\begin{footnotesize}
\textsuperscript{195} See, e.g., \textsc{Paulson}, \textit{supra} note 39, at 260 (Paulson’s first-person account describing his efforts “to resist pressure on [executive] compensation restrictions” at companies receiving government bailout money ).


\textsuperscript{198} See \textsc{Paul H. Robinson} \& \textsc{John M. Darley}, \textit{Justice, Liability and Blame: Community Views and the Criminal Law} 5-6, 201-03 (1995); \textsc{Tom R. Tyler}, \textit{Why People Obey the Law} 25 (1990).
\end{footnotesize}
disregard it without consequences undermines the retributivist’s moral imperative to comply with law. Animal behaviorists have observed in a number of species an evolutionary fair play at work. Confidence is diminished when members of the group perceive that the rules are unfairly applied. Studying the same social behaviors in these empathetic animals exemplifies that the survival value of “fair play” in evolution, as it developed early on the evolutionary scale, is widespread and prominent. 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

---

199 Dan M. Kahan, Social Influence, Social Meaning, and Deterrence, 83 VA. L. REV. 349, 358 (1997). 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 or her perception of the expected punishment for evasion.” Kahan, supra, at 354; see Harold G. Grasmick & Donald E. Green, Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980). Thus a taxpayer may conclude 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. Kahan, supra, at 354. Indeed, an announced crackdown on the unrepentant tax cheat has been shown to have the unexpected effect of less compliance rather than more compliance, as the announcement confirms 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. See Sheffrin & Triest, supra note 17, at 212-13.

200 See DeWAAL, supra note 17. 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. Animals recognize when one of its members refuse to observe the cultural rules of fair play of the clan and then they work to communicate to the rebel to either conform or exit the group. Id.

201 See DeWAAL, supra note 17; Frans DeWaal, How Animals Do Business, 2 SCIENTIFIC AMERICAN, Apr. 2005, at 72-79.

202 See DeWAAL, supra note 17, at 4-7. But see Joseph Henrich et al., Markets, Religion, Community Size, and the Evolution of Fairness and Punishment, SCIENCE, Mar. 19, 2010, at 1480-84 (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”).
in market growth and other aspects of a complex society. Beyond the social meaning attached to why we punish, is the meaning attached to who gets punished and who does not.

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 murders another individual, lynchings were permissible forms of community activity in 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 for criminal acts committed before

203 See Henrich et al., supra note 202, at 1480-84. 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 DEWAAH, supra note 17, 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.

204 See ROBINSON, supra note 177, at 2 (“each purpose of punishment when used as a distributive principle gives a quite different distribution of punishment”).

205 Kahan, supra note 199, at 350-51.

206 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 199, at 353-54. Professor Kahan identifies looting and riots as other mob activities that draw individuals without prior criminal records, or with differing socio-economic backgrounds from those who live in the affected area. Id.
witnesses from 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 the conduct was culturally bound up in the community, and 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,\(^{207}\) permits law enforcement to express the message that neighborhoods have a color, where some individuals belong and others do not.\(^{208}\) 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 violently than in the past, but as Professor Bennett Capers observes, 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.”\(^{209}\)

---

\(^{207}\) *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that law enforcement may stop and question individuals under the lesser standard of reasonable suspicion).


\(^{209}\) *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.”).
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.210 Every citizen contact with the discretionary features of the criminal justice system strengthens or erodes the meaning of a legally ordered society.211 When the conduct rises far beyond the reasonable suspicion necessary for law enforcement to stop and make inquiry in the moment, and instead amounts to widespread reports of fraud for which the prosecutor is able to make a carefully considered decision, the social meaning in choosing to forgo prosecution of elite crimes is unmistakable.

