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

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

MARY KREINER RAMIREZ

Recent financial scandals and the relative paucity of criminal prosecutions against elite actors that spawned the crisis 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 that gave 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 the potential affirmance of crime. Otherwise, the profitability of crime promises massive future losses.

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

MARY KREINER RAMIREZ*

*“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.”*¹

I. INTRODUCTION

Hindsight may be twenty-twenty, but the facts leading up to the financial crisis in 2008² demonstrate that 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.³ Central to the American criminal justice system is an

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¹ FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FIGHT TO CRIMINALIZE BUSINESS VIOLENCE 365 (2d ed. 2006) (referencing Joseph Gusfield).

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 COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT xi, 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, which began with the major bank collapses of Bear Stearns and of Lehman Brothers, the takeover of Merrill Lynch, and most pointedly, when Secretary of the Treasury Henry Paulson went to the President and Congress to recommend a bailout for the major banking institutions, among others. *See* FCIC REPORT, *supra* at 280, 325, 353; *infra* Part II.

³ *But see* Michiyo Nakamoto & David Wighton, *Bullish Citigroup Is ‘Still Dancing’ to the Beat of the Buy-out Boom*, FIN. TIMES, July 10, 2007, at 1 (reporting that Citigroup chief executive downplayed the fear of a downturn in the financial market). 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.* (internal quotation marks omitted).

expectation that a known breach of the criminal laws will yield punishment. In the aftermath of the federal bailouts,⁴ expectations that CEOs would be held criminally accountable as had occurred after the fall of Enron abounded, and they still do.⁵ Yet, despite congressional investigations revealing knowing fraud⁶ and numerous fraud settlements worth billions,⁷ the Department of Justice (“DOJ”) 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.⁸

⁴ FCIC REPORT, *supra* note 2, at 386.

⁵ In his 2012 State of the Union Address, President Obama advised the Attorney General to address the lack of criminal responsibility that led to the housing crisis. President Obama remarked in a State of the Union address:

And tonight I’m asking my Attorney General to create a special unit of Federal prosecutors and leading State attorney generals 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.

Address Before a Joint Session of Congress on the State of the Union, 2012 DAILY COMP. PRES. DOC. 8 (Jan. 24, 2012); *see also* Edward Wyatt & Shaila Dewan, *New Housing Task Force Will Zero in on Wall St.*, N.Y. TIMES, Jan. 26, 2012, at B1 (reporting that “the unit would most likely focus on Wall Street firms, big banks and other entities that many people thought had escaped scrutiny for their role in the housing crisis,” and “could lead to charges of tax evasion, insurance fraud and securities fraud”).

⁶ *See, e.g.*, FCIC REPORT, *supra* note 2, at xxii–xxiii (explaining that the Financial Crisis Inquiry Commission found high rates of mortgage fraud and executives continued even with the threat of a “financial and reputational catastrophe”).

⁷ *See, e.g.*, Edward Wyatt, *Citigroup to Pay Millions to End Fraud Complaint*, N.Y. TIMES, Oct. 20, 2011, at A1 (reporting on \$285 million civil fraud settlement with SEC on charges that Citigroup misled investors by creating mortgage-related investments intended to fail, sold them to unsuspecting investors, and bet against their success); Press Release, U.S. Dep’t of Justice, Office of Pub. Affairs, Fed. Gov’t and State Attorneys Gen. Reach \$25 Billion Agreement with Five Largest Mortg. Servicers to Address Mortg. Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), *available at* <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html> (reaching \$25 billion settlement with nation’s five largest mortgage servicers); Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO, Litigation Release No. 21,592, 98 SEC Docket 3135–36 (Feb. 28, 2011) (alleging that Goldman Sachs committed securities fraud in connection with a subprime mortgage product); Press Release, U.S. Sec. & Exch. Comm’n, J.P. Morgan to Pay \$153.6 Million to Settle SEC Charges of Misleading Investors in CDO Tied to U.S. Hous. Mkt. (June 21, 2011) (charges concerned misleading investors in complex mortgage securities transaction).

⁸ Wyatt & Dewan, *supra* note 5 (noting that no major prosecutions have come out of the housing crisis); Scot J. Paltrow, *Insight: Top Justice Officials Connected to Mortgage Banks*, REUTERS (Jan. 20, 2012), <http://www.reuters.com/article/2012/01/20/us-usa-holder-mortgage-idUSTRE80J0PH20120120> (reporting that Justice Department has failed to bring any criminal cases against companies involved in mortgage crisis); Gabriel Sherman, *The Meltdown Fall Guys*, NYMAG.COM (Aug. 23, 2009), <http://nymag.com/guides/fallpreview/2009/businessmedia/58519/> (reporting that two hedge fund managers are facing trial for their role in the June 2007 collapse of two hedge funds at Bear Stearnes, yet no senior executives at Bear Stearnes, Lehman Brothers, Bank of America, Merrill Lynch, or AIG, have been charged with wrongdoing).

Classic theories of punishment identify utilitarian⁹ and retributivist¹⁰ 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.¹¹ 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.

Reasons for exercising discretion against pursuing criminality may be varied.¹² For the prosecutor, a weak case, an overload of cases, resource

⁹ Jeremy Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 396 (John Bowing ed., 1838) ("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.").

¹⁰ IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 195–98 (W. Hastie trans., 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*, 64 PHIL. REV. 3, 7 (1955) ("[R]etributionists have rightly insisted . . . that no man can be punished unless he is guilty [of having] broken the law.").

¹¹ 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. *Id.* at 82. 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." *Id.* 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." *Id.* (internal quotation marks omitted) (citing HOWARD JONES, CRIME AND THE PENAL SYSTEM: A TEXTBOOK OF CRIMINOLOGY 123 (1956)).

¹² See generally T. KENNETH MORAN & JOHN L. COOPER, DISCRETION AND THE CRIMINAL JUSTICE PROCESS (1983) (exploring the exercise of discretion in the criminal justice process at various stages). 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 myriad 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%; Staff Reduced Because of Budget Crunch*, 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." *Id.*

considerations, or more compelling cases, to name a few, may factor into that discretionary decision.¹³ Beyond these reasons lay other possibilities, such as community remedies, civil alternatives to criminal punishment, or perceived blameworthiness.¹⁴ 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.” Perhaps a minor casualty in minor crimes; however, if the crime costs billions of dollars or more, or involves abuse of economic power, the more likely message to both the wrongdoer and the rest of us is one of “affirmance”: crime *does* pay.¹⁵ Some criminals will

¹³ See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-27.000, 9-28.000 (1997) [hereinafter U.S. ATTORNEYS’ MANUAL] (Principles of Federal Prosecution, and Principles of Federal Prosecution of Business Organizations, respectively). The DOJ has explicit policies regarding considerations for initiating and declining prosecution. See *id.* § 9-27.200, Initiating, and Declining Prosecution—Probable Cause Requirement; § 9-27.220, Grounds for Commencing or Declining Prosecution; § 9-27.230, Initiating and Declining Charges—Substantial Federal Interest; § 9-27.240, Initiating and Declining Charges—Prosecution in Another Jurisdiction; § 9-27.250, Non-Criminal Alternatives to Prosecution; § 9-27.260, Initiating And Declining Charges—Impermissible Considerations; § 9-27.270, Records of Prosecutions Declined; see also Stephen Holmes, *The Spider’s Web: How Government Lawbreakers Routinely Elude the Law*, in WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 121, 130 (Austin Sarat & Nasser Hussain eds., 2010). Holmes observes:

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. at 125.

¹⁴ See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1297 (2001).

¹⁵ See MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* xiv–xv (2010). In the prologue to *The Big Short*, Lewis reflected on the response to his first book, *Liar’s Poker*, which described his experience in the bond market as an associate working at Salomon Brothers on Wall Street from 1985 to 1988. While Lewis anticipated that the tale of reckless speculation in the bond market yielding lucrative salaries to associates but massive losses to investors would warn young people against careers in the financial markets, six months after the book was published he was inundated with letters from college students using his book “as a how-to manual” and asking him to share additional secrets about Wall Street. *Id.* at xiii–xv; see also Geraldine Szott Moohr, *The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement*, 46 AM. CRIM. L. REV. 1459, 1478 (2009) (observing that regulatory, civil enforcement, and criminal prosecution ideally “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 for redress”). Professor Moohr

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, as well as other individuals, 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.¹⁶

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 *not* punishing elite crime adequately can undermine the rule of law,¹⁷ diminish confidence in government,¹⁸ and promote further costly criminality.¹⁹ This Article

asserts that resorting to criminal prosecutions may “divert the public and legislators from the task of devising more effective ways to control corporate misconduct.” This concern, however, ignores the very nature of the problem, in that the same corporate leaders who engage in financial wrongdoing spearhead limiting the effectiveness of regulatory oversight and weakening civil litigation as a means of redressing misconduct. *Id.* at 1474, 1476, 1479. Indeed, criminal prosecution is the last resort for the very reasons she observes.

¹⁶ See *infra* Parts I, V.D.

¹⁷ 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: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 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* 64–65 (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. SKINNER, *supra* at 65. Positive reinforcement occurs when a rewarding environmental stimulus or consequence follows an individual’s behavior. *Id.* at 73. 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 to increase a behavior’s frequency through gained benefits. *Id.* at 182.

¹⁸ Confidence is diminished when members of the group perceive that the rules are unfairly applied. See FRANS DE WAAL, *THE AGE OF EMPATHY: NATURE’S LESSONS FOR A KINDER SOCIETY* 162, 167, 188 (2009) (discussing how human sense of fairness and trust fuel our society and how the 2008 bailouts highlighted public distrust of the wealthy and the government); Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire? Perceptions and Attitudes in Taxpayer Compliance*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 193, 195, 210–13 (Joel Slemrod ed., 1992) (reporting on study showing that reading about the tax gap and the \$100 billion not collected by the IRS negatively impacted students’ confidence in the tax system and compliance compared to reading about IRS’s increased compliance efforts).

¹⁹ 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 & RON J. FELDMAN, *TOO BIG TO FAIL: THE HAZARDS OF BANK*

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 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.²⁰

Part II 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 DOJ.²¹ Indeed, the Article highlights relevant considerations that ought to be included in making an assessment about whether to pursue criminal charges.

Part III surveys the numerous factors embedded 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 associated with allowing society’s wealthiest and best-connected citizens to escape prosecution.

Part IV 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

BAILOUTS 17 (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, *Social Learning Analysis of Aggression*, in ANALYSIS OF DELINQUENCY AND AGGRESSION 203, 204–06, 212 (Albert Bandura & Emilio Ribes-Inesta eds., 1976) (explaining that affirmance functions as a modeling influence and is an effective way to encourage people to behave as they have observed others behaving).

²⁰ 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 CEO 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 (Dec. 21, 2011), http://topics.nytimes.com/topics/news/business/companies/countrywide_financial_corporation/index.html?inline=nyt-org. Mozilo left when Bank of America acquired Countrywide. *Id.*

²¹ *But see* Paltrow, *supra* note 8 (highlighting a federal conflict of interest between U.S. Attorney General Eric Holder and Lanny Breuer, head of the Justice Department’s criminal division, due to their prior employment representing big banks who are now at the center of the alleged foreclosure fraud).

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. Affirmance 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 advertises exponential future wrongdoing, while wrongdoers undermining the rule of law remain in power and are often richly compensated from their crime.

Part V 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 prosecute these actors redefines 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.²²

This Article concludes by suggesting that prosecutors must exercise their discretion to decline prosecutions, accept plea bargains, or offer non-criminal alternative sanctions, all the while bearing in mind the affirming effect of that decision, particularly in elite crimes. Ignoring affirmance to gain politically expedient resolutions²³ expresses a social meaning at odds with a cohesive criminal justice system, and thereby undermines the

²² See, e.g., Colin Barr, *Where Are the Subprime Perp Walks?*, CNNMONEY.COM (Sept. 15, 2009), <http://money.cnn.com/2009/09/15/news/subprime.perpwalk.fortune/index.htm> (noting the lack of prosecutions of high profile subprime mortgage executives whose excesses led to the financial crisis in 2007); Jean Eaglesham, *Criminal Mortgage Probes Fizzle Out*, WALL ST. J., Aug. 6, 2011, at B1 (reporting that three high-profile investigations into the subprime mortgage crisis have gone dormant or have been closed without any criminal prosecutions); Editorial, *Soft on Crime Our View o [sic] Skating Free After Bringing the Economy to Its Knees*, ST. LOUIS POST-DISPATCH, July 28, 2011, at A16 (“Americans [have] a gnawing sense that no justice was done, that the guys who wrecked everything got away with it.”).

²³ See Gretchen Morgenson & Louise Story, *A Financial Crisis with Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1 (reporting that Treasury Secretary Timothy Geithner met with then-New York Attorney General Andrew M. Cuomo to express concern about the fragility of the financial system and a desire to calm markets, “a goal that could be complicated by a hard-charging attorney general”); Jon Talton, *WaMu: No Justice, No Peace (of Mind)*, SEATTLE TIMES (Aug. 12, 2011, 10:15 AM), http://seattletimes.nsource.com/html/soundeconomywithjontalton/2015891715_wamu_no_justice_no_peace_of_mi.html (observing that U.S. Attorney General Eric Holder has not prosecuted a single major figure behind the “greatest financial collapse since 1929”). In his article, Talton asks, “Any curiosity at all, Mr. Holder? Or are you planning for your next job at Goldman after the 2012 elections.” Talton, *supra*.

opportunity to positively shape society through law.²⁴

II. 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 Henry Paulson's alarm in September 2008 warning of a financial market meltdown unless billions in bailout funds were handed to him for disbursement,²⁵ the average American may have been unaware of the trillions of dollars trading in derivatives²⁶ in virtually unregulated markets,²⁷ and may not have known that the subprime mortgage industry was handing out liar's loans like candy bars on Halloween.²⁸ Nevertheless,

²⁴ See Carolyn B. Ramsey, *Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law*, 54 HASTINGS L.J. 1641, 1642–44 (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, *Democracy as the Rule of Law, in WHEN GOVERNMENTS BREAK THE LAW*, *supra* note 13, at 153, 157. 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.* at 159 (describing voting as “a form of controlled revolutionary activity” in a democratic society). Moreover, in a democratic society, the rules of the game must ultimately be subject to popular control in order “to command the respect and obedience of the people who are subject to it.” *Id.* at 159–60. Affirmance, through prosecutorial discretion, undermines democratic society.

²⁵ See Andrew R. Sorkin et al., *As Credit Crisis Spiraled, 36 Hours of Alarm and Action as Crisis Spiraled*, N.Y. TIMES, Oct. 1, 2008, at A1 (noting that the request for \$700 billion dollars in funds was parsed in the fear of total economic meltdown); *Treasury's Bailout Proposal*, CNNMONEY.COM (Sept. 20, 2009, 11:47 AM), http://money.cnn.com/2008/09/20/news/economy/treasury_proposal/index.htm (requesting an authorized limit of \$700 billion in bailout funds for the purchase of mortgage-related bad assets).

²⁶ See FCIC REPORT, *supra* note 2, at xviii (noting the widespread failure in self-regulation and the trillions of dollars risked through “shadow banking” and “over-the-counter derivatives markets”).

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 (emphasis added).

²⁷ See generally andré douglas pond cummings, *Still “Ain’t No Glory in Pain”*: *How the Telecommunications Act of 1996 and Other 1990s Deregulation Facilitated the Market Crash of 2002*, 12 FORDHAM J. CORP. & FIN. L. 467, 529–36 (2007) (explaining how the Commodities Futures Modernization Act does not allow for the regulation of derivatives).

²⁸ See Joe Nocera, *In Prison for Taking a Liar Loan*, N.Y. TIMES, Mar. 26, 2011, at B1 (discussing an example of a loan borrower being imprisoned for lying on mortgage forms at the encouragement of his broker); see also RICHARD BITNER, *CONFESSIONS OF A SUBPRIME LENDER: AN*

there were early indications that something was amiss.²⁹

As early as 1998, Commodity 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.³⁰ 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.³¹ Their efforts to derail derivatives regulation were nearly foiled by the meltdown of Long-Term Capital Management (“LTCM”) in September 1998,³² but despite a glimpse of catastrophic losses that could arise from the unregulated derivatives trading,³³ Congress was persuaded to place a moratorium on the

INSIDER’S TALE OF GREED, FRAUD, AND IGNORANCE 73, 80–96 (2008) (describing “[t]he [a]rt of [c]reative [f]inancing” in subprime mortgage lending to qualify borrowers for mortgage loans, which the author termed “[m]aking [c]hicken [s]alad [o]ut of [c]hicken [s]hit”).

²⁹ See Over-the-Counter Derivatives, 63 Fed. Reg. 26,114, 26,114 (May 12, 1998) (noting the increased sophistication and volume of over-the-counter derivatives and encouraging new safeguards).

³⁰ *Frontline: The Warning* (PBS television broadcast Oct. 20, 2009) (interview with Brooksley Born, former Chairperson, CFTC), available at <http://www.pbs.org/wgbh/pages/frontline/warning/interviews/born.html>.

³¹ See FCIC REPORT, *supra* note 2, at 47–48 (noting that 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 27, at 530–31 (describing the response to Director Born’s study and the CFTC concept release as being ultimately “quashed by Congress”); Press Release, U.S. Dep’t of Treasury, Joint Statement by Treasury Secretary Robert E. Rubin, Fed. Reserve Bd. Chairman Alan Greenspan, and Sec. & Exch. Comm’n Chairman Arthur Levitt (May 7, 1998), available at <http://www.treasury.gov/press-center/press-releases/Pages/tr2426.aspx> (questioning the “jurisdiction” of the CFTC in the derivatives market).