C. Modeling Subversion of the Rule of Law

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.212 Social learning theory posits that modeling—learning by observation and imitation—occurs after the observer is exposed to a certain behavior.213 First, the observer must have the capacity to understand the significant features of the behavior, such as consequences.214 Second, in order to reproduce the behavior, the observer must encode the observed information into long-term memory for later retrieval if they are


211 Brown, supra note 13, at 1306-07.

212 See BANDURA & RIBES-INESTA, supra note 18, at 24-28; Kahan, supra note 199, at 354.


214 See id. at 24-28.
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.

For those benefitting from excessive fees generated through subprime mortgage lending and risky credit default swaps, disregard for longstanding rules and practices

---

215 See id. at 24-28.

216 See id. at 24-28.

217 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.

218 See Brian Mullen et al., Jaywalking as a Function of Model Behavior, 16 PERSONALITY & SOC. PSYCHOL. BULL. 320, 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 199, at 354-55 & n.24 (citing studies on increased instances of mob violence and looting).

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.\textsuperscript{220} Once the bad behavior became so wide-spread and the monumental financial costs of that behavior manifested in the financial crisis of 2008 the federal government focused its attention on stopping the panic in the financial markets rather than punishing the initiators of the conduct.\textsuperscript{221} 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.\textsuperscript{222} With so many actors misbehaving, those who most benefitted financially deflected responsibility by laying blame at the doors of others—such as the credit-rating agencies and the regulators.\textsuperscript{223} Nevertheless, the failure to pursue these models of bad behavior further affirms their misconduct.

\textsuperscript{220} See Floyd Norris, \textit{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. \textit{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. \textit{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.” \textit{Id. See also STEVEN A. RAMIREZ, supra note 67, at ch.7, 11-12 nn.38-47; Ramirez, supra note 67, at 24-25 (describing the reckless loan practices at Countrywide and the role that its CEO, Angelo Mozilo, played in the its demise).}

\textsuperscript{221} See PAULSON, \textit{supra} note 39, 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”).

\textsuperscript{222} 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 unloading the toxic assets. \textit{See PAULSON, supra} note 39, at 260-61.

\textsuperscript{223} \textit{See, e.g.,} Subprime Lending and Securitization and Government-Sponsored Enterprises (GSEs): Hearing Before Financial Crisis Inquiry Commission 2-4 (April 1, 2010) (Statement of Charles Prince, Former Chairman and CEO of Citigroup Inc.) [available at
Legislatures may authorize the use of criminal sanctions in statutory language, but the use of such sanctions depends upon their application by administrators of the law. 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.” If laws are perceived as being applied unfairly so that persons of wealth or power are permitted to operate above the law, the rule of law is undermined.

http://www.huffingtonpost.com/2010/04/08/financial-crisis-commissi_n_529841.html] (asserting the “precipitous nature” of the “dramatic downgrading” by the rating agencies of “widespread holding of securitized assets” . . . led to the general recession rather than excessive risk-taking by the banks); see also Mark J. Flannery et al., Credit Default Swap Spreads as Viable Substitutes for Credit Ratings, 158 U. PA. L. Rev. 2085, 2089-94 (2010) (describing the evolution of credit rating agencies in the United States, the conflicts of interest undermining the credibility and integrity of the ratings system that arose from regulatory dependence on credit ratings and issuer-based fees for ratings, and the consequential slow response by the private rating agencies to negative information regarding rated companies that have been identified as failing to alert investors to the underlying risks of companies involved in the 2008-2009 financial crisis).


225 See Holmes, supra note 12, at 123.

226 The “rule of law” is a general notion defined in a myriad of ways, some of which are contradictory. See Horwitz, supra note 23, at 153-56. Horwitz cites numerous examples by authors both acknowledging the differences in definition, as well as contrasting authors’ definitions. 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 the availability of impartial legal procedures.” See Richard H. Fallon, Jr., “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.

(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.”
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—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.

(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.