³² See FCIC REPORT, *supra* note 2, at 56–58. “LTCM” was 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. *Id.* 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.* 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 fourteen of the largest financial institutions with large exposures to LTCM (later central players in the taxpayer bailout of those banks) “to inject \$3.6 billion into LTCM in return for 90% of its stock.” *Id.* All but one of the fourteen institutions (Bear Stearns declined) contributed between \$100 million and \$300 million. *Id.*

³³ See FCIC REPORT, *supra* note 2, at 46–47 (noting the “wave of significant losses and scandals [that] hit the market” between 1994 to 1998 after the CFTC “exempt[ed] certain nonstandardized OTC derivatives” from trading on a regulated exchange). *But see Private-Sector Refinancing of the Large Hedge Fund, Long-Term Capital Management: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. (1998) (statement of Alan Greenspan, Federal Reserve Chairman), available at www.federalreserve.gov/boarddocs/testimony/1998/19981001.htm (claiming that there was a “relative absence of such examples over the past five years” and that “[d]ynamic markets periodically engender large defaults”).

CFTC's ability to regulate over-the-counter ("OTC") derivatives. In December 2000, Congress "in essence deregulated the OTC derivatives market and eliminated oversight by both the CFTC and the SEC."³⁴ In 2004, Federal Bureau of Investigation ("FBI") agents were asking for more investigators to address fraud in the mortgage industry; their pleas were ignored.³⁵ In 2005, a cover story from *The Economist* reported on the worldwide rise in house prices as "the biggest bubble in history," and urged Americans to "[p]repare for the economic pain when it pops."³⁶ 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; he was not alone.³⁷ In August 2007, more warning bells

³⁴ FCIC REPORT, *supra* note 2, at 48; *see also* Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (2000) (deregulating OTC derivatives by enacting H.R. 5660 into law); Cummings, *supra* note 27, at 533 (describing how Congress refused to regulate OTC derivatives by removing OTC transaction regulations).

³⁵ 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 et al. *supra* note 12, at A1 (reporting a loss of 625 agents—36% of the FBI's 2001 levels). Executives in the private sector also complained of "difficulty attracting the bureau's attention in cases involving possible frauds of millions of dollars." *Id.* Emblematic of governmental disregard for the rampant financial abuses beginning in May 2000 and continuing to 2008, regulators at the SEC repeatedly ignored the persistent claims by a citizen whistleblower named Harry Markopolis that Bernie Madoff was running a Ponzi scheme. *Assessing the Madoff Ponzi Scheme and Regulatory Failures: Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 5 (2009) [hereinafter *Hearing on Regulatory Failures*] (statement of Harry Markopolos, Chartered Financial Analyst and Certified Fraud Examiner); David Gelles & Gillian Tett, *From Behind Bars, Madoff Spins His Story*, FIN. TIMES (Apr. 8, 2011 5:04 PM), <http://www.ft.com/cms/s/2/a29d2b4a-60b7-11e0-a182-00144feab49a.html?ftcamp=traffic/email/regsnl/memmkmt/#axzz1JMG01IMV> (noting that the firm was founded in 1960 and Madoff claims that the Ponzi scheme first began in the early 1990s, whereas Irving Picard, the trustee seeking to retrieve assets for Madoff's victims, asserts that the fraud began as early as 1983). Although Markopolis's 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 et al. *Top Broker Accused of \$50 Billion Fraud*, WALL ST. J., Dec. 12, 2008, at A1 (describing the manner in which Madoff confessed to his sons). By then, the losses had grown to an estimated \$50 billion to \$65 billion. *Hearing on Regulatory Failures, supra*; *see also* Efrati, *supra* (placing the value of the Ponzi scheme at \$50 billion); 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. Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1; Diana B. Henriques & Jack Healy, *Madoff Jailed After Pleading Guilty to Fraud*, N.Y. TIMES, Mar. 13, 2009, at A1.

³⁶ *Special Report: The Global Housing Boom; in Come the Waves*, THE ECONOMIST, June 16, 2005.

³⁷ 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:

sounded when credit markets tightened.³⁸ Prior to their collapses, several of the banks showed stress.³⁹ By the time Paulson approached President George W. Bush in 2008, financial markets were on the brink of collapse⁴⁰ and losses were in the trillions of dollars.⁴¹ 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.⁴² One insurance company,

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.

³⁸ See Les Christie, *Mortgage Meltdown Contagion: A Grim Forecast Has Economists More Pessimistic Over How Far the Collapse Will Spread to the Rest of the Economy*, CNNMONEY.COM (Aug. 13, 2007, 11:49 AM), http://money.cnn.com/2007/08/10/real_estate/mortgage_meltdown_crushing_other_markets/index.htm (noting that the housing market's collapse sparked fears that "tighter credit will have a broader impact on consumers, markets and the economy").

³⁹ See STIGLITZ, *supra* note 17, at 136 (stating that in the first two weeks of August 2007, the European Central Bank and the Federal Reserve supplied "massive liquidity to the market" with the European Central Bank injecting around \$274 billion, and the Federal Reserve injecting \$38 billion "[a]t the first signs of problems"); see also Shawn Tully, *Wall Street's Money Machine Breaks Down*, CNNMONEY.COM (Nov. 12, 2007, 12:13 PM), http://money.cnn.com/magazines/fortune/fortune_archive/2007/11/26/101232838/ (archiving the list of banks and financial institutions damaged by the financial collapse).

⁴⁰ See HENRY M. PAULSON, JR., *ON THE BRINK: INSIDE THE RACE TO STOP THE COLLAPSE OF THE GLOBAL FINANCIAL SYSTEM* 254 (2010) (stating that the mortgage crisis was the "economic equivalent of war" and that the markets were "ready to collapse").

⁴¹ 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> (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"); see also PAULSON, *supra* note 40, at 255–56 (describing the Presidential briefing regarding the financial collapse).

⁴² See NOMI PRINS, *IT TAKES A PILLAGE* 13–14 (2009) (calculating that in the summer of 2009 the federal government's bailout of the banks was approximately \$13.3 trillion—which "is more money than the combined costs of every major U.S. war at that time—and observing that "\$50 trillion in global wealth was erased between September 2007 and March 2009"); ANDREW ROSS SORKIN, *TOO BIG*

responsible for guaranteeing a large amount of subprime mortgages, received \$182 billion alone.⁴³

While the financial markets careened toward disaster and narrowly escaped total collapse due to taxpayer-funded bailouts, unemployment skyrocketed to near-Great Depression levels.⁴⁴ Unemployment benefits were extended several times in an effort to address high long-term unemployment rates.⁴⁵ 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.⁴⁶ As foreclosures flooded the real estate

TO FAIL 396–99 (2009) (describing how even prior to the Troubled Asset Relief Program (“TARP”), which was 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); 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); David Goldman, *CNNMoney.com’s Bailout Tracker*, CNNMONEY.COM, <http://money.cnn.com/news/storysupplement/economy/bailouttracker/> (last visited Oct. 8, 2012) (using sources from the Federal Reserve, Treasury, FDIC, CBO, and White House to track the various federal programs used to bailout the economy and reporting that, as of November 16, 2009, \$11 trillion had been committed for bailouts with \$3 trillion of those funds extended by that date). In all, AIG received a total of \$182 billion in federal bailout money. Christian Plumb, *U.S. Drops Criminal Probe of AIG Executives*, REUTERS (May 22, 2010), <http://www.reuters.com/article/2010/05/23/us-aig-doj-idUSTRE64L09W20100523>. 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 Henry Paulson’s former company, and subject to cascading bankruptcies, remains a subject of debate. Carol D. Leonnig, *AIG Founder Wielded Personal Influence in Washington*, WASH. POST, Oct. 1, 2008, at A15.

⁴³ Plumb, *supra* note 42. Among those companies that received bailouts, some of it has been repaid. See Goldman, *supra* note 42 (tracking companies that have repaid some of the bailout money).

⁴⁴ See, e.g., STIGLITZ, *supra* note 17, at 63 (calculating that the economy lost eight million jobs between December 2007 and October 2009, and that, given the number of new entrants to the job markets, twelve million jobs would be required to restore the economy to full employment); Eleni Theodossiou & Steven F. Hipple, *Unemployment Remains High in 2010*, 134 MONTHLY LAB. REV., Mar. 2011, at 3, available at <http://www.bls.gov/opub/mlr/2011/03/art1exc.htm> (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 2007–2009 recession and was “down from a 26-year high of 10.0 percent a year earlier”).

⁴⁵ See Middle Class Tax Relief and Job Creation Act of 2012, H.R. 3630, 112th Cong. §§ 2121–24 (2012) (extending unemployment benefits by modifying the end dates of the emergency employment compensation program, the Unemployed Workers and Struggling Families Act, and benefits under the Railroad Unemployment Insurance Act); Carl Hulse, *Senate Is Set to Extend Aid to the Jobless*, N.Y. TIMES, July 20, 2010, at A1 (detailing the political battle within the Senate over whether unemployment benefits should be extended); Robert Pear & Jennifer Steinhauer, *Congress Passes Tax Cut Extension, and Everyone Claims a Win*, N.Y. TIMES, Feb. 18, 2012, at A16 (reporting on compromise that extended tax cuts and unemployment benefits).

⁴⁶ STIGLITZ, *supra* note 17, at 16; see PRINS, *supra* note 42, at 54 (calculating losses at \$6 trillion in the U.S. housing market, \$7.5 trillion in pension plans and household portfolios, \$5.6 trillion in other assets, and an increase in joblessness from 7.5 to 14.7 million as unemployment nearly doubled in the eighteen months between January 2008 and June 2009).

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.⁴⁷ The Mortgage Bankers' Association warned consumers that walking away from mortgage obligations was irresponsible⁴⁸ only one month before it reportedly refused to provide the terms of a deal it made with creditors after vacating its new facilities.⁴⁹ Foreclosures since the crisis have reached record numbers, with more waiting to be processed.⁵⁰

American Insurance Group ("AIG") was the world's largest insurance company and one of its units, AIG Financial Products Corporation ("AIG FP"), "dominated dealing in OTC derivatives," accumulating a one-half trillion dollar position in credit default swaps.⁵¹ AIG recognized the income from these derivatives without creating any reserves for possible losses,⁵² basically insuring subprime mortgages through these derivatives.

⁴⁷ See Beth Braverman, *Homeowners Abandoning Houses En Masse*, CNNMONEY.COM (Apr. 30, 2010, 4:12 PM), <http://moremoney.blogs.money.cnn.com/2010/04/30/homeowners-abandoning-houses-en-masse/> ("A quarter of all borrowers—11.3 million homeowners—were underwater on their mortgages at the end of 2009.").

⁴⁸ Roger Lowenstein, *Just Walk Away*, N.Y. TIMES, Jan. 10, 2010, at MM15. In May 2010, the CBS news show *60 Minutes* reported on "strategic default[s]" 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), available at <http://www.cbsnews.com/video/watch/?id=6470184n&tag=related:photovideo>. The *Wall Street Journal* has also reported on strategic defaults. Dawn Wotapka, *So You're Underwater, What's Next?*, WALL ST. J. (Nov. 24, 2009, 12:02 AM), <http://blogs.wsj.com/developments/2009/11/24/so-youre-underwater-whats-next/>.

⁴⁹ See James R. Hagerty, *Mortgage Group in Property Pinch*, WALL ST. J., Feb. 8, 2010, at C1 (reporting that the Mortgage Bankers Association's was selling its headquarters building for substantially less than it owes its lenders). The Mortgage Bankers Association purchased the Washington, D.C. building for \$79 million, and after sold the building to CoStar Group for a mere \$41.3 million, it moved five blocks away into rental space. *Id.*

⁵⁰ See *RealtyTrac Reports Foreclosure Activity Dips 15 Percent in Q1 of 2011*, NATIONALMORTGAGEPROFESSIONAL.COM (Apr. 15, 2011, 11:24 AM), <http://nationalmortgageprofessional.com/news24664/realtytrac-reports-foreclosure-activity-dips-15-percent-q1-2011> (March 2010 had the highest monthly total of foreclosure notices since the inception of RealtyTrac monthly reports in January 2005, with 367,056 homeowners receiving a foreclosure notice.). In the first quarter of 2011, foreclosures fell to a three-year low, with one in every 191 U.S. housing units receiving a foreclosure filing. *Id.*

⁵¹ FCIC REPORT, *supra* note 2, at 50. The report stated:

A key OTC derivative in the financial crisis was the credit default swap. . . . The purchaser of a CDS transferred to the seller the default risk of an underlying debt. The debt security could be any bond or loan obligation. The CDS buyer made periodic payments to the seller during the life of the swap. In return, the seller offered protection against default or specified "credit events" such as a partial default. If a credit event such as a default occurred, the CDS seller would typically pay the buyer the face value of the debt.

Id.

⁵² *Id.* Although a CDS is often compared to insurance, there are two key distinctions: (1) CDS can be used to speculate on the losses of others' property or interests because the purchaser of the CDS

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.⁵³ When the housing bubble burst, AIG FP had guaranteed billions of dollars worth of subprime mortgages for which it could not pay.⁵⁴ 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.⁵⁵

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 derivatives in the mortgage and subprime mortgage markets,⁵⁶ calls to aid homeowners who were unable to meet their repayments were met with objections from the financial markets, arguing that doing so would create a moral hazard⁵⁷—that is, a disincentive to pay their mortgages because owners would hold out hope of a bailout.⁵⁸ Moral hazard did not impede the flow of bailout funds to lenders.

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 (2) the seller of the CDS is not required to put aside financial reserves in case of loss as regulated insurers must. *Id.*

⁵³ *Id.* at 273–74.

⁵⁴ *Id.*

⁵⁵ *Id.* at 270.

⁵⁶ PAULSON, *supra* note 40, at 364, 368. On Monday, October 13, 2008, nine banks agreed to receive \$125 billion to address massive undercapitalization in the banking system: Citigroup, Wells Fargo, and JPMorgan all received \$25 billion; Bank of America 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. *Id.* at 364. Among the basic conditions of each bank's loan, their CEOs 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.” *Id.* at 366 (internal quotation marks omitted). 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. *See, e.g.*, *State of Nevada v. Bank of Am. Corp.*, Case No. A-10-631557-B XXV (D. Ct. Clark Cnty., Nev., Dec. 17, 2010) (Complaint), available at http://www.s355160796.onlinehome.us/_oneclick_uploads/2012/03/state-of-nevada-vs-ank-of-america.pdf; Andrew Martin and Michael Powell, *Two States Sue Bank of America Over Mortgages*, NY TIMES, Dec. 18, 2010, at B3, available at <http://www.nytimes.com/2010/12/18/business/18mortgage.html> (reporting on complaints filed by the attorneys general of Arizona and Nevada that “accused Bank of America of assuring customers that they would not be foreclosed upon while they were seeking loan modification, only to proceed with foreclosures anyway; of falsely telling customers that they must be in default to obtain a modification; of promising that the modifications would be made permanent if they completed a trial period, only to renege on the deal; and of conjuring up bogus reasons for denying modifications”).

⁵⁷ *See* Richard Eskow, *Foreclosures and Guilt: The “Home Loan Moral Hazard Scorecard,”* OURFUTURE.ORG (Oct. 18, 2010, 2:45 AM), <http://www.ourfuture.org/blog-entry/2010104218/foreclosures-and-guilt-home-loan-moral-hazard-scorecard> (providing a “scorecard” comparing the moral hazard of bankers versus borrowers in the wake of the 2008 subprime mortgage crisis); PRINS, *supra* note 42, at 37, 108 (citing statements made by Treasury Secretary Paulson that government intervention to aid home mortgage borrowers would be inappropriate).

⁵⁸ STIGLITZ, *supra* note 17, at 16.

Bankruptcies also hit record levels as businesses failed due to lack of available credit,⁵⁹ while the bailed-out banks hoarded funds due to the need for liquidity,⁶⁰ favorable interest rates from the federal reserve,⁶¹ and the lucrative investment opportunities in the derivatives market.⁶² In fact, as of September 2012, the bailed-out banking sector sat on nearly \$1.5 trillion in excess reserves.⁶³

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.⁶⁴ Rather than acting contrite, the CEOs of the bailed out corporations gave themselves and their top managers hefty bonuses and “retention grants.”⁶⁵

⁵⁹ See, e.g., Christine Dugas, *Small Businesses Vital to Economic Recovery Go Bankrupt*, USA TODAY (July 2, 2009, 10:35 AM), http://www.usatoday.com/money/smallbusiness/2009-06-30-small-businesses-bankruptcy_N.htm (citing the difficulty in getting small business loans due to the credit crunch and the inability to rely upon credit cards among reasons for the bankruptcies); Michael J. de la Merced, *General Growth Properties Files for Bankruptcy*, N.Y. TIMES DEALBOOK (Apr. 16, 2009, 2:34 AM), <http://dealbook.nytimes.com/2009/04/16/general-growth-properties-files-for-bankruptcy/> (stating that the company president “cit[ed] ‘the unprecedented disruption in the real estate financing markets and the need to extend maturing debt’ as the reason [his] company filed” for bankruptcy).

⁶⁰ See Ramirez, *Subprime Bailouts and the Predator State*, *supra* note 42, at 97–99 (stating that “zombie banks” hurt the economy by hoarding capital to repay the government and averting intervention by the government when losses were imminent).

⁶¹ See STIGLITZ, *supra* note 17, at 138 (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 Federal Reserve rather than lending it out to borrowers).