227 See Ramirez, supra note 67, at 29-30 (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 Hous. 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); Narayanan, supra note 71, at 1600-01 (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).
D. **Expressing the Message of Affirmance in Elite Crimes**

In one of the earliest cases imposing imprisonment sentences on individuals engaged in economic crimes,\(^{228}\) “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.’”\(^{229}\) The U.S. Attorney General characterized the defendants’ conduct even more starkly, as “a serious threat to democracy.”\(^{230}\) 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.\(^{231}\)

When a prosecutor elects against criminal prosecution, the general public does not have internal access to that decision, and consequently cannot fairly assess whether the cost of moving forward with a criminal prosecution is outweighed by the benefits of a

---

\(^{228}\) United States v. Westinghouse Elec. Corp., 1960 Trade Cas. 76,753 (E.D. Pa.) (often referred to as the “Electrical Equipment Antitrust Cases”).

\(^{229}\) Ball & Friedman, supra note 224, at 198 (citing N.Y. Times, Feb. 7, 1961, at 26).

\(^{230}\) Id. (citing a television interview with Attorney General Robert Kennedy (quoted in J. Fuller, The Gentlemen Conspirators 176 (1962))).

decision to drop the case, move forward with a civil case instead, impose a regulatory fine, or negotiate a settlement short of full prosecution, given the multitude of considerations factoring into the decision. Thus, the prosecutor must be aware of the long-term consequences of affirming crime including its social meaning.

Perception becomes reality in the long run. Elites who violate the law and benefit greatly from those violations without incurring personal punishment model bad behavior for others. Observers perceiving a lack of fair play, will assess for themselves whether the costs outweigh the benefits of adhering to the rule of law.232 Ironically, those who follow the law may actually be at a competitive disadvantage relative to those who break the law because they forgo corrupt profits.233 The inequality in profits and market power due to illegitimate practices causes the bad actors to drive out the good.234

232 See Sorkin, supra note 41, at 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. Id. at 28, 144.

233 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”).

234 See id. at 40 (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, supra note 2, at xxv, 147-50 (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, 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%.” Id. at 148. In 2006, Moody’s rate 30 mortgage-related securities as triple-A (its highest rating) every day; in early 2010, only 6 private-sector companies received the triple-A rating from Moody’s. Id. at xxv.
the social order ensues as each actor pursues misconduct due to competitive pressures.\textsuperscript{235} Crime becomes socially acceptable, even socially compelled, much like the lynch mobs of the past.\textsuperscript{236}

The top executives who manage these corporations sit in particularly powerful seats because they direct the financial heft of the corporations they govern.\textsuperscript{237} In the financial crisis of 2008, the federal government bailed out financial institutions before regulators had an opportunity to assess the viability of the institutions and before investigators could assess whether fraudulent conduct had led to the crisis. Professor Bill Black, a senior regulator\textsuperscript{238} during the Savings and Loan debacle of the late 1980s,

\begin{itemize}
\item \textsuperscript{235} 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); George Akerlof, The Market for “Lemons”: Qualitative Uncertainty and the Market Mechanism, 84 Q.J. ECON. 488 (1970).
\item \textsuperscript{236} See, e.g., Peter Coy, Paul M. Barrett, & Chad Terhune, Mortgage Mess: Shredding the Dream, BUSINESS WEEK, Oct. 25, 2010, http://www.businessweek.com/print/magazine/content/10_44/b4201076208349.htm (last visited Apr. 12, 2012) (reporting on rampant fraudulent conduct in mortgage loans and foreclosures, as well as the 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.” \textit{Id.} See also Norris, supra note 220 (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”).
\item \textsuperscript{237} See Ramirez, supra note 67, at 1.
\end{itemize}
examined the risk of moral hazard, or adverse incentives, in the financial markets.\textsuperscript{239} Nobel Laureate Joseph Stiglitz has also pointed to the moral hazard that attaches to bank bailouts.\textsuperscript{240} 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.\textsuperscript{241} Typically, one consequence would be replacing management while shareholders faced losing their equity interest, a risk recognized by the shareholders when purchasing shares.\textsuperscript{242} In his book,\textit{ Freefall}, Professor Stiglitz asserts that the 2008 government bailout of the financial industry, like the bailouts of the 1980s, 1990s, and 2000s, signal the banks that they need not worry about risk management because the government will “pick up the pieces.”\textsuperscript{243} This assurance permits the least prudent bankers to continue or to repeat their reckless practices.\textsuperscript{244}

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

\textsuperscript{239} See \textit{BLACK}, supra note 233, 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.”).