⁶² See Matt Wirz & Serena Ng, *Subprime Bonds Are Back—As Economy Recovers, Long-Term Investors Willing to Take on More Risks*, WALL ST. J., Apr. 1, 2011, at A1 (reporting that banks, and even bailed-out insurance giant, AIG, have returned to investing in subprime and other residential mortgage bonds because the higher risk associated with those bonds also provides the opportunity for higher yields on the investments).

⁶³ *Excess Reserves of Depository Institutions (EXCRESNS)*, FED. RESERVE BANK OF ST. LOUIS (Sept. 7, 2012, 9:49 AM), <http://research.stlouisfed.org/fred2/series/EXCRESNS>.

⁶⁴ See, e.g., Joe Rauch & Clare Baldwin, *BofA, Wells, Citi See Foreclosure Probe Fines*, REUTERS (Feb. 25, 2011), <http://www.reuters.com/article/2011/02/26/us-banks-foreclosures-idUSTRE71P0AT20110226> (“The biggest U.S. mortgage lenders 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.”).

⁶⁵ See, e.g., STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 154 (Comm. Print 2011) (describing how the executive committee members at Washington Mutual were exempted from the 2008 bonuses after public outcry and instead, quietly given “retention grants”); STIGLITZ, *supra* note 17, at 56 (stating that despite the banks tightened lending decisions, executives received near record bonuses); Edmund L. Andrews & Peter Baker, *At A.I.G., Huge Bonuses After \$170 Billion Bailout*, N.Y. TIMES, Mar. 15, 2009, at A1 (reporting that AIG planned to pay about \$165 million in bonuses to executives that brought the company to the brink of collapse the prior year); Peter Cohan, *Goldman Sachs: \$1 Billion for Charity, \$23 Billion for Banker Bonuses*, DAILY FIN. (Oct. 13, 2009, 10:15 AM), <http://www.dailyfinance.com/story/goldman-sachs-1-billion-for-charity-23-billion-for-banker-bo/19193897/> (criticizing Goldman Sachs for giving \$23 billion in bonuses in light of the \$12.9 billion taxpayer dollars used to bail the company out of a bad CDS bet with AIG); Eric Dash & Louise Story,

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.⁶⁶ Those who benefited from creating the subprime mortgage debacle faced civil and regulatory fines, yet no senior executives, nor their firms, have been criminally charged.⁶⁷ 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 typify the pervasive recklessness and misconduct yielding outrageous fortunes to the few at the expense of the many.⁶⁸

Citigroup's Top Officers to Decline '08 Bonuses, N.Y. TIMES, Jan. 1, 2009, at B1 (detailing that in 2008, financial executives and senior bankers received lower bonuses due to earning results); Stephen Grocer, *Banks Set for Record Pay*, WALL ST. J., Jan. 15, 2010, at A1 (reporting that major U.S. banks and securities firms are still paying their employees a massive \$145 billion for 2009, despite public frustration with Wall Street's pay culture); Ben White, *What Red Ink? Wall Street Paid Hefty Bonuses*, N.Y. TIMES, Jan. 29, 2009, at A1 (reporting that despite losses and bailouts, employees at financial companies in New York collected an estimated \$18.4 billion in bonuses in 2008); see also ROUBINI & MIHM, *supra* note 37, at 68–69 (explaining how the financial industry's reliance upon bonuses as a compensation mechanism created the moral hazard of encouraging excessive risk-taking to incur short-term profits that would enhance bonuses).

⁶⁶ See, e.g., FCIC REPORT, *supra* note 2, at 241 (reporting that two Bear Sterns executives were criminally charged with fraud for communications with investors after major losses in two hedgefunds); Morgenson & Story, *supra* note 23 (reporting that the regulators' failure to compile information that could lead to criminal prosecution has slowed efforts to charge senior executives); Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE, Mar. 3, 2011, at 44 (criticizing regulatory agencies for failing to hold financial companies and executives on Wall Street criminally accountable for the economic collapse).

⁶⁷ See, e.g., Sarah Childress, *Report: DOJ Criminal Chief Lanny Breuer Stepping Down*, PBS FRONTLINE (Jan. 23, 2013), <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/report-doj-criminal-chief-lanny-breuer-stepping-down/> (reporting that the Washington Post report that Breuer is stepping down came a day after a *PBS Frontline* report aired in which Breuer defended the lack of criminal prosecutions against Wall Street executives or their companies that were at the center of the 2008 financial meltdown); Jason M. Breslow, *Too Big to Jail? The Top Ten Civil Cases Against the Banks*, PBS FRONTLINE (Jan. 22, 2013), <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/untouchables/too-big-to-jail-the-top-10-civil-cases-against-the-banks/> (describing the top civil cases brought in lieu of criminal prosecutions against the banks at the center of the 2008 financial meltdown); Eaglesham, *supra* note 22 (reporting on three separate DOJ investigations against Washington Mutual Inc., IndyMac Bancorp, and New Century Financial Corp. that were either stalled or closed); Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES, Feb. 26, 2011, at B1 (describing the lack of prosecution of many executives of financial corporations that led to the demise of the global financial system); E. Scott Reckard, *Criminal Probe Dropped Against Countrywide CEO Mozilo*, WASH. POST, Feb. 19, 2011, at A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/18/AR2011021807930.html>; Amir Efrati, *AIG Executives Won't Face Criminal Charges*, WALL ST. J. (May 22, 2010), <http://online.wsj.com/article/SB10001424052748704852004575259240428335282.html> (explaining the decision by federal prosecutors not to bring criminal charges against current and former American International Group, Inc. executives for their role in the financial crisis). In August 2012, the DOJ announced that it would not bring criminal charges against Goldman Sachs or any of its employees for financial fraud in connection with the mortgage crisis, citing no “viable basis to bring a criminal prosecution.” Reed Albergotti & Elizabeth Rappaport, *U.S. Not Seeking Goldman Charges*, WALL ST. J., Aug. 10, 2012, at C1.

⁶⁸ 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,

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.⁶⁹ Countrywide Financial originated more subprime loans than any other company.⁷⁰ The fees from the easy mortgages granted by Countrywide yielded financial riches for Angelo Mozilo, the former CEO of Countrywide, whose income included \$102 million in 2006, a total of \$259 million in 2007, and a retirement benefit package of \$58 million in 2008.⁷¹ 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.⁷² Countrywide, once valued with assets of \$200 billion, was acquired by Bank of America in 2008, then valued at \$2.8 billion.⁷³

Executives at the financial firms made millions in salary, perks, fees, and bonuses, while many of the companies they commanded yielded negative shareholder returns.⁷⁴ Nearly \$17 trillion in household net wealth

Bank of America had assets of \$2.3 trillion in September 2009, absorbing both Countrywide and Merrill Lynch after the 2008 global financial meltdown. SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 180 (2010). Indeed, in March 2009, Bank of America’s assets were 16.4% of GDP. *Id.* at 1, 12.

⁶⁹ FCIC REPORT, *supra* note 2, at xxii.

⁷⁰ Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54 ST. LOUIS U. L.J. 1, 24 (2009) [hereinafter *Lessons from the Subprime Debacle*]; see also STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW 192 (2012) [hereinafter LAWLESS CAPITALISM].

⁷¹ Ramirez, *Lessons from the Subprime Debacle*, *supra* note 70, at 25. 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, which were sold immediately prior to the firm’s announcement of a \$388 million write down due to loan losses. RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at 192.

⁷² Morgenson, *supra* note 20; see also RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at 192; Nocera, *supra* note 67 (“On the eve of the trial date last fall, the S.E.C. blinked and settled with Mr. Mozilo. One of the S.E.C.’s charges was insider trading—that Mr. Mozilo sold nearly \$140 million worth of stock after he knew the company was in trouble.”); Ramirez, *Lessons from the Subprime Debacle*, *supra* note 70, at 24 (detailing the civil suit brought by eleven states for over \$8 billion on the grounds that Countrywide misled consumers and actively lied about its “no closing cost loans”).

⁷³ *Countrywide Financial Corporation*, *supra* note 20.

⁷⁴ See Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257, 272–73 (2010) (analyzing the net financial payoff for Bear Stearns and Lehman executive teams during 2000–2008 and concluding that “performance based compensation” more than made up for paper losses from exposing the firms to high risk investments); Ramirez, *Lessons from the Subprime Debacle*, *supra* note 70, at 6 (discussing the distorted consequences of risk-taking conduct by CEOs that leads to high financial payoffs in executive compensation “while offloading staggering risks” of losses onto the corporation and the global economy); Sanjai Bhagat & Brian Bolton, *Investment Bankers’ Culture of Ownership?* 4–5, 18–20 (Aug. 24, 2010) (unpublished manuscript), available at <http://ssrn.com/abstract=1664520> (reviewing executive compensation structure of the CEOs for the fourteen largest firms involved in the U.S.

vanished in the financial crisis, while over two dozen emergency programs were implemented “to stabilize the financial system and to rescue specific firms.”⁷⁵ The Attorney General of the United States, Eric Holder, in assuring an audience that the Justice Department was 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.”⁷⁶ 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, President George W. Bush’s Administration addressed fraud by imposing prison sentences.⁷⁷

financial crisis during 2008—the U.S. Treasury-required TARP participants, Bank of America, Bank of New York Mellon, Citigroup, Goldman Sachs, JPMorgan Chase, Morgan Stanley, State Street, Wells Fargo, Merrill Lynch, Bear Stearns, Lehman Brothers, Countrywide Financial, and AIG—and concluding that the compensation structures created financial incentives for executive risk-taking that resulted in positive payoffs for the CEOs from 2000–2008, while the investor shareholders experienced negative returns); see, e.g., M.P. Narayanan et al., *The Economic Impact of Backdating of Executive Stock Options*, 105 MICH. L. REV. 1597, 1601 (2007) (finding that backdating options result in losses of \$400 million per firm while executives gained \$500,000).

⁷⁵ See FCIC REPORT, *supra* note 2, at 375–76, 391 (In addition to TARP, 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 Federal Reserve’s purchase of agency mortgage-backed securities of \$1.25 trillion.). Household net wealth decreased from the decline in housing prices, as well as from the declining value of financial assets. *Id.* at 391; see also 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. 3 (2009) (analyzing the origins of the global financial meltdown in the U.S. subprime mortgage markets and the proliferation of extensive financial risk by Wall Street); Ramirez, *Lessons from the Subprime Debacle*, *supra* note 70, at 1 (arguing that, among other factors, “[c]orporate governance in the United States played a central role in the historic subprime debacle now gripping the global economy” (footnote omitted)).

⁷⁶ Peter Lattman, *Holder Defends Efforts to Fight Financial Fraud*, N.Y. TIMES DEALBOOK (Feb. 23, 2012, 9:30 PM), <http://dealbook.nytimes.com/2012/02/23/holder-defends-efforts-to-combat-financial-fraud/>.

⁷⁷ See, e.g., Kamelia Angelova, *Top 10 White-Collar Criminals in Jail*, BUS. INSIDER (Jul. 16, 2009, 2:05 PM), <http://www.businessinsider.com/white-collar-criminals-in-jail-2009-7> (listing the executives of major corporations that are serving prison sentences for fraud and embezzlement). Former WorldCom CEO Bernard Ebbers, convicted of false financial reporting and fraud, is serving twenty-five years; former Enron CEO Jeffrey Skilling, convicted on securities fraud and other crimes, has an expected release date from federal prison of 2028. *Id.* Former HealthSouth Corp. founder and CEO Richard M. Scrushy served a seventy-month sentence for a 2006 conviction for paying \$500,000 in campaign contributions in exchange for a hospital regulatory board seat. Sophia Pearson, *Ex-HealthSouth Chief Scrushy’s Prison Term Cut to 70 Months*, BLOOMBERG BUSINESSWEEK (Jan. 25, 2012), <http://www.businessweek.com/news/2012-01-26/ex-healthsouth-chief-scrushy-s-prison-term-cut-to-70-months.html>. Former Tyco International CEO Dennis Kozlowski is serving a ninety-eight month to twenty-five year prison term for a 2005 accounting fraud conviction. *Kozlowski in NYC Work*

The Financial Crisis Inquiry Commission, as well as Congress, found evidence of fraud and made referrals to the Justice Department.⁷⁸ This Article maintains that given the enormous costs of the crisis, the DOJ's timidity toward pursuing prosecutions is simply inexplicable.⁷⁹ The continued failure to impose criminal sanctions affirms white-collar misconduct, threatening to lay the seeds for the next crisis.

III. 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.⁸⁰ Indeed, scholars have long recognized that legal systems compromise between the certainty of rules and the discretion of "informed" officials based upon particular facts.⁸¹ Consequently, the prosecutor is given broad discretion in making criminal charging decisions.⁸² "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."⁸³ Many factors impact the prosecutor's decision. Some factors are explicit and are often set forth in prosecutorial guidelines,

Release, N.Y. POST (Mar. 15, 2012, 12:07 AM), http://www.nypost.com/p/news/business/kozlowski_in_nyc_work_release_CzB8HN8Nldrmqy2Y7VNZ3K.

⁷⁸ See Phil Angelides, *Will Wall Street Ever Face Justice?*, N.Y. TIMES, Mar. 2, 2012, at A25 (reporting that 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—yet, while others have relied on this evidence to support claims of fraud and misrepresentation, the Justice Department has failed to devote appropriate resources or attention to this case or others, which is in stark contrast to the massive efforts to address the savings-and-loan debacle of the late 1980s); see also FCIC REPORT, *supra* note 2, at 169–70, 187 (detailing the Commission's analysis of fraud by the corporate executives leading to the financial crisis and its conclusion that the firms securitizing mortgages violated due diligence).

⁷⁹ See, e.g., Interview by Chris Martenson with Gretchen Morgenson, Columnist, *N.Y. Times*, (Mar. 23, 2012), available at <http://www.chrismartenson.com/blog/gretchen-morgenson-wall-street-really-does-enjoy-different-set-rules-rest-us/72774> ("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." (quoting Gretchen Morgenson)).

⁸⁰ See MORAN & COOPER, *supra* note 12, 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." (footnote omitted)).

⁸¹ See H.L.A. HART, *THE CONCEPT OF LAW* 127 (1961).

⁸² 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.").

⁸³ ERWIN CHERMERINSKY & LAURIE L. LEVENSON, *CRIMINAL PROCEDURE: ADJUDICATION* 29 (2008); see *United States v. Batchelder*, 442 U.S. 114 (1979) (holding that prosecutors are not required to charge a defendant with the most lenient statute).

ethical rules, or court opinions; others are implicit, possibly even unrecognized, factors, such as racial bias, relationships among supervisors and suspects, or the socioeconomic status of the offender and her perceived ability to finance a defense.⁸⁴ 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 a prosecutor might make. When wealth or power are implicit factors discouraging prosecution, a 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 statutorily bound.⁸⁵ Further, because the probable cause standard required to charge a crime is lower 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, the trial sufficiency model, and the system efficiency model.⁸⁶

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.⁸⁷ 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.⁸⁸ 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.⁸⁹ The costs of such an error are borne by the defendant to a large

⁸⁴ See *id.* at 30–32 (describing the relevant factors when prosecutors are deciding whether to bring a case, such as economic realities, the defendant's background, and the strengths of each case).

⁸⁵ See MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 135–36, 143 (4th ed. 2011) (noting that prosecutors usually have the most important voice in determining what charges to select, among other factors such as criminal codes and policies and procedures of the particular office).

⁸⁶ See Joan E. Jacoby, *The Charging Policies of Prosecutors*, in *THE PROSECUTOR* 75, 82–86 (William F. McDonald ed., 1979) (describing four prosecutorial models, including Legal Sufficiency, System Efficiency, and Trial Sufficiency).

⁸⁷ *Id.* at 82.

⁸⁸ See *id.* at 82–83 (noting that with the Legal Sufficiency policy, prosecutors want to maximize plea bargaining due to the overload of the court with less serious misdemeanor cases).

⁸⁹ The Oxford Dictionary of Economics states:

extent (e.g., cost of defense, potential loss of reputation or employment, and loss of liberty if the defendant is convicted at trial or agrees to plea bargain to gain a discount in punishment), but also by the public generally (e.g., cost of prosecuting and punishing the wrong person, failure to identify, prosecute, and punish the actual wrongdoer, or 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.⁹⁰ 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 are charged.⁹¹ Here, the risk of a type I error is greatest in that an early decision not to charge risks leaving the guilty unchallenged and unpunished.⁹² Inevitably, prosecutors screening cases with a view toward trial sufficiency are less likely to pursue those whose guilt is more difficult to prove.⁹³

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.⁹⁴ This mixed model is often employed in urban communities where prosecutors face heavy caseloads.⁹⁵ Plea bargaining facilitates system efficiency, but at the inherent cost of those

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, when 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, available at <http://www.enotes.com/econ-encyclopedia/type-and-ii-errors> (last visited Aug. 16, 2011); see also A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 99 (1989) (explaining that type I errors denote when “truly guilty defendants escape liability” and type II errors describe those in which “truly innocent defendants are found liable”).

⁹⁰ Jacoby, *supra* note 86, at 92, 94.

⁹¹ *Id.* at 90; see U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-27.220(A) (“The attorney for the government should commence or recommend Federal prosecution if he/she believes that the person’s conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction”); Jeffrey B. Bumgarner, *Community-Related Correlates to Prosecutorial Decisions Regarding Accidental Killers: An Examination of Child Hyperthermia Automobile Deaths 2003–2006*, 44 CRIM. L. BULL. 679, 681 (2008) (“[T]he trial sufficiency model . . . is often adopted by federal prosecutors in the United States Attorney[s]’ offices.”).

⁹² *Supra* note 89; see Jacoby, *supra* note 86, at 87 (“[T]he Trial Sufficiency policy . . . logically should result in a substantial rejection rate at intake”).