\textsuperscript{240} \textit{STIGLITZ}, supra note 16, at 16-17, 39.

\textsuperscript{241} \textit{Id.} at 116-17.

\textsuperscript{242} \textit{Id.} at 121.

\textsuperscript{243} \textit{Id.} at 135. In the bank bailouts of 2007-09, the government opted to avoid conservatorship for those too big to fail. \textit{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 functioning no matter what.” \textit{See FCIC REPORT}, supra note 2, at 60-61.

\textsuperscript{244} \textit{STIGLITZ}, supra note 16, at 118, 135; \textit{see FCIC REPORT}, supra note 2, at 61.
generous bailouts in 2007-09, but also risks “our sense of fairness and social cohesion in the long run.”\textsuperscript{245} 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.\textsuperscript{246} 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.”\textsuperscript{247}

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.\textsuperscript{248} As AIG’s financial situation faltered, it brought Greenberg back as its chairman emeritus to draw on Greenberg’s relationships with wealthy

\textsuperscript{245} STIGLITZ, supra note 16, at 39.

\textsuperscript{246} Id. at 39, 118.

\textsuperscript{247} Id. at 118.

\textsuperscript{248} 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 41, 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 41 (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.”).

76
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.\textsuperscript{249}

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.\textsuperscript{250} 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.\textsuperscript{251}

Notably, Joseph Cassano, who headed up AIG Financial Products Corp. and is credited with pushing AIG into underwriting credit default swaps,\textsuperscript{252} was one of those thirteen employees who had previously worked for Drexel Burnham Lambert during Michael Milken’s reign of the junk bond market.\textsuperscript{253} After Sosin left AIG Financial

\textsuperscript{249} 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 about $860 million, so that it could announce that Greenberg was returning to AIG as its chairman emeritus. See SORKIN, supra note 41, at 272, 280. \textit{Id.} at 280.

\textsuperscript{250} See SORKIN, supra note 41, at 155-56; FRIEDRICHS, supra note 191, at 164-65. Milken plead guilty to six felony charges for securities fraud and conspiracy. FRIEDRICHS, supra, at 164.

\textsuperscript{251} See SORKIN, supra note 41, at 155-56.

\textsuperscript{252} See \textit{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. \textit{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. \textit{Id.} at 161-62.

\textsuperscript{253} See \textit{id.} at 155-56.
Products in 1993, Cassano remained and was promoted to chief operating officer. 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


256 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 Apr. 12, 2012). 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 2, 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

257 See FCIC REPORT, supra note 2, at 272.

258 See id. at 272.

began to hit and gave rise to the need for the company to report a multibillion dollar loss.260

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,261 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.262

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.263 A group of banks had collectively created an organization, known as

260 See Voreacos & Smith, supra note 255.

261 See Nocera, supra note 64; Matthew Karnitschnig et al., US to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up, WALL ST. J., Sept. 17, 2008, at A1.

262 Efreti, supra note 64 (reporting that federal prosecutors had focused the investigation on Joseph Cassano, head of AIG’s London-based Financial Products unit). New York Federal Reserve Chairman Geithner reportedly visited with then-New York Attorney General Cuomo and discussed AIG. See, e.g., Morgenson & Story, supra note 22. Although Cuomo’s investigation into the financial crisis and its aftermath 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. Id.