⁹³ See Jacoby, *supra* note 86, at 87.

⁹⁴ Bumgarner, *supra* note 86, at 681.

⁹⁵ *Id.*

with less bargaining power (the poor and marginalized) and to the inherent benefit of those with more status and resources.⁹⁶

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, for example, either making relevant decisions or approving those decisions.⁹⁷ 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.⁹⁸ Communicating this complexity and cutting through it to present a case to a jury takes skill, patience, and resources.⁹⁹

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.¹⁰⁰ Once pieced together, the prosecutor must organize the information in a cohesive and straightforward manner to a jury to gain a conviction.¹⁰¹ Moreover, for lower-

⁹⁶ See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1924, 1935 (1992) (discussing efficiencies that incentivize prosecutors to conduct plea bargains); Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 CRIM L. BULL. 965, 968–69, 974–76 (2010) (discussing judicial and prosecutorial identification of system efficiencies as a benefit of plea bargaining, and identifying “less 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,” among others).

⁹⁷ See RICHARD D. HARTLEY, CORPORATE CRIME 41 (2008) (“[M]ost corporate criminal activity involves employees at all levels and stems from existing circumstances in the corporation.”).

⁹⁸ See Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 MARQ. L. REV. 971, 998–99 (2010) [hereinafter *Prioritizing Justice*] (“[T]he complexity of multidistrict corporate structures requires greater expertise to investigate and analyze. . . . Moreover, the complexity of the laws that govern corporate conduct . . . require[s] legal and financial expertise that is often not available in the typical U.S. Attorney’s Office.”).

⁹⁹ See *id.* (arguing that the unique demands associated with investigating and prosecuting corporate crimes warrant the creation of a dedicated Corporate Crimes Division within the DOJ).

¹⁰⁰ See, e.g., DAVID O. FRIEDRICH, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 270 (2d ed. 2004) (“Corporate and finance crime cases . . . pose problems in obtaining appropriate witness or victim cooperation. These cases may require sifting through masses of dull and difficult-to-understand records . . .” (citation omitted)).

¹⁰¹ See *id.* at 281–82 (suggesting that prosecutors face an inherently delicate task in undertaking complex white-collar trials by noting that at least some studies of such cases show “jurors could not accurately remember important . . . economic information”).

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 and were thus unaware of their complicity in criminal conduct.¹⁰² Complexities 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 often confuses jurors and the battle of the experts creates doubt.¹⁰³

Finally, cases, such as those involving fraud, typically require a high level of mens rea, such as knowing or intentional misrepresentation.¹⁰⁴ The complexity in an 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.¹⁰⁵

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

¹⁰² See HARTLEY, *supra* note 97, at 71 (stating that complexities in corporate operations may provide insulation from scrutiny because they make it "difficult to determine which actions were deliberately undertaken").

¹⁰³ See, e.g., Linda Sandler et al., *JPMorgan, Citigroup Helped Doom Lehman, Report Says*, BLOOMBERG (Mar. 12, 2010), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ab1XUyb pK4Vg> (reporting that the Lehman Brothers bankruptcy examiner spent a year and \$38 million producing a 2200-page bankruptcy report); see also Jean Eaglesham & Liz Rappaport, *Lehman Probe Stalls; Chance of No Charges*, WALL ST. J., Mar. 12, 2011, at B1 (reporting that the SEC is doubtful it will be able to bring charges against Lehman Brothers and that the DOJ is unlikely to pursue criminal charges if the SEC does not move forward); Greg Farrell, *Justice Department Ends Two-Year Criminal Probe into AIG*, FIN. TIMES, May 24, 2010, at 23 (reporting that the DOJ determined there was insufficient evidence to pursue charges against AIG or its senior executives).

¹⁰⁴ See John C. Coffee, Jr. & Charles K. Whitebread, *The Federalization of Fraud: Mail Fraud and Wire Fraud Statutes*, in WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 9.05 (Otto Obermaier & Robert Morvillo eds., 2011).

¹⁰⁵ J. KELLY STRADER, UNDERSTANDING WHITE COLLAR CRIME § 1.02B (3d ed. 2011); see also Reckard, *supra* note 67 (contasting simple "cook the books" accounting fraud cases such as Enron with Countrywide's activity where "blame could be assigned to an entire chain of players: mortgage brokers who falsified applications; investment bankers who concocted complex and 'opaque' mortgage bonds; rating firms that provided high ratings on the bonds but said they were lied to; and institutional investors that relied on dubious ratings because the securities carried above-market interest while promising to be risk-free").

on victims, law enforcement, and the community; and punishment goals.¹⁰⁶ Considerations of mercy,¹⁰⁷ excuse,¹⁰⁸ or justification¹⁰⁹ may also persuade a prosecutor to decline prosecution rather than risk acquittal or jury nullification.

Some of these factors tend to favor the elite white-collar offender. The nature of financial crimes involves no overt violence, so direct harm is financial, 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 the corporate entities they run.¹¹⁰ They are gainfully employed (unless they

¹⁰⁶ F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 194–96 (2002) (noting that prosecutorial consideration is given to the nature and gravity of a crime, the defendant's personal characteristics and criminal history, the victim's wishes, and punishment goals); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532, 533–35 (1970) (noting prosecutorial consideration given to administrative costs, limitations in enforcement resources, and the potential for the defendant to cooperate as an informant, among other factors).

¹⁰⁷ See Bumgarner, *supra* note 86, at 689–90 (observing that the exercise of prosecutorial discretion to decline prosecution in favor of mercy could be an agent of goodness when there is a sympathetic offender, such as in cases where a parent has accidentally killed a child and deterrence is an insufficient reason to punish).

¹⁰⁸ Excuse defenses may be raised by defendants in cases where the prosecution is able to establish all elements of the criminal offense, however, “conviction is deemed inappropriate because of a lack of responsibility on the part of the defendant.” LAFAVE, CRIMINAL LAW, *supra* note 109, at 447–48; see also Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1523 (1992) (“Satisfaction of the culpable conduct requirement creates a defeasible presumption that the defendant was morally culpable for his crime. But, the defendant can defeat this presumption of moral fault by denying that he was morally responsible for engaging in the culpable conduct”). Excuse defenses include insanity, intoxication, infancy, and duress. LAFAVE, CRIMINAL LAW, *supra* note 109, at 448, 450.

¹⁰⁹ 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 H. ROBINSON, CRIMINAL LAW DEFENSES § 24(a) (1984); cf. Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1599 (2002) (arguing that justification defenses should not be available to actors who engage in harmful conduct without knowledge that the conduct was objectively justified); 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, 63–64 (1984) (critiquing justification constructs advanced by George Fletcher as too rigid to properly account for “important moral gradations” and arguing that “justifications need not always involve objectively right conduct”).

¹¹⁰ See, e.g., Russell Hubbard, *Scrushy's Charitable Donations Continue as Trial Approaches*, BIRMINGHAM NEWS, Nov. 18, 2003, available at <http://www.al.com/specialreport/birminghamnews/index.ssf?healthsouth/healthsouth146.html> (reporting on the potential influence in the Alabama community of the millions of dollars given by the Richard M. Scrushy Charitable Foundation, including contributions to thirty-eight organizations during 2003, when its founder (the former CEO of HealthSouth Corp.) was facing a jury trial on eighty-five criminal counts). Scrushy was acquitted of the accounting fraud charges in 2005, but convicted in 2006 of paying \$500,000 in campaign contributions to then-Alabama governor Don Siegelman for a seat on a hospital regulatory board.

have been asked to resign), and may be able to marshal significant personal resources—and often corporate resources¹¹¹—for their defense. If the financial scheme in question 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.¹¹² 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.¹¹³ 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.¹¹⁴ Consequently, the economic reality is often that pursuing an elite crime may draw those resources from dozens of other cases.¹¹⁵

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 criminal conduct, it had caused power outages in Northern California,¹¹⁶ emptied pension funds,¹¹⁷ and decimated the

Scrushy was resentenced to seventy months imprisonment for that crime in January 2012. Pearson, *supra* note 74.

¹¹¹ See, e.g., Alicia Mundy, *Forest Chief Prevails Over U.S.*, WALL ST. J., Aug. 6, 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 pled guilty to misdemeanors for actions committed while he was CEO).

¹¹² 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, 399–400 & n.219 (2003) [hereinafter *Just in Crime*] (describing Michael Milken's assistance in the bankruptcy settlement of Drexel Burnham Lambert by unraveling the junk bond market he created while working there, and the consequent reduction in his term of imprisonment from ten years to about twenty-two months).

¹¹³ *Supra* notes 95–98 and accompanying text.

¹¹⁴ *Supra* notes 98–100 and accompanying text.

¹¹⁵ Cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–72 (2004) (recognizing that prosecutors may also have some personal incentives to avoid resource-intensive criminal trials, such as lightening workloads to have personal time with families, enhancing job successes through negotiated deals that count as wins for the government, and avoiding the risk of losing at trial and potential associated embarrassment).

¹¹⁶ See, e.g., Jason Leopold, *Enron Linked to California Blackouts*, MARKET WATCH (May 16, 2002, 11:56 AM), <http://www.marketwatch.com/story/enron-caused-california-blackouts-traders-say> (reporting that numerous former Enron traders admitted that manipulative energy trading led to an energy crisis in California).

¹¹⁷ See, e.g., Eric Berger, *Feds Suing Enron Over Workers' Pension Losses*, HOUSTON CHRONICLE, June 26, 2003, available at <http://www.chron.com/business/enron/article/Feds-suing-Enron-over-workers-pension-losses-2125174.php> (reporting that the U.S. Labor Department was suing Enron and its former executives for failing to properly oversee the employee pension funds while

Houston community.¹¹⁸ During the financial crisis of 2008, the global economy crashed, unemployment sky-rocketed, and millions lost their homes to foreclosure.¹¹⁹

C. *Guidance on Discretionary Decision Making*

The operation of federal criminal law is key to combatting complex financial crime carried out on a nationwide or global scale. While there are innumerable federal crimes that are relevant to white-collar crime, at its broadest level, federal law gives federal prosecutors broad powers to combat fraud—particularly mail fraud,¹²⁰ wire fraud,¹²¹ bank fraud,¹²² and securities fraud.¹²³ The DOJ sets forth its policies in the U.S. Attorneys’ Manual for exercising prosecutorial discretion to charge or decline prosecution.¹²⁴ 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.”¹²⁵

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

knowing that the Enron shares in its fund were overvalued); Steven Greenhouse, *Enron’s Many Strands: Retirement Money; Public Funds Say Losses Top \$1.5 Billion*, N.Y. TIMES (Jan. 29, 2002), <http://www.nytimes.com/2002/01/29/business/enron-s-many-strands-retirement-money-public-funds-say-losses-top-1.5-billion.html?pagewanted=all&src=pm> (describing significant losses to state government employee pension funds that held Enron shares due to their sharp drop in value).

¹¹⁸ See, e.g., Adam Liptak, *Justices Face Issue of How to Resolve Juror Bias Claims in the Internet Age*, N.Y. TIMES, Mar. 1, 2010, at A12 (observing that widespread harm to the Houston economy caused by Enron’s collapse arguably made it difficult to find untainted jurors in the criminal case against Jeffrey K. Skilling, the company’s former CEO).

¹¹⁹ See, e.g., FCIC REPORT, *supra* note 2, at xv–xvi (providing a brief synopsis of the global financial crisis of 2008 and noting that, at the time the report went to print, approximately four million American families had lost their homes to foreclosure and more than twenty-six million Americans remained unemployed).

¹²⁰ 18 U.S.C. § 1341 (2006).

¹²¹ *Id.* § 1343.

¹²² *Id.* § 1344.

¹²³ *Id.* § 1348; 17 C.F.R. § 240.10b-5 (outlawing fraud in connection with the purchase or sale of securities); 15 U.S.C. § 78ff (2006) (imposing up to twenty years imprisonment for violations of rules such as Section 10b-5).

¹²⁴ See U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-27.220(A) (describing when an attorney for the government should commence or decline prosecution).

¹²⁵ *Id.*

the same act(s) or transaction(s)” unless there is “a substantial federal interest” that is “demonstrably unvindicated” despite prior state prosecution.¹²⁶ Moreover, given the breadth of federal laws, the DOJ must prioritize potential cases to effectively allocate limited prosecutorial resources.¹²⁷ 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 “[p]revent [c]rime, [e]nforce [f]ederal [l]aws, and [r]epresent the [r]ights and [i]nterests of the American [p]eople,” is the effort to “[c]ombat public and corporate corruption, fraud, economic crime, and cybercrime.”¹²⁸ 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, which was 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 American people.¹²⁹ Moreover, the visibility and widespread impact of high-profile financial frauds demands prosecutorial attention lest their ubiquity impose the greater cost of undermining the rule of law and thereby driving a stake in the heart of the American justice system.

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

¹²⁶ *Id.* § 9-2.031(A). 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 (2006); 15 U.S.C. §§ 80a-36, 1282 (2006)).

¹²⁷ See U.S. DEP’T OF JUSTICE, 2007–2012 STRATEGIC PLAN 13–14, available at http://www.justice.gov/archive/mps/strategic2007-2012/goals_and_objectives.pdf (identifying three key goals and objectives: “Prevent Terrorism and Promote the Nation’s security . . . Prevent Crime, Enforce Federal Laws, and Represent the Rights and Interests of the American People . . . [and] Ensure the Fair and Efficient Administration of Justice”).

¹²⁸ *Id.* at 14.

¹²⁹ See *supra* Part I (stating that the financial crisis caused multiple bank failures, mortgage company bankruptcies, and real estate foreclosures); see also FCIC REPORT, *supra* note 2, at 389–401 (stating that the financial crisis led to a fall in gross domestic product (“GDP”), employment, household net worth, real estate values, and local government tax revenues). In Part V of the FCIC Report, The Aftershocks, the subtitles of the contents sum up the extensive impact of the financial crisis, especially the losers and winners: Household: “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.

other civil violations of law, or they may bring *qui tam* actions on behalf of the government under the False Claims Act when the defendants have defrauded the government.¹³⁰ Many white-collar criminal federal statutes provide for or have civil counterparts.¹³¹ Consequently, government agents may choose to file civil suits rather than criminal charges.¹³² Many administrative agencies have authority to press administrative proceedings to address individual or corporate misconduct and parallel criminal prosecutions are often possible;¹³³ however, a skilled defense attorney may be able to avoid such risks through a global settlement that resolves the risk of criminal charges by using tools such as deferred prosecution or non-prosecution agreements.¹³⁴ Civil asset forfeitures, state license revocation

¹³⁰ False Claims Act, 31 U.S.C. §§ 3729–30 (2006).

¹³¹ See, e.g., Sherman Act, 15 U.S.C. § 1 (2006) (stating that any person who is found guilty for violating antitrust laws can be punished by fine or by imprisonment); Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1963, 1964 (2006) (providing that criminal and civil penalties can be imposed on any person found guilty of racketeering); Clean Water Act, 33 U.S.C. § 1319 (2006) (imposing civil and criminal penalties for violations of the Clean Water Act); Clean Air Act, 42 U.S.C. § 7413 (2006) (allowing the EPA to commence civil and criminal actions if a state is not acting in compliance with the Clean Air Act); see also *United States v. Stringer*, 535 F.3d 929, 936–37 (9th Cir. 2008) (discussing overlapping civil and criminal parallel investigations for violations of securities laws).

¹³² See J. KELLY STRADER, *UNDERSTANDING WHITE COLLAR CRIME* 5–7, 365–66 (2d ed. 2006) (“[V]iolations of white collar criminal statutes may lead to civil and/or administrative remedies in addition to or instead of criminal penalties.”).

¹³³ JEROLD H. ISRAEL ET AL., *WHITE COLLAR CRIME: LAW AND PRACTICE* 670 (3d ed. 2009); see, e.g., U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-27.250(B) (describing alternatives to criminal prosecution carried out by administrative agencies, such as “civil tax proceedings; civil actions under the securities, customs, antitrust, or other regulatory laws; and reference of complaints to licensing authorities or to professional organizations such as bar associations”).

¹³⁴ See Gretchen Morgenson & Louise Story, *Behind the Gentler Approach to Banks by U.S.*, N.Y. TIMES, July 8, 2011, at A1 (observing that the federal prosecutors are moving away from criminal prosecutions in white-collar cases to lesser alternatives, such as deferred prosecutions or civil litigation). The deferred prosecution agreement (“DPA”) 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. U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-22.010; see Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT’L L. 509, 557–62 (2011) (discussing the prevalence of deferred prosecution agreements and non-prosecution agreements (“NPA”) since 2002 and providing a table listing the numerous corporations that have obtained a DPA or NPA since 2005); Steven R. Peikin, *Outside Counsel: Deferred Prosecution Agreements: Standard for Corporate Probes*, N.Y. L.J., Jan. 31, 2005, at 28 (stating that deferred prosecution agreements “have become a standard means of resolving major corporate investigations”); F. Joseph Warin & Jason C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 J. CORP. L. 121, 124 (1997) (“The cases involving Salomon Brothers, Sequa Corporation, Prudential Securities, and Coopers & Lybrand provide useful examples of alternative dispositions of cases involving corporate defendants.”). 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. Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate*

proceedings, professional disciplinary proceedings, and self-regulatory organization enforcement proceedings are additional alternatives (or parallel processes) to criminal prosecution.¹³⁵ 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, or in the case of governmental civil actions, it may impose fines without requiring admission of wrongdoing.¹³⁶

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.¹³⁷ Moreover, a small portion of the spoils may be used to further protect their interests in the form of lobbying for preferred legislation,¹³⁸ supporting favored politicians who

Death Penalty, 47 ARIZ. L. REV. 933, 952 (2005) [hereinafter *The Science Fiction of Corporate Criminal Liability*]. Both parties benefit from resource savings. *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. . . . Likewise, civil and regulatory alternatives may be appropriate in certain cases

U.S. ATTORNEYS' MANUAL, *supra* note 13, § 9-28.200.