263 See 60 Minutes: The Next Housing Shock, supra note 47 (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 61 (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, http://www.nytimes.com/2011/03/13/business/13gret.html?_r=1&pagewanted=print (last visited Apr. 12, 2012) (reporting on the bank settlement being negotiated between state attorneys general and Bank of America and its subsidiaries to address improper loan-servicing and foreclosure practices); State of Nevada v. Bank of America Corp., Case No. A-10-631557-BXXV (D.Ct. Clark County, Nevada, Dec. 17, 2010)
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{264} By doing so, the banks avoided additional filing fees required to lawfully record mortgage assignments or transfers.\textsuperscript{265} 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{266} Instead, “the mortgage finance industry circumvented the state and national debate that normally precedes significant legislative change.”\textsuperscript{267} When loans began to fail, banks realized that the failure to properly document the transfers left them potentially without recourse in the foreclosure (Complaint) (also available at \url{http://www.nytimes.com/2011/03/13/business/13gret.html?_r=1&pagewanted=print} by selecting link “initial terms of a deal” in text).

\textsuperscript{264} See Christopher L. Peterson, \textit{Foreclosure, Subprime Mortgage Lending and the Mortgage Electronic Registration System}, 78 U. CN. L.REV. 1359, 1361-63, 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, \textit{supra}, 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. 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 Apr. 12, 2012) (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).


\textsuperscript{266} See Peterson, \textit{supra} note 264, at 1369-70, 1374, 1406.

\textsuperscript{267} \textit{Id.} at 1405.
Consequently, forged documents and fraudulent affidavits in support of foreclosure actions were created and submitted to courts in support of foreclosures.\textsuperscript{269} Despite unquestionably fraudulent conduct, federal regulators investigating the misconduct in foreclosures entered into 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.\textsuperscript{270} 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.”\textsuperscript{271} 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.\textsuperscript{272}

\textsuperscript{268} Id. at 1367-68, 1375-80.

\textsuperscript{269} See 60 Minutes: The Next Housing Shock, supra note 47.


\textsuperscript{271} See Lazo & Reckard, supra note 270 (quoting Alys Cohen, staff attorney for the National Consumer Law Center).

\textsuperscript{272} Two Nobel prize-winning economists have recognized the corrosive effect of the mortgage foreclosure fraud crisis on the rule of law. See Joseph Stiglitz, Foreclosures and Banks’ Debt to Society, THE GUARDIAN, Nov. 5, 2010, http://www.guardian.co.uk/commentisfree/cifamerica/2010/nov/05/banking-
VI. Conclusion

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

---

273 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 2; 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).

274 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. 12, 2012) (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.

275 See FCIC REPORT, supra note 2, at 398-400.
federal budget devastated by the cost of the bailout.\textsuperscript{276} With such lop-sided consequences, it is easy to predict that leaders in the financial industry will continue to probe for opportunities to further violate laws in the pursuit of fortune\textsuperscript{277} or use their fortunes to decriminalize and shape laws to their favor,\textsuperscript{278} that others will follow in their path,\textsuperscript{279} 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{280} will continue to lose faith in the rule of law.


\textsuperscript{277} See Steven A. Ramirez, Dodd-Frank as Maginot Line, 15 CHAP. L. REV. 109, 119, 130 (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 Apr. 12, 2012) (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{278} See FCIC REPORT, supra note 2, at xviii (concluding that the financial industry “played a key role in weakening regulatory constraints on institutions, markets, and products”).


\textsuperscript{280} Joseph E. Stiglitz, Of the 1\%, By the 1\%, For the 1\%, VANITY FAIR, May 2011.
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 shift the question of exercising prosecutorial discretion to charge by highlighting the costs to society of punishing corporations or their leaders,\textsuperscript{281} or by characterizing the pursuit of justice as a political act of retribution\textsuperscript{282} 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 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{283} 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


\textsuperscript{282}\textit{See, e.g.}, Baker, \textit{supra} note 192, at 357-38 (referring to prosecutions after the collapse of Enron and WorldCom).

\textsuperscript{283}\textit{See} Lessig, \textit{supra} note 151, at 961-63.
confidence in all laws. 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.

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 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

284 “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, 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 Apr. 12, 2012).

285 See Lessig, supra note 151, at 955-56; Kahan, supra note 199, 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.”).

crisis of 2007 to 2009, a systematic declination of prosecution by the Department of Justice amounts to an affirmation of those crimes that invites continued lawlessness in the financial sector and beyond.