¹³⁵ See ISRAEL ET AL., *supra* note 117, at 643–47, 676–77, 679–80 (describing those forms of proceedings).

¹³⁶ See SEC v. Vitesse Semiconductor Corp., 771 F. Supp. 2d 304, 308–09 (S.D.N.Y. 2011) (issuing an order accepting settlement but criticizing the 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." *Id.* at 309.

¹³⁷ See Morgenson, *supra* note 20 (stating that Countrywide and Bank of America paid \$45 million of the \$67.5 million settlement by former CEO of Countrywide Financial, and it was reported that he made \$521 million during his tenure at Countrywide).

¹³⁸ See PBS Frontline, *The Long Demise of Glass-Steagall*, <http://www.pbs.org/wgbh/pages/frontline/shows/wallstreet/weill/demise.html> (last visited Jan. 7, 2013) (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, the 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 1997–1998 election cycle, the finance, insurance, and real estate industries targeted \$150 million in political campaign donations to congressional banking committees and other financial services committee members, and spent more than \$200 million on lobbying efforts. *Id.* Congress passed the Financial Services Modernization Act of 1999, 12 U.S.C. § 1811, repealing those provisions of the Glass-Steagall and Bank Holding Company Acts. *Id.* Treasury Secretary Rubin resigned his post to join Citigroup in October 1999 as a director and chair of Citigroup's executive

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. 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.¹³⁹ The U.S. Attorneys' 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."¹⁴⁰ The policies may, in fact, be modified by United States Attorneys "in the interests of fair and effective law enforcement within the district."¹⁴¹ 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.¹⁴² ABA Standards for Criminal Justice promotes standards for prosecutors, addressing sufficiency, public interest, and ethical concerns in exercising discretion.¹⁴³

committee, days after the Clinton Administration agreed to support the legislation on October 22, 1999. *Id.*; see also Mara Der Hovanesian, *Citigroup's Rubin Resigns*, BLOOMBERG BUSINESSWEEK, Jan. 9, 2009, http://www.businessweek.com/bwdaily/dnflash/content/jan2009/db2009019_851357.htm (noting that Rubin reportedly earned about \$115 million in his advisory role over the ten years with Citigroup).

¹³⁹ See Bob Van Voris, *Goldman's Tourre Travels to Rwanda While Awaiting Trial*, BLOOMBERG (Mar. 24, 2012), <http://www.bloomberg.com/news/2012-03-23/goldman-s-tourre-travels-to-rwanda-while-awaiting-trial.html> (reporting that Fabrice Tourre, Goldman Sachs Group Inc. executive director, is a defendant in a federal case in New York in which he is accused of defrauding investors in a collateralized debt obligation known as Abacus 2007-AC1, while Goldman Sachs settled claims for \$550 million). Public offerings are seldom a one-man show. See, e.g., Press Release, Sec. & Exch. Comm'n, Goldman Sachs to Pay Record \$550 Million to Settle SEC Charges Related to Subprime Mortgage CDO (July 15, 2010), available at <http://www.sec.gov/news/press/2010/2010-123.htm> (reporting that Goldman agreed to a civil settlement without admitting or denying allegations, where \$250 million will be distributed to harmed investors and \$300 million will be paid to the U.S. Treasury); Press Release, The Goldman Sachs Group, Inc., Goldman Sachs Reports Earnings Per Common Share of \$13.18 for 2010 (Jan. 19, 2011), available at <http://www.goldmansachs.com/media-relations/press-releases/current/pdfs/2010-q4-earnings.pdf> (reporting net revenues of \$39.16 billion and net earnings of \$8.35 billion for the year ending December 31, 2010).

¹⁴⁰ U.S. ATTORNEYS' MANUAL, *supra* note 13, § 9-27.150. The manual explains further that the principles have been "developed purely as [a] matter of internal Departmental policy and [are] being provided to Federal prosecutors solely for their own guidance in performing their duties." *Id.*

¹⁴¹ *Id.* § 9-27.140 (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").

¹⁴² See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 3-3.9(a)-(d) (3d ed. 1993) (describing the standards for charging discretion).

¹⁴³ ABA STANDARDS FOR CRIMINAL JUSTICE at 3-3.9(a)-(d) provides the following:

- (a) "A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction."
- (b) A prosecutor "may . . . for good cause consistent with the public interest decline

One ABA standard implicitly imports affirmance considerations in that it permits declining prosecution “for good cause consistent with the public interest.”¹⁴⁴ By recognizing that public interest considerations rightly factor into exercising discretion, the ABA standards implicitly support affirmance considerations, but fail affirmatively to 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 investigate or prosecute elite crime.¹⁴⁵ Prosecutors, thus, are ethically bound to consider affirmance because it is central to the public’s interest.

D. *Plea Bargaining*

Prosecutorial discretion extends 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.¹⁴⁶ Resolving a case through a plea agreement may leave some feeling that the government could do more.¹⁴⁷ Given the uncertainty inherent in trial litigation, if the outcome of the trial is anything less than guilty (*e.g.*, a hung jury or an acquittal), the government has lost the opportunity to recover any part of the losses, and in the case of a mistrial,

to prosecute, notwithstanding . . . sufficient evidence” to support a conviction.

(c) “A prosecutor should not be compelled by his or her supervisor to prosecute a case in which he or she [the prosecutor] has a reasonable doubt about the guilt of the accused.”

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

Id.

¹⁴⁴ *Id.* at 3-3.9(b).

¹⁴⁵ See Morgenson & Story, *supra* note 134 (reporting on declinations policies in the DOJ); Taibbi, *supra* note 66 (same).

¹⁴⁶ See FED. R. CRIM. P. 11(c)(3)(A) (stating that “the court may accept the agreement, reject it, or defer a decision”).

¹⁴⁷ See, *e.g.*, Jim Carlton, *Ex-EPA Official Faults Probe of BP Alaska Oil Spill*, WALL ST. J., Nov. 19, 2008, at A6 (reporting on former FBI special agent in charge of investigation of two British Petroleum (“BP”) oil spills in 2006, and his concern that the investigation had been quashed mid-investigation by the DOJ after BP agreed to plead to a misdemeanor and a substantially lower fine than recommended by the EPA to settle the charges).

the government 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 while conserving limited resources.¹⁴⁸ Moreover, the resolution is usually considered a “win” for the government.

Defendants may consider such resolutions a “win” 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.¹⁴⁹ Otherwise, a

¹⁴⁸ One of the oft-cited purposes of a plea agreement is to provide certainty. See MORAN & COOPER, *supra* note 12, at 60 (stating that when a “prosecutor negotiates a deal with an accused, he is actually invoking the right of the court to sentence a convicted person”). Another justification for plea agreements is a mutually beneficial exchange in terms of lesser charge bargaining or sentencing bargaining for the defendant and conservation of resources for the government. For example, the U.S. Attorneys’ Manual provides:

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

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

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

U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-27.400 (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, emails, invoices, and interviews. See Darryl K. Brown, *The Problematic and 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); Ramirez, *Prioritizing Justice*, *supra* note 98, at 1007–08 (proposing a Corporate Crimes Division of the DOJ to centralize expertise and resources necessary to address complex litigation associated with corporate and white-collar criminality). 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 reduce significantly the total number of cases disposed of by the office. Thus, this *exception* has the potential to swallow the rule. See U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-28.200 (suggesting that it may at times be appropriate to resolve a corporate criminal case by means other than indictment).

¹⁴⁹ 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

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. Because private civil litigation may expose defendants to great losses, defendants have powerful incentives to force plaintiffs to meet their burden of proof on all elements of their claims. 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 defendant cannot use the verdict 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,¹⁵⁰ criminal prosecution is the most powerful tool

permitted), or a global civil settlement that resolves the criminal charges. *North Carolina v. Alford*, 400 U.S. 25, 37–38 (1970) (stating that a court may accept a guilty plea where the defendant maintains innocence, provided there is strong evidence of actual guilt, a strong factual basis for criminal charge, the defendant was advised by competent counsel, and the defendant intelligently concluded that he should plead guilty to second degree murder to avoid risk of death penalty if convicted for first degree murder); Ramirez, *The Science Fiction of Corporate Criminal Liability*, *supra* note 134, at 950 n.100 (describing the use of global settlements to resolve criminal, civil, and regulatory violations).

¹⁵⁰ The U.S. Attorneys’ Manual offers instruction for plea bargaining. See U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-27.430 (providing that with certain narrow exceptions, 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.” *Id.* § 9-28.1300; Memorandum from Paul J. McNulty, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Dep’t Components, U.S. Att’ys, *Principles of Federal Prosecution of Business Organizations* § XIII (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf; see also Press Release 06-828, Dep’t of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corp. Fraud (Dec. 12, 2006), available at http://www.justice.gov/opa/pr/2006/December/06_odag_828.html (explaining the McNulty Memorandum policy change and what factors prosecutors should consider when charging fraud).

Another possibility is that charges are brought against or a plea is negotiated with a corporate entity associated with the parent entity, but the plea grossly understates the criminality or underpunishes because it includes a relatively meager fine, 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); Ken Ward, Jr., *Massey Firm to Plead Guilty in Mine Deaths*, CHARLESTON GAZETTE, Dec. 23, 2008 (reporting on global settlement by Massey Energy Co.

society has to address very costly antisocial behavior.

E. *Ambiguity in Declination Obscures Implicit Motivations*

“[T]he power to be lenient is the power to discriminate.”¹⁵¹ 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.’”¹⁵² 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.”¹⁵³ Moreover, such discretionary power may hinge “unjustifiably on the relative weakness or strength of the networks to which perpetrator and victim belong.”¹⁵⁴ 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 their 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.¹⁵⁵ The U.S. Supreme Court has recognized prosecutorial freedom in exercising discretion, placing limits on that discretion in extremely limited circumstances.¹⁵⁶ Indeed, the only parties able and available to challenge charging decisions are those who challenge their own charges by claiming an abuse of prosecutorial discretion to charge a crime: vindictive prosecution in violation of due

that resolved over 1300 violations of the Federal Mine Safety and Health Act at Massey energy subsidiaries).

¹⁵¹ LAFAVE ET AL., *supra* note 82, at 683.

¹⁵² *Id.* (quoting Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 17 (1932)).

¹⁵³ *Id.* at 685; *see, e.g.*, *Wayte v. United States*, 470 U.S. 598, 607–08 (1985) (stating that court oversight in prosecutorial discretion delays proceedings, chills law enforcement, and undermines prosecutorial effectiveness); *United States v. Goodwin*, 457 U.S. 368, 382 (1982) (“A prosecutor should remain free before trial to exercise the broad direction entrusted to him to determine the extent of the societal interest in prosecution.”).

¹⁵⁴ Holmes, *supra* note 13, at 126.

¹⁵⁵ *See, e.g.*, *In re Dean*, 527 F.3d 391, 395–96 (5th Cir. 2008) (denying standing of victims to challenge plea).

¹⁵⁶ 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).

process¹⁵⁷ or selective or discriminatory enforcement in violation of the Equal Protection Clause.¹⁵⁸ Beyond such specific and identifiable instances of review of prosecutorial discretion for violations of constitutional protections, courts have identified the separation of powers doctrine in declining to interfere with prosecutorial discretion.¹⁵⁹ The Supreme Court has expressed a reluctance toward further inquiry because “[s]uch factors 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.”¹⁶⁰ 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.

¹⁵⁷ See, e.g., *Goodwin*, 457 U.S. at 379–80 (affording prosecutors wide latitude in reevaluating charging decisions, even after defendant has exercised his constitutional right to request a jury trial); *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (finding no presumption of vindictiveness when prosecutor threatens to increase charges if defendant rejects plea offer); *Blackledge v. Perry*, 417 U.S. 21, 28–29 (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*).

¹⁵⁸ See, e.g., *Wayte*, 470 U.S. at 610 (stating that discretion is broad, but not unfettered; the defendant must show not just the discriminatory effect but also the discriminatory purpose of punishment); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (holding that a 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).

¹⁵⁹ LAFAVE ET AL., *supra* note 82, at 686–87; see, e.g., *United States v. Friday*, 525 F.3d 938, 960 (10th Cir. 2008) (declining to review prosecutorial discretion in deciding to prosecute Native Americans and power companies differently); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“[T]he courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”). 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 KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 210 (1969) (criticizing the court’s reasoning in *United States v. Cox*, 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); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 12–13 (2009) (criticizing judicial review of executive discretion because it does not comport with the separation of powers doctrine in Administrative Law); see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 15–16 (1994) (explaining that historical accounts suggest that the U.S. Constitution did not compel exclusive executive control over prosecutors).

¹⁶⁰ *Wayte*, 470 U.S. at 607. 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.” *Id.* The Court stated that: “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.*

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 relatively short terms.¹⁶¹ 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.¹⁶² Often such rules have a limited time period,¹⁶³ but they will not invariably provide the transparency necessary for public confidence, especially when the discretionary activities encompass a broad range of considerations, as is true of prosecutorial discretion.¹⁶⁴ Moreover, if government leaders choose to appoint industry 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 recommending actions against other industry actors who engaged in conduct similar to the appointee.¹⁶⁵

¹⁶¹ 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, 141–43 (2009) (reviewing a history of revolving door appointments from the banking industry, including the two ethics waivers Henry Paulson received as Treasury Secretary, allowing him to participate in matters affecting Goldman Sachs, his former employer).

¹⁶² See, e.g., Louise Story & Gretchen Morgenson, *S.E.C. Hid Its Lawyer's Madoff Ties*, N.Y. TIMES, Sept. 21, 2011, at B1 (reporting that the SEC's Inspector General referred the actions taken by the SEC's general counsel David M. Becker—including recommending a compensation plan for the victims of the Bernard Madoff Ponzi scheme that was favorable to Becker's personal interests in an inheritance from a Madoff account—to the DOJ); Edward Wyatt, *Ex-Official at S.E.C. Settles Case for \$50,000*, N.Y. TIMES, Jan. 14, 2012, at B3 (reporting that Spencer Barasch, former enforcement director for the SEC's Fort Worth Regional office from 1998 to 2005, who was accused of discouraging or blocking three investigations into the alleged Ponzi scheme by Stanford Financial Group during his SEC tenure, agreed to a civil fine for violating federal conflict-of-interest rules by later representing Stanford Financial Group before the Commission); Press Release, Dep't of Justice Off. of Pub. Affairs (U.S.A.O. E.D. Tex.), *Former SEC Head of Enforcement for the Fort Worth Office Settles Conflict of Interest Allegations* (Jan. 13, 2012), available at www.justice.gov/usao/txe/News/2012/edtx-barasch-011312.html (reporting that Spencer Barasch entered into a settlement offer to pay \$50,000 dollars for his representation of Stanford Financial Group despite a permanent conflict of interest).

¹⁶³ President Obama extended the timeframe from one year to two years. See Paltrow, *supra* note 8 (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 spring 2011).

¹⁶⁴ See, e.g., *id.* (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 that the firm provided legal opinion letters needed to create MERS; moreover, in 2010, both Holder's and Breuer's chiefs-of-staff returned to Covington).

¹⁶⁵ See, e.g., Andrew Ross Sorkin, *Revolving Door at S.E.C. Is Hurdle to Crisis Cleanup*, N.Y. TIMES (Aug. 1, 2011), <http://dealbook.nytimes.com/2011/08/01/revolving-door-at-s-e-c-is-hurdle-to>

3. *Unaccountable Discretion*

Prosecutors are not required to identify their reasons for declining prosecution.¹⁶⁶ Information obtained through grand jury proceedings is secret and only available to the public in limited circumstances.¹⁶⁷ By affording the prosecutor consideration of so many factors in deciding whether or not to prosecute, an ambiguous reality emerges in which the decision to forgo prosecution can be based on myriad factors such that it is impossible to detect any underlying attitudinal aversion to prosecuting the powerful.¹⁶⁸ 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,¹⁶⁹ especially in the corporate and white-collar arena where regulatory action is often a potential alternative offered to support the decision against criminal prosecution.¹⁷⁰

crisis-cleanup/ (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 hedfund 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).

¹⁶⁶ See, e.g., Letter from Brian A. Benczkowski, Principal Deputy Asst. Att’y Gen., U.S. Dep’t of Justice to Bart Stupak & John D. Dingell, U.S. Reps. (Apr. 3, 2008), available at <http://democrats.energycommerce.house.gov/images/stories/Documents/investigations/energy/BP.040308.respto031208.BP.ltr.pdf> (responding to an inquiry about BP plea agreements by advising “about relevant Department of Justice policy” and explaining that many considerations factor into the exercise of prosecutorial discretion in negotiating plea agreements, but refusing to “disclose non-public information about . . . prosecutorial decisions” in the case).

¹⁶⁷ See FED. R. CRIM. P. 6(e) (listing the rules for recording and disclosing grand jury proceedings). The purpose of secrecy is not to shield the prosecutor, but rather to protect against witness tampering or influencing grand jurors, and to encourage testimonial forthrightness, thereby reducing the likelihood of flight by those being investigated and protecting those who are investigated but exonerated from negative consequences. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 449 (5th ed. 2009).

¹⁶⁸ See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1010–12 (1995) (discussing the effect of blurring an act which is to be regulated by providing an alternate meaning).

¹⁶⁹ Large organizations or powerful corporations are able to use their size and resources to protect themselves and their employees from criminal prosecutions for decisions made by individuals on behalf of the corporations, even when those decisions result time and again in death, great financial calamity, or harm to the corporation itself. See, e.g., Mundy, *supra* note 111 (reporting that after Forest Laboratories Inc.’s guilty plea to misdemeanors for health care fraud, CEO Howard Soloman was able to avoid debarment by the U.S. Department of Health and Human Services—a move that would have excluded him from jobs in the health care industry that do business with the U.S. government—by hiring a lobbyist for \$80,000 to argue against the exclusion and by marshalling support from the U.S. Chamber of Commerce and the Pharmaceutical Research and Manufacturers of America, among others).

¹⁷⁰ This is especially true when there is an established regulatory presence or perception that civil litigation is sufficient to address wrongdoing. See CULLEN ET AL., *supra* note 1, at 292 (recognizing private civil lawsuits as the legal remedy of choice in defective product cases and the heightened safety

Today, many corporations have become conglomerates wielding both political and economic power.¹⁷¹ 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.¹⁷² With threats of corporations that are “too big to fail”¹⁷³ or claims that corporate

threshold for consumer products regulated by the federal government). Thus, for health and safety violations in the United States, the FDA and the Occupational Health and Safety Administration have been the primary governmental vehicles for expressing societal expectations in the workplace and in consumer goods. *See id.* at 292, 298 (asserting that “criminal sanctions . . . have been brought almost exclusively by federal regulatory agencies—especially the Food and Drug Administration,” and that there is a general unwillingness to prosecute workplace safety violation cases).

¹⁷¹ MARSHALL B. CLINARD, *CORPORATE CORRUPTION: THE ABUSE OF POWER* 4–5 (1990); HARTLEY, *supra* note 97, at 14; *see also* Nancy Folbre, *Risks, Radiation and Regulation*, N.Y. TIMES (Mar. 18, 2011), <http://economix.blogs.nytimes.com/2011/03/18/risks-radiation-and-regulation> (“The threat of social meltdown arises not from excessive growth of the state and its regulatory role but from its capture by groups able to translate market power into political power: socialism for big investors, capitalism for everyone else.”). Marshall Clinard connected the contributions of corporations and industry political action committees (“PACs”) to the democratic process. CLINARD, *supra*, at 6–7. In *Citizens United v. Federal Election Commission*, the Supreme Court effectively gutted bipartisan campaign finance reform legislation, stating that “we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” 130 S. Ct. 876, 909 (2010). In January 2011, Public Citizen, a national, non-profit advocacy organization, released a report on the effects of the *Citizens United* decision on the 2010 election cycle. Press Release, Public Citizen, *Citizens United: One Year Later* (Jan. 18, 2011), *available at* <http://www.citizen.org/12-months-after>. Among its findings were the following facts:

[1] spending by outside groups jumped to \$294.2 million in the 2010 election cycle from just \$68.9 million in the 2006 cycle; [2] the uncharacteristically high spending in 2010 presages blockbuster spending in the upcoming 2012 elections; [3] nearly half of the money spent (\$138.5 million, or 47.1 percent) came from only 10 groups; [4] 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 [5] of 75 congressional contests in which partisan power changed hands, spending by outside groups favored the winning candidate in 60 contests.

Id.

¹⁷² *See* HARTLEY, *supra* note 97, at 14 (describing favorable legal conditions); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-157, *INTERNATIONAL TAXATION: LARGE U.S. CORPORATIONS AND FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS* 4 (2008) (reporting that eighty-three of the one hundred largest U.S. corporations have subsidiaries in tax havens or international financial privacy jurisdictions); 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); *see also* Press Release, Remarks by the President on Int'l Tax Policy Reform (May 4, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-The-President-On-International-Tax-Policy-Reform/ (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”).

¹⁷³ *See* JOHNSON & KWAK, *supra* note 68, at 175 (“[V]irtually everyone involved acknowledged that the megabanks were too big to fail, because if any one of them collapsed the system as a whole might collapse.”); ROGER LOWENSTEIN, *THE END OF WALL STREET* 252 (2010) (“Citigroup was seen as truly too big to fail, and any upset to it horrified the Fed.”); SORKIN, *supra* note 42, at 7 (stating that

prosecution could cost thousands of jobs to innocent employees,¹⁷⁴ there is significant temptation for the prosecutor to hide behind the numerous and noncontentious discretionary factors available to a prosecutor in choosing not to charge criminal conduct or to enter into a deferred prosecution agreement.¹⁷⁵ 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,¹⁷⁶ so *someone* has broken a criminal law. In instances where a corporation negotiates a deferred

decision makers on Wall Street and in Washington thought they themselves were too big to fail); STIGLITZ, *supra* note 17, at 40 (“The banks had grown not only too big to fail but also too politically powerful to be constrained.”).

¹⁷⁴ See, e.g., Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 107 (2006) (discussing the Arthur Andersen investigation). 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.*; Darin Bartholomew, *Is Silence Golden When It Comes to Auditing?*, 36 J. MARSHALL L. REV. 57, 57 (2002). Andersen was charged with a single-count indictment for obstruction of justice, and was convicted by a federal jury in Houston, Texas. Ainslie, *supra*, at 107; Eric L. Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1663 (2006). 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) (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 DOJ subsequently moved to dismiss the charges against the firm. *Move by Ex-Andersen Partner Could Affect Enron Case*, N.Y. TIMES, Nov. 24, 2005, at C9. It was the criminal indictment, however, and not the conviction that sealed the firm’s fate. See Lawrence D. FINDER & Ryan D. McCONNELL, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 3 n.8 (2006) (discussing the fallout from the prosecution of Arthur Andersen). Although the criminal investigation of Arthur Andersen involved a limited number of employees in the Houston office of the nationwide firm, the demise of the firm reportedly led to the loss of 28,000 U.S. jobs. See Ainslie, *supra*, at 107–08 (stating that documents were shipped to Andersen’s Houston office for shredding at the direction of a Houston-based partner); FINDER & McCONNELL, *supra*, at 3 (noting that 28,000 jobs were lost after Andersen’s indictment). The Enron-related conviction of Arthur Andersen in June 2002 came on the heels of a large 2001 settlement with the SEC for the firm’s accounting and auditing work for Waste Management Corporation, and an SEC suit against five Arthur Andersen officers and the lead partner for its work with the Sunbeam Corporation; neither of these investigations was centered on the Houston office. Ainslie, *supra*, at 107. Thus, by the time Arthur Andersen was charged with accounting fraud related to Enron, the firm had demonstrated actionable misconduct on other accounts and in other locations, suggesting a deficit in executive ethical leadership, implicating a broader firm culture of misconduct.

¹⁷⁵ See *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013) (interview with Lanny Breuer, DOJ Assistant Attorney General, Criminal Division, in which Breuer offered up several reasons why banks and senior executives were not prosecuted), available at <http://www.pbs.org/wgbh/pages/frontline/untouchables/>; Ramirez, *The Science Fiction of Corporate Criminal Liability*, *supra* note 134, 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).

¹⁷⁶ See 1 KATHLEEN F. BRICKEY, *CORPORATE CRIMINAL LIABILITY* 89 (2d ed. 1992) (describing theories by which corporate criminal liability may be imputed through the acts of a corporation’s agents).

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 deals demonstrate certitude that criminal charges could have, or more to the point, *should have* been brought against individuals.¹⁷⁷

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.¹⁷⁸ Legal limitations upon such decisions are few, and courts will seldom interfere with the process and only in narrow circumstances.¹⁷⁹ Most significantly, the decision not to investigate or prosecute is even less susceptible to interference.¹⁸⁰ Consequently, no mechanism exists to require the prosecutor to reflect upon the affirmance effect of declining prosecution. Nevertheless, the social meaning of such declinations persists in elite crimes, affirming the misconduct and undermining the rule of law.

¹⁷⁷ Early studies of white-collar crime included both civil liability and criminal liability cases. MARSHALL B. CLINARD, *ILLEGAL CORPORATE BEHAVIOR* 22 (1979); *see also* EDWIN H. SUTHERLAND, *WHITE COLLAR CRIME: THE UNCUT VERSION* 13–14, 45–53 (1983) (analyzing violations of law and crimes committed by corporations). *But see* Leonard Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, in *CORPORATE AND WHITE COLLAR CRIME: AN ANTHOLOGY* 127, 129 (Leonard Orland ed., 1995) (criticizing the empirical work of Edwin Sutherland and Marshall Clinard and his associates for including adverse adjudications by civil courts and non-criminal administrative agencies against corporations and classifying them as crimes). These early sociological studies of white-collar crime refused to accede to the labels placed by legislators designating certain fraudulent actions as “crimes” while others were labeled “violations.” *See* Laureen Snider, *Researching Corporate Crime*, in *UNMASKING THE CRIMES OF THE POWERFUL: SCRUTINIZING STATES & CORPORATIONS* 49, 51 (Steve Tombs & Dave Whyte eds., 2003). Snider observes:

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, *Just in Crime*, *supra* note 112, at 372 n.72 (describing the difficulty in reaching a consensus as to what conduct should be included in the term “white collar crime”).

¹⁷⁸ *See* Sandra Caron George, *Prosecutorial Discretion: What’s Politics Got to Do with It?*, 18 *GEO. J. LEGAL ETHICS* 739, 744 (2005) (discussing typical considerations of prosecutors).

¹⁷⁹ Brandon K. Crase, *When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 *GEO. J. LEGAL ETHICS* 475, 480 (2007).

¹⁸⁰ *See* Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 *LAW & SOC. INQUIRY* 387, 390 (2008) (asserting that decisions not to prosecute are “actions that are legally authorized, but not legally regulated”).

IV. 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.¹⁸¹ 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."¹⁸² Serious or very costly crimes usually result in incarceration. Serious criminal sanctions like incarceration operate as society's strongest condemnation of anti-social behavior.¹⁸³

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.¹⁸⁴ The theories fall into two broad categories: retributive and utilitarian.¹⁸⁵ Retributive theories are backward-looking, asserting the need for affirmative punishment deserved by the individual for breaking societal rules.¹⁸⁶ Under this label, several theorists have further expanded upon the type of message and need for the message; affirmative retribution,¹⁸⁷ negative retribution,¹⁸⁸ and assaultive

¹⁸¹ See 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 . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

¹⁸² See *id.* at 405 (stating a "criminal" penalty is "conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community").

¹⁸³ See, e.g., Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U. J. GENDER & L. 1, 70–71 (1995) ("The mandatory minimum sentence of fifteen years with the prospect of incarceration for life represents one of the most severe penalties prescribed under New York State law. It expresses society's and the Legislature's highest level of condemnation for the most serious offenders who commit the most reprehensible crimes.").

¹⁸⁴ See Hart, *supra* note 181, at 410 (discussing why it is difficult to have only one theory of criminal punishment).

¹⁸⁵ Kent Greenawalt, *Punishment*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1284 (Joshua Dressler ed., 2d ed. 2002).

¹⁸⁶ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16–17 (4th ed. 2006); see also HONDERICH, *supra* note 11, at 17 (explaining that retribution theories of punishment find justification in the offender's freely chosen actions). 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 that the offender had the power of origination or free will." *Id.* at 201.

¹⁸⁷ See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179–82 (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.").

¹⁸⁸ See HONDERICH, *supra* note 11, 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 offences 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").

retribution¹⁸⁹ 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.¹⁹⁰ Thus, through incapacitation, the law-breaker is imprisoned to protect society from his acts.¹⁹¹ Rehabilitation allows society to focus on the individual offender in order to teach him to become a more productive member of society, one who is willing and able to follow the law.¹⁹² Specific deterrence aims to influence future individual behavior and thereby improve society by conveying to the law-breaker in advance that punishment will follow his breach of the laws.¹⁹³ General deterrence punishes the individual law-breaker so that society is reminded to avoid deviance and is assured that breaking the rules incurs punishment.¹⁹⁴

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 talionis*¹⁹⁵ approach is not universally accepted.¹⁹⁶ 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.¹⁹⁷ Because punishment can be justified by more than one theory, legal philosophers need not reconcile their

¹⁸⁹ See 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81–82 (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”); see also JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 3 (1988) (stating James Stephen thought criminals should be treated as “noxious insects to be ground under the heel of society”).

¹⁹⁰ See Bentham, *supra* note 9 (“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. HONDERICH, *supra* note 11, at 75.

¹⁹¹ TERANCE D. MIETHE & HONG LU, PUNISHMENT: A COMPARATIVE HISTORICAL PERSPECTIVE 17–18 (2005).

¹⁹² *Id.* at 22–23.

¹⁹³ *Id.* at 20.

¹⁹⁴ *Id.* at 21.

¹⁹⁵ HONDERICH, *supra* note 11, at 20. *Lex talionis* is the latin term for “law of retaliation,” sometimes explained as “an eye for an eye” from the Bible. *Exodus* 21:22–26.

¹⁹⁶ See HONDERICH, *supra* note 11, at 22–29 (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.

¹⁹⁷ See KANT, *supra* note 10, at 195–97 (“Juridical [p]unishment can never be administered merely as a means for promoting another [g]ood either with regard to the [c]riminal himself or to [c]ivil [s]ociety, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a [c]rime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another.”).

differences.¹⁹⁸ The retributivists accept criminal punishment pursuant to the justifications they find acceptable, while the utilitarians accept punishment for its prospective impact on society.¹⁹⁹

When criminal laws are created and potential penalties are 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.²⁰⁰ When society's criminals are prosecuted, we convey our disapproval, and the law-breaker and other would-be law-breakers can appreciate the seriousness that 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.²⁰¹ Whereas specific deterrence

¹⁹⁸ 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) (2006) (stating that the court must consider various factors to impose a sentence that is "sufficient, but not greater than necessary"). 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; . . . protect the public from further crimes of the defendant; and . . . provide . . . educational or vocational training, medical care, or other correctional treatment" *Id.* §§ 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).

¹⁹⁹ *But see* PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED 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 law rule-making").

²⁰⁰ 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 H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 3 (2d ed. 2008) ("[D]ifferent principles . . . [of punishment] are relevant at 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 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 199, at 3–6 (asserting the "dangerousness of the unarticulated 'laundry list' approach" of general purposes of punishment).

²⁰¹ See DRESSLER, *supra* note 186, at 16 (contrasting retributivism with utilitarianism).

encourages the law-breaker to follow the law and thereby to 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 conveys 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 echelons of society enjoy affirmance of their crimes through non-prosecution, the rule of law erodes as all citizens 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.²⁰² Similarly, when the most powerful may act with impunity to enrich themselves at the expense of society in general, their continued control over society's most concentrated sources of economic wealth (public corporations and large banks, for example) becomes downright hazardous in ways beyond the conception of mere deterrence. Wealth achieved through the criminal abuse of powerful economic actors can crash capitalism, destroy ecosystems, and disperse great risks to human health and safety.²⁰³ Despite the accrual of great wealth—even hundreds of millions of dollars—to individuals controlling these economically powerful institutions, the deadweight loss to society may amount 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.

²⁰² In fact, confidence in the rule of law in America has declined since 2007, hurting competitiveness. According to the World Economic Forum, the U.S. ranks fiftieth in confidence in politicians and fiftieth in government's ability to deal with private sector at arms length. This contributed greatly to the United States's most rapid erosion in competitiveness worldwide. WORLD ECONOMIC FORUM, THE GLOBAL COMPETITIVENESS REPORT 2011–2012 23–24 (2011), available at http://www3.weforum.org/docs/WEF_GCR_Report_2011–12.pdf.

²⁰³ 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 eleven 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 NAT'L COMM'N ON THE BP DEEPWATER HORIZON OIL SPILL & OFFSHORE DRILLING, DEEP WATER: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING: REPORT TO THE PRESIDENT 129–31, 173 (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf (discussing the response to the “worst environmental disaster America has ever faced”). 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.* at vii–viii.

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 incentives at the apex of our system. They further fail to account for the corrosion of the rule of law arising from high-profile advertisement of the profitability of even the most 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 the punishments for breaches thereof convey social meaning.²⁰⁴ As discussed below, failure to punish conveys meaning as well; one of those meanings is affirmance.

V. 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; by labeling an act as "criminal," society intends to convey its disapproval of the conduct, to apply the negative label of "felon" in perpetuity,²⁰⁵ 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.²⁰⁶ Criminal laws empower the government to label and punish individuals in a meaningful way such that they can

²⁰⁴ See Lessig, *supra* note 168, at 951–52 (describing how actions convey social meaning). Lessig defines "social meanings" as

the semiotic content attached to various actions, or inactions, or statuses, within a particular context. If an action creates a stigma, that stigma is a social meaning. If a gesture is an insult, that insult is a social meaning. . . . [Use of the term "social"] emphasize[s] its contingency on a particular society or group or community within which social meanings occur.

Id.

²⁰⁵ See, e.g., MICHELLE ALEXANDER, *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).

²⁰⁶ See HART, *supra* note 200, at 6 (explaining why society punishes criminal offenders). 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 CLINARD, *supra* note 177, at 22 (discussing a study of corporate crime focusing on the largest publically owned corporations in the United States); SUTHERLAND, *supra* note 177, at 13–14, 45–47 (reasoning that violations of laws concerning restraints of trade, misrepresentation in advertising, patent infringement, and unfair labor practices under the National Labor Relations Law constitute crimes); George Hoberg, *North American Environmental Regulation*, in *CHANGING REGULATORY INSTITUTIONS IN BRITAIN AND NORTH AMERICA* 305, 313–14 (G. Bruce Doern & Stephen Wilks eds., 1998) (discussing changing labels to replace environmental "crime" with permits or licenses to pollute).

constrain individuals from breaching these laws.²⁰⁷ 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.”²⁰⁸

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.²⁰⁹

At common law, traditional felony crimes, such as murder and rape, were described as “*malum in se*,”—that is, “wrong in itself.”²¹⁰ Such crimes were recognized as inherently evil. Other offenses, typically misdemeanors at common law, were described as “*malum prohibitum*,” or “a wrong prohibited.”²¹¹ 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.²¹² 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

²⁰⁷ See Lessig, *supra* note 168, at 955 (explaining that social meanings constrain individuals). The passage of laws, both criminal and non-criminal, are inherently political; the true question is whether laws are the result of social consensus or powerful interests. See Snider, *supra* note 177, at 49, 55 (discussing the social and political legitimization of corporate crime); 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 “weak[en] regulatory constraints on [financial] institutions, markets, and products”). The Commission observed, “From 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.” FCIC REPORT, *supra* note 2, at xviii, 55.

²⁰⁸ Lessig, *supra* note 168, at 960.

²⁰⁹ *Id.* at 960–61 (emphasis added).

²¹⁰ BLACK’S LAW DICTIONARY 1112 (Rev. 4th ed. 1968).

²¹¹ *Id.*

²¹² See *id.* at 1045 (explaining that many regulatory violations are described as “*mala prohibita*”).

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.²¹³ Nevertheless, drug dealing is a felony under federal law, and after thirty years of the “War on Drugs,”²¹⁴ it carries a social meaning of inherent immorality today. Likewise, corporations were not subject to criminal laws at first because they are legal entities rather than humans.²¹⁵ Yet, unlike drug crimes, the prosecution of corporations and their corporate leaders for economic crimes has been persistently attacked as anti-business²¹⁶ and as waging class warfare.²¹⁷ 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.²¹⁸ The Principles of Federal Prosecution of Business Organizations require prosecutors to consider the potential impact of prosecution on investors and employees, and to consider non-criminal alternatives to prosecution for both the corporation and the individual.²¹⁹ Drug dealers do not warrant such consideration.

²¹³ For example, Coca-Cola was named after one of its key original ingredients: cocaine. 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).

²¹⁴ See ALEXANDER, *supra* note 205, at 49 (discussing the Reagan Administration’s “war on drugs”). In 1982, only two percent of the U.S. population believed that drugs were the most important problem in the United States. The “War on Drugs,” however, spurred a dramatic increase in funding to combat the drug trade (from \$33 million in 1981 to over \$1 billion in 1991), and drug offense related incarcerations soared from roughly 41,000 people in 1980 to about 500,000 people thirty years later. *Id.* at 49, 59.

²¹⁵ See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493–94 (1908) (rejecting the common law view that corporations are not subject to criminal laws); DAVID O. FRIEDRICH, *TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY* 57–58 (2d ed. 2004) (describing the historical development of corporate crime).

²¹⁶ See, e.g., John S. Baker, Jr., *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.”); *supra* note 157 (discussing the Arthur Andersen case).

²¹⁷ See Baker, *supra* note 216, at 350–51 (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 [h]ard work”).

²¹⁸ See *id.* at 310–11 (characterizing corporate and criminal defense lawyers’ objections to prosecution for white-collar crimes).

²¹⁹ See U.S. ATTORNEYS’ MANUAL, *supra* note 13, § 9-28.300 (stating that 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”); *id.* § 9-28.1100 (“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. See *id.* § 9-27.250

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.²²⁰ Key provisions of the Dodd-Frank Act,²²¹ which were 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.²²² 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.

B. *Fair Play and the Negative Message of Inequality*

Perception of fairness in the law is critical to compliance with the law.²²³ Indeed, the perception that one is foolish for complying with the law when others flagrantly disregard it without consequences undermines the retributivist's moral imperative to comply with law.²²⁴ Animal

("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.").

²²⁰ See PAULSON, *supra* note 40, at 260 (describing his first person account and efforts "to resist pressure on [executive] compensation restrictions" at companies receiving government bailout money).

²²¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2012).

²²² See, e.g., Jean Eaglesham, *As Business Takes Aim at Dodd-Frank, Battle Shifts to Courts*, WALL ST. J. (July 29, 2011), <http://online.wsj.com/article/SB10001424053111904772304576470313933175814.html> (reporting on efforts to attack Dodd-Frank in the courts); Tamara Keith, *New Consumer Protection Agency Faces Opposition*, NPR (July 21, 2011), <http://www.npr.org/2011/07/21/138550502/new-consumer-protection-agency-faces-opposition> (describing efforts opposing the Consumer Protection Bureau created by Dodd-Frank).

²²³ See PAUL H. ROBINSON & JOHN M. DARLEY, *JUSTICE, LIABILITY & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW* 202–03 (1995) (positing that people are less likely to comply with the law if it is seen as unjust); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 25 (1990) (asserting that people may not distinguish between the favorability of outcomes, fairness of outcomes, and procedural fairness when accessing justness of outcomes under the law).

²²⁴ Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 358–59 (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. . . . [A] person's beliefs about whether other persons in her situation are paying their taxes 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.

behaviorists have observed in a number of species an evolutionary fair play at work.²²⁵ Confidence is diminished when members of the group perceive that the rules are unfairly applied.²²⁶ 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.²²⁷ Research by social scientists supports the conclusion that world religions incorporate and encourage fair play which, in turn, permits advanced societies to engage in market growth and other aspects of a complex society.²²⁸ Beyond the social meaning of why we punish is the

Id. at 354; see also Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325, 327 (1980) (“[N]o commentator writing from the deterrence perspective has suggested that legal force is the sole mechanism of control Rather, what is emerging . . . is a model of social control containing three inhibitory variables—internalization of norms, threat of social disapproval, and threat of legal punishment . . .”). 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 358. 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 18, at 212–13 (asserting that publicizing “the tax gap increases the degree to which others are viewed as dishonest” and suggesting that this in turn will result in increased noncompliance).

²²⁵ See DE WAAL, *supra* note 18, at 5 (“There is exciting new research about the origins of altruism and fairness in both ourselves and other animals. . . . By protesting against unfairness, [humans’ and monkeys’] behavior supports both the claim that incentives matter and that there is a natural dislike of injustice.”). De Waal 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 refuses 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. See FRANS DE WAAL, *OUR INNER APE* 201 (2005) (exemplifying this principle with an example of a time when a pair of apes were the first ones to come inside the zoo to eat after being beaten the previous night for refusing to come in and thus keeping the others from eating).

²²⁶ See DE WAAL, *supra* note 225, at 187–88 (illustrating this truth with a test of two monkeys where one bartered and was given a favorite food, grapes, and the other was given cucumber and lost interest and became agitated); Frans B.M. de Waal, *How Animals Do Business*, 2 SCI. AM., Apr. 2005, at 73, 78 (same).

²²⁷ See DE WAAL, *supra* note 225, at 4–7 (focusing on “the role of empathy and social connectedness” instead of the “selfish side to our species”). But see Joseph Henrich et al., *Markets, Religion, Community Size, and the Evolution of Fairness and Punishment*, SCI. MAG, Mar. 19, 2010, at 1480, 1480 (reporting on study spanning fifteen diverse populations suggesting that modern prosociality regarding fair play and punishment “is not solely the product of an innate psychology, but also reflects norms and institutions,” such as larger-scale market integration and world religions, “that have emerged over the course of human history”).

²²⁸ See Henrich et al., *supra* note 208, at 1481 (“If markets and world religions are linked to the norms that sustain exchange in large-scale societies, we expect that experimental measures of fairness in anonymous interactions will positively covary with measures of involvement in these two institutions.”). 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 DE WAAL, *supra* note 18, at 65–69 (acknowledging one Swedish psychologist’s assertion that “we don’t decide to be empathic—we simply are”). The capacity to understand others also creates an ability to harm or deceive another deliberately because cruelty relies on the propensity to imagine how

meaning attached to who we punish and who we do not.²²⁹

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.”²³⁰ Thus, there is the broadly observed phenomenon 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.²³¹ The failure by law enforcement to subsequently pursue the instigators of the lynchings for criminal acts committed before 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 that the conduct was culturally tolerated in the community, and that the law sanctioned punishing some without due process while absolving thousands without charges.

Though the days of lynching are largely behind us, 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,²³² permits law enforcement to express the message that neighborhoods have a color, and that some

one’s own behavior affects another. *See id.* at 210–11 (asserting that “taking another’s perspective is a neutral capacity: It can serve both constructive and destructive ends” and that “[c]rimes against humanity often rely on precisely this capacity”). 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 (“[A]dvanced empathy requires both mental mirroring and mental separation.”).

²²⁹ *See* ROBINSON, *supra* note 199, at 2 (“[E]ach purpose of punishment when used as a distributive principle gives a quite different distribution of punishment.”).

²³⁰ Kahan, *supra* note 224, at 350.

²³¹ *See* 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 widespread anti-black violence in the antebellum 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 224, at 353–54 (identifying 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).

²³² *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that law enforcement may stop and question individuals under the lesser standard of reasonable suspicion).

individuals belong there and others do not.²³³ 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-learned.²³⁴ 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.”²³⁵

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.²³⁶ Every citizen contact with the discretionary features of the criminal justice system strengthens or erodes the meaning of a legally ordered society.²³⁷ 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.²³⁸

²³³ See I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43, 72 (2009) (acknowledging that many minorities when choosing a neighborhood will be risk adverse, choosing neighborhoods that are predominantly minority, “where they are less likely to face a hostile police”).

²³⁴ See *id.* (“[W]hen the police patrol neighborhoods and use racial incongruity as a factor for initiating an encounter or a stop and frisk, it sends the expressive message that neighborhoods have a color.”).

²³⁵ *Id.* at 68 (citation omitted); see also *id.* (“[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.” (citations omitted)).

²³⁶ See William J. Stuntz, *Race, Class and Drugs*, 98 COLUM. L. REV. 1795, 1835 (1998) (noting the disparate sentences for crack and cocaine, and how that disparity is a direct bias against “black drug crime”).

²³⁷ See Brown, *supra* note 13, at 1306–07 (showcasing that the negative effects of street crime laws and enforcement choices are felt most strongly by disadvantaged communities, in particular low-income minority communities).

²³⁸ See Matt Taibbi, *Outrageous HSBC Settlement Proves Drug War Is a Joke*, ROLLINGSTONE.COM (Dec. 13, 2012), <http://www.rollingstone.com/politics/blogs/taibblog/outrageous-hsbc-settlement-proves-the-drug-war-is-a-joke-20121213> (asserting that failure to prosecute HSBC for brazen money-laundering of Mexican drug cartel money and international terrorist-associated organizations and accepting comparatively low civil settlement fine on the “absurd ground” that prosecuting the financial institution “might imperil the world financial system” removes any “moral authority” by the government to prosecute minor drug crimes and pursue asset forfeitures); Brown, *supra* note 13, at 1308 (illustrating that prosecutors may, in order to avoid social harm, decline criminal punishment for civil remedies against a fraudulent health care provider if it is the lone provider in a community).

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.²³⁹ Social learning theory posits that modeling—learning by observation and imitation—occurs after the observer is exposed to a certain behavior.²⁴⁰ First, the observer must have the capacity to understand the significant features of the behavior, such as consequences.²⁴¹ Second, in order to reproduce the behavior, the observer must encode the observed information into long-term memory for later retrieval if he is capable of reproducing the behavior.²⁴² Most importantly, the final factor in modeling behavior is the observer's motivation, or reinforcement, where he anticipates a positive result, or reward for the observed behavior.²⁴³ 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.²⁴⁴ Thus, bad behavior modeling eclipses the threat of retribution for violation of the law, affirming that one can flaunt the legal threat and get away with it.²⁴⁵ Illegal conduct that appears occasional and isolated may become prevalent if prosecution is not vigorously pursued.²⁴⁶

²³⁹ See Albert Bandura, *Social Learning Analysis of Aggression*, in ANALYSIS OF DELINQUENCY AND AGGRESSION 203, 212 (Emilio Ribes-Inesta & Albert Bandura eds., 1976) (“[I]t has been shown that exposure to models engaging in threatening activities without adverse consequences has disinhibiting effects on observers by extinguishing their fears vicariously.”); Kahan, *supra* note 224, at 356–57 (“If individuals perceive that their neighbors are freely dealing drugs or routinely evading their taxes, they are likely to infer that the risks of such behavior are small and the potential rewards high.”).

²⁴⁰ Bandura, *supra* note 237, at 206.

²⁴¹ See *id.* (asserting that “some people do not gain much from example because they fail to observe the essential features of the model’s behavior”).

²⁴² See *id.* (“Past modeling influences achieve some degree of permanence if they are represented in memory in images, words, or some other symbolic form.”).

²⁴³ See *id.* at 216 (“Unfavorable discrepancies between observed and experienced outcomes tend to create discontent, whereas individuals may be satisfied with limited rewards as long as they are as good as, or better than, what others are receiving.”).

²⁴⁴ See DE WAAL, *supra* note 225, at 202–03 (asserting that one’s disbelief in reciprocity is “an out-and-out negation of why we humans live in group, of why we do each other any favors at all”).

²⁴⁵ See Brian Mullen et al., *Jaywalking as a Function of Model Behavior*, 16 PERSONALITY & SOC. PSYCHOL. BULL. 320, 324, 327 (1990) (finding a statistically significant increase in illegal jaywalking by individuals exposed to disobedient models, with at least one perspective of data analysis suggesting “something uniquely powerful about the disobedient model”). 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 hijackings and abductions); Kahan, *supra* note 224, at 354–55 (citing studies indicating that instances of mob violence and looting are often “interlinked” and “responsive to the decisions of other individuals”).

²⁴⁶ See, e.g., Stephen Joyce, *Insider Trading Violations Now Evolving into “Actual Business Model,” Official Says*, 43 SEC. REG. & L. REP. 589 (2011) (“Insider-trading conduct is changing from relatively small, single episodes of illegal behavior to an ‘actual business model,’ where rings of

For those who benefited from excessive fees generated through subprime mortgage lending and risky credit default swaps, disregard for longstanding rules and practices became so profitable that they ignored the greater risks they were taking to achieve those profits, while others followed this profit model in the hopes of achieving its promised rewards.²⁴⁷ Once the bad behavior became widespread and its monumental costs manifested in the financial crisis of 2008, the federal government focused on stopping the panic in the financial markets rather than punishing the initiators of the conduct.²⁴⁸ The urgent need for a financial fix was optimal for the initial wrongdoers, since the attention shifted from those at fault to those able to assist with the fix.²⁴⁹ With so many actors misbehaving, those who financially benefitted most deflected responsibility by laying blame for systemic failure at the doors of others—such as the credit rating agencies that failed to appropriately rate risk and the regulators that failed to investigate or appropriately sanction misconduct.²⁵⁰ Nevertheless, the failure to counteract these models of bad

sophisticated businesspeople from several distinct industries repeatedly break the law to reap huge illicit gains, Securities and Exchange Commission Associate Regional Director David Rosenfeld said March 11.”)

²⁴⁷ See Floyd Norris, *Eyes Open, WaMu Still Failed*, N.Y. TIMES, Mar. 25, 2011, at B1 (recounting how, in 2008, Washington Mutual (“WaMu”) became the largest bank failure in American history). Although internal officers warned the CEO, Kerry K. Killinger, and the board of directors of impending disaster from risky lending practices, and regulators were made aware of the problems as early as 2006, no efforts were made at the bank to reign in risk and regulators resisted taking any enforcement action until it was too late. *Id.* WaMu “had identified Countrywide Financial as a model to emulate, and any other course would have surrendered market share, not to mention immediate profits that financed huge paychecks for executives.” *Id.*; see also RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at 24–25, 191–93 (describing the reckless loan practices at Countrywide Financial and the role that CEO Angelo Mozilo played in its demise).

²⁴⁸ See PAULSON, *supra* note 40, 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”).

²⁴⁹ Paulson resisted suggestions that any bailout legislation include compensation restrictions, asserting that banks would be unwilling to accept bailouts if such conditions were in the package, and he wanted to “encourage[] maximum participation” in the bailout so that the banks would unload the toxic assets. *Id.* at 260.

²⁵⁰ See, e.g., U.S. FIN. CRISIS INQUIRY COMM’N, HEARING ON SUBPRIME LENDING AND SECURITIZATION AND GOVERNMENT-SPONSORED ENTERPRISES (GSEs) 8 (Apr. 8, 2010) (statement of Charles Prince, Former Chairman and CEO of Citigroup, Inc.), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0408-Transcript.pdf (asserting the “precipitous nature” of “dramatic[] downgrad[ing]” by the rating agencies of “widespread holdings” of “securitized products . . . 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

behavior further affirms the misconduct while permitting wrongdoers to remain at the apex of the U.S. financial system.

Legislatures may authorize the use of criminal sanctions in statutory language, but the use of these sanctions depends upon their application by administrators of the law.²⁵¹ 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.”²⁵² 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.²⁵³

Affirmance of the crimes of the rich and powerful sends an

have been identified as failing to alert investors to the underlying risks of companies involved in the 2008–2009 financial crisis).

²⁵¹ Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197, 199 (1965).

²⁵² Holmes, *supra* note 13, at 123.

²⁵³ The “rule of law” is a general notion defined in myriad ways, some of which are contradictory. See Horwitz, *supra* note 24, at 153–54 & n.4, 155–56 (citing numerous examples by authors both acknowledging the differences in definition of “rule of law,” as well as contrasting authors’ definitions). 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.*” 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.”
- (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. (citations omitted). This Article would extend the fifth element’s “impartial justice” to go beyond employing fair procedures by courts to include fair practices by prosecutors that are impartial to the political or financial status of the citizens. See RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at 186–91 (summarizing a continuum of views defining the rule of law from Justice Holmes’s view of the rule of law “as mere scrivener to elite power,” to Friedrich Hayek’s view that “the rule of law be fixed and announced in advance,” and proposing a “more durable” rule of law that “secure[s] important legal and regulatory infrastructure from elite subversion” that limits “the economically mighty [from imposing] massive costs on others and society generally”).

unmistakable message: despite the obvious and extensive harm they cause to many, elite criminals are above the law and will not pay a price to society for disrupting its rules and imposing suffering on others. Elite criminals are assured that they can take risks with other people's lives or livelihoods, their money or their environment, and reap 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, consequences are unlikely to reach them personally; at most, the organizations they control suffer great losses—deadweight losses well in excess of any benefits they harvest.²⁵⁴ Even if some individual economic harm is incurred, the benefits will far outweigh those costs. Affirmance assures economically powerful elites that their harvesting of illicit profits will continue unabated.

D. *Expressing the Message of Affirmance in Elite Crimes*

In one of the earliest cases imposing imprisonment sentences on individuals engaged in economic crimes,²⁵⁵ “[t]he 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.”²⁵⁶ Then-U.S. Attorney General Robert Kennedy characterized the defendants’ conduct even more starkly, as a “serious threat to democracy.”²⁵⁷ 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 profit-gorging crimes 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

²⁵⁴ See RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at xv (describing how the subprime mortgage crisis yielded millions for corporate managers, but cost trillions to firms through the taxpayer bailout of those firms); George W. Dent, Jr., *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 personally to benefit financially through legal and fraudulent means at the expense of the corporation and its shareholders); Narayanan et al., *supra* note 74, at 1600–01 (concluding that executive options backdating led to an average loss per firm of about \$389 million, while the average potential gain from the practices to the benefiting executives in each firm was less than \$500,000).

²⁵⁵ *United States v. Westinghouse Elec. Corp.*, 1960 Trade Cas. ¶69,699 (E.D. Pa. May 13, 1960) (often referred to as the “Electrical Equipment Antitrust Cases”).

²⁵⁶ Ball & Friedman, *supra* note 251, at 198 (internal quotation marks omitted).

²⁵⁷ *Id.* (citing JOHN G. FULLER, THE GENTLEMEN CONSPIRATORS: THE STORY OF PRICE FIXERS IN THE ELECTRICAL INDUSTRY 175–76 (1962)) (recounting a television interview of Attorney General Robert Kennedy on the subject of civil action against industrial electrical equipment manufacturers for damages suffered by the government related to a price fixing scheme by the private corporations).

elite crimes uniquely threatens the rule of law.²⁵⁸

When a prosecutor elects against criminal prosecution, the general public does not have internal access to that decision and, consequently, given the multitude of considerations factoring into the decision, cannot fairly assess whether the cost of moving forward with a criminal prosecution is outweighed by the benefits of a decision to drop the case, move forward with a civil case instead, impose a regulatory fine, or negotiate a settlement short of full prosecution. 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 that perceive a lack of fair play will assess for themselves whether the costs outweigh the benefits of adhering to the rule of law.²⁵⁹ Ironically, those who follow the law and forgo corrupt profits may actually be at a competitive disadvantage relative to those who break the law.²⁶⁰ The inequality in profits and market power due to illegitimate practices causes the bad actors to drive out the good.²⁶¹ Rejection of the social order ensues as each actor

²⁵⁸ See, e.g., Nate Raymond, *Rakoff Again Blasts SEC Settlements Where Defendants Admit No Wrong*, N.Y. L.J., Mar. 24, 2011 (reporting on remarks by U.S. District Court Judge Jed Rakoff regarding the practice in SEC civil settlements that allege “terrible wrongs” but allow defendants to avoid admitting or denying guilt and concluding that “[t]he disservice to the public inherent in such a practice is palpable” (quoting *SEC v. Vitesse Semiconductor Corp.*, 771 F. Supp. 2d 304, 309 (S.D.N.Y. 2011))).

²⁵⁹ See SORKIN, *supra* note 42, at 14 (describing Lehman Brothers’s 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 had modeled their investment risk-taking after Goldman Sachs. *Id.* at 28, 144.

²⁶⁰ See WILLIAM K. BLACK, *THE BEST WAY TO ROB A BANK IS TO OWN ONE: HOW CORPORATE EXECUTIVES AND POLITICIANS LOOTED THE S&L INDUSTRY 2* (2005) (explaining that CEO “control frauds” manipulate the external controls over CEO power by “shop[ping] for accommodating accountants, appraisers, and attorneys”).

²⁶¹ See *id.* at 40 (illustrating how control frauds during the S&L crisis were “routinely able” to find auditors from top-tier firms willing to give them clean opinions “even when they were deeply insolvent and engaged in massive accounting fraud”); NAT’L COMM’N ON FIN. INST. 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) (same); 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 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* note 2, 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 149. In 2006, Moody’s rated thirty mortgage-related securities as triple-A (its highest rating) every day; in early 2010, only six private-sector companies received the triple-A rating from Moody’s. *Id.* at xxv.

pursues misconduct due to competitive pressures.²⁶² Crime becomes socially acceptable, even socially compelled, much like the lynch mobs of the past.²⁶³

The top executives who manage these corporations sit in particularly powerful seats because they direct the financial heft of the corporations they govern.²⁶⁴ During 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 regulator²⁶⁵ during the Savings and Loan debacle of the late 1980s, examined the risk of moral hazard, or adverse incentives, in the financial markets.²⁶⁶ Nobel Laureate Joseph Stiglitz has also pointed out that moral hazard attaches to bank bailouts.²⁶⁷ 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.²⁶⁸ Typically, one consequence would be replacing management while shareholders faced losing their equity interest, a risk recognized by the shareholders when purchasing shares.²⁶⁹ In his book, *Freefall*, Professor Stiglitz asserts that the 2008 government bailout of the

²⁶² See, e.g., *House of Cards—Original Documentary* (CNBC television broadcast 2009), available at <http://video.cnbc.com/gallery/?video=1145392808&play=1> (including 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, 488 (1970) (expounding the theory that when “buyers use some statistic to judge the quality of prospective purchases,” “returns for good quality accrue mainly to the entire group whose statistic is affected” and sellers are incentivized to market poorer quality goods, resulting in a general reduction in the quality of goods available and in the size of the market).

²⁶³ See, e.g., Chad Terhune et al., *Mortgage Mess: Shredding the Dream*, BUSINESSWEEK. (Oct. 21, 2010), http://www.businessweek.com/magazine/content/10_44/b4201076208349.htm (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). Reporting on the reaction to the need to address the crisis quickly, the authors observed: “The longer it drags on, the more the foreclosure crisis corrodes Americans’ faith in their financial and legal systems. A pervasive sense of injustice is bad for the economy and democracy as well.” *Id.*; see also Norris, *supra* note 247 (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”).

²⁶⁴ See RAMIREZ, LAWLESS CAPITALISM, *supra* note 70, at 12.

²⁶⁵ See *Public Policy Issues Raised by the Report of the Lehman Bankruptcy Examiner: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 123–24 (2010) (statement of William K. Black), available at <http://financialservices.house.gov/media/file/hearings/111/printed%20hearings/111-124.pdf> (listing Black’s regulatory roles during the S&L crisis).

²⁶⁶ See BLACK, *supra* note 260, 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.”).

²⁶⁷ STIGLITZ, *supra* note 17, at 16–17.

²⁶⁸ *Id.* at 116–17.

²⁶⁹ *Id.* at 121.

financial industry, like the bailouts of the 1980s, 1990s, and 2000s, signals the banks that they need not worry about risk management because the government will “pick up the pieces.”²⁷⁰ This assurance permits the least prudent bankers to continue or to repeat their reckless practices.²⁷¹

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 and this risks not only the need for future bailouts that will be even greater in magnitude than the generous bailouts from 2007 to 2009, but also risks “our sense of fairness and social cohesion in the long run.”²⁷² Stiglitz observes that even those operating in the financial markets objected to the bailouts as favoring the mega-institutions at the expense of other institutions that may have been more pragmatic in their investment strategies.²⁷³ 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.”²⁷⁴

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.²⁷⁵ As AIG’s financial

²⁷⁰ *Id.* at 135. In the bank bailouts of 2007 to 2009, the government opted to avoid conservatorship for those too big to fail. *Id.* Earlier bailouts by the Federal Reserve after the collapse of LTCM and later, Enron, gave rise to a new term by analysts to describe the behavior, “the Greenspan put.” FCIC REPORT, *supra* note 2, at 60 (quoting *First the Put; Then the Cut?*, ECONOMIST, Dec. 16, 2000, at 81). This term was shorthand for “investors’ faith that the Fed would keep the capital markets functioning no matter what.” *Id.* at 61; *see also* John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1048 (2012) (describing the implicit government subsidy in easy loans at lower interest rates for too-big-to-fail banks due to the perception that the government would not let them fail).

²⁷¹ STIGLITZ, *supra* note 17, at 118, 135; *see also* FCIC REPORT, *supra* note 2, at 61 (raising the question of whether the financial industry took on more risk because of the expectation that the Federal Reserve “would keep the capital markets functioning no matter what”).

²⁷² STIGLITZ, *supra* note 17, at 39.

²⁷³ *Id.* at 39, 118.

²⁷⁴ *Id.* at 118.

²⁷⁵ 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 42, 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 DOJ and agreed to a thirteen-month probationary period for AIG Financial Products Corporation (one of its operating units). *Id.* In 2005, AIG Financial Products Corporation 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 160. Although considered by New York’s Attorney General, no criminal charges were filed against Greenberg or AIG. *Id.* 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 as supporting favorable legislative initiatives, and opposing unfavorable regulations. *See* Leonnig, *supra* note 42 (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”).

situation faltered, it brought Greenberg back as its chairman emeritus to draw on Greenberg's relationships with wealthy investors to shore up its financial distress and hopefully buy the company some time as it faltered under the weight of AIG Financial Products Corporation's credit default swaps obligations.²⁷⁶

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,²⁷⁷ leaving before Drexel Burnham pled guilty to violations of federal securities laws in 1988 and agreed to a \$650 million fine, with the investment firm ultimately collapsing in bankruptcy due to Michael Milken's "epoch-defining" junk bond scandal.²⁷⁸ 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.²⁷⁹

Notably, Joseph Cassano, who headed up AIG Financial Products and is credited with pushing AIG into underwriting credit default swaps,²⁸⁰ was one of those thirteen employees who had previously worked for Drexel Burnham Lambert during Michael Milken's reign of the junk bond market.²⁸¹ After Sosin left AIG Financial Products in 1993,²⁸² Cassano remained and was promoted to chief operating officer.²⁸³ Cassano eventually took the helm as CEO, earning a reported \$280 million during his eight-year tenure at AIG Financial Products.²⁸⁴ In December 2007, Cassano had assured investors that "it is very difficult to see how there can be any losses" in the CDS portfolios,²⁸⁵ without revealing that AIG had

²⁷⁶ SORKIN, *supra* note 42, at 280. On the very day Hank Greenberg was being deposed by the New York State Attorney General's 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. *Id.* at 272, 280.

²⁷⁷ SORKIN, *supra* note 42, at 155–56.

²⁷⁸ FRIEDRICHS, *supra* note 215, at 161. Milken pled guilty to six felony charges for securities fraud and conspiracy. *Id.* at 162.

²⁷⁹ SORKIN, *supra* note 42, at 156.

²⁸⁰ *Id.* at 157. 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, and AIG was required to revise its 2007 estimates of losses in November and December from \$1 billion to more than \$5 billion. *Id.* at 160–61. Although AIG's CEO Martin Sullivan wanted to fire Cassano, he agreed to keep Cassano on as a consultant at \$1 million per month. *Id.* at 160–62.

²⁸¹ *Id.* at 156.

²⁸² Robert O'Harrow, Jr. & Brady Dennis, *The Beautiful Machine*, WASH. POST, Dec. 29, 2008, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122801916.html?nav=rss_email/components&sid=ST2010062905395.

²⁸³ SORKIN, *supra* note 42, at 156.

²⁸⁴ David Voreacos & Elliot Blair Smith, *Cassano's Statements on AIG Probed by Prosecutors*, *People Say*, BLOOMBERG (Nov. 26, 2008), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a6m_BOe9Ftk4&refer=news.

²⁸⁵ Joe Cassano, President, CEO, AIG Fin. Prods., Am. Int'l Grp., Remarks at the Am. Int'l Grp. Investor Meeting (Dec. 5, 2007), available at <http://www.scribd.com/doc/16785264/AIGTranscript200>

posted \$2 billion in collateral to Goldman Sachs to cover losses.²⁸⁶ Nor did Cassano inform those investors that AIG had overstated its earnings by \$3.6 billion.²⁸⁷ Cassano was forced to resign in 2008 after the catastrophic losses of billions of dollars²⁸⁸ when the subprime mortgage derivatives began to hit and gave rise to the need for the company to report a multi-billion dollar loss.²⁸⁹

Rather than face criminal charges due to a record of financial misconduct,²⁹⁰ AIG received the benefit of a \$182 billion bailout from the federal government in 2008 and 2009. Cassano was also given a \$1 million monthly consulting fee upon resigning as CEO and walked away with millions in earnings.²⁹¹ The federal probe into AIG and Cassano's role in the financial crisis resulted in the unusual announcement that no criminal charges would be brought against AIG executives.²⁹²

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.²⁹³ A group of banks had collectively created

71205T13301. 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 any of those transactions. . . . We see no issues at all emerging. We see no dollar of loss associated with any of [the CDO] business." 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.

²⁸⁶ FCIC REPORT, *supra* note 2, at 272.

²⁸⁷ *Id.*

²⁸⁸ See David Ellis, *US Takes Another Crack at AIG Rescue*, CNNMONEY.COM (Mar. 3, 2009), <http://money.cnn.com/2009/03/02/news/companies/aig/index.htm> (reporting a \$99 billion loss for 2008); Reuters, *A.I.G. Reports Record Quarterly Loss of \$5.29 Billion*, N.Y. TIMES, Feb. 29, 2008, at C2 (reporting largest loss in its eighty-nine year history after reporting a write-down of securities exposed to bad mortgage investments).

²⁸⁹ Voreacos & Smith, *supra* note 284.

²⁹⁰ See Matthew Karnitschnig et al., *U.S. to Take Over AIG in \$85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, WALL ST. J., Sept. 17, 2008, at A1 (reporting government imposed conditions on the first \$85 billion of bailout funds extended to AIG in September 2008); Nocera, *supra* note 67 (reporting on Cassano's record of financial misconduct); Plumb, *supra* note 42 (noting the total amount of bailout funds extended to AIG was \$182 billion).

²⁹¹ Voreacos & Smith, *supra* note 284.

²⁹² Efrete, *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 Timothy Geithner reportedly visited with then-New York Attorney General Andrew M. Cuomo and discussed AIG. Morgenson & Story, *supra* note 23. Although Cuomo's investigation into the financial crisis and its aftermath continued, no charges were filed against AIG prior to Cuomo's departure from the office for his newly elected position as Governor of New York. *Id.*

²⁹³ Complaint, *State v. Bank of Am. Corp.*, Case No. A-10-631557-B XXV (D. Ct. Clark Cnty., Nev., Dec. 17, 2010), available at http://www.s355160796.onlinehome.us/_onclick_uploads/2012/03/state-of-nevada-vs-bank-of-america.pdf (containing initial claims by the Nevada attorney general against Bank of America and related companies regarding the use of fraudulent documents used to foreclose on homeowners); Gretchen Morgenson, *A Swift Deal May Not Be a Sound One*, N.Y. TIMES, Mar. 13, 2011, at BU1 (reporting on the bank settlement being negotiated between state attorneys

an organization known as Mortgage Electronic Registration Systems (“MERS”) and used it as the designated mortgagee in home loans rather than the actual beneficiaries of the loans.²⁹⁴ By doing so, the banks avoided additional filing fees required to lawfully record mortgage assignments or transfers.²⁹⁵ 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.²⁹⁶ Instead, “the mortgage finance industry circumvented the state and national debate that normally precedes significant legislative change.”²⁹⁷ When loans began to fail, banks realized that the failure to properly document the transfers left them potentially without recourse in the foreclosure process.²⁹⁸ Consequently, forged documents and fraudulent affidavits in support of foreclosure actions were created and submitted to courts in support of foreclosures.²⁹⁹ Despite unquestionably fraudulent

general and Bank of America and its subsidiaries to address improper loan-servicing and foreclosure practices); Rauch & Baldwin, *supra* note 64 (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”); *60 Minutes: The Next Housing Shock* (CBS television broadcast Apr. 3, 2011), available at <http://www.cbsnews.com/video/watch/?id=7375936n> (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); *see also infra* note 303.

²⁹⁴ See Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending and the Mortgage Electronic Registration System*, 78 U. CIN. 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 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. *Id.* at 1361–62. “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.” *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. *Id.* at 1362–63, 1372–73; *see also* Richard Eskow, *Pictures of MERS, Part 1: Corporate Documents Illustrate the Mortgage Shell Game*, HUFFINGTON POST (Oct. 20, 2010, 09:20 AM), http://www.huffingtonpost.com/rj-eskow/pictures-of-mers-part-1-c_b_769181.html (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).

²⁹⁵ See Peterson, *supra* note 294, at 1362 (“By paying MERS a fee, the parties to a securitization lower their operating costs.”); Toluse Olorunnipa, *Marshall C. Watson’s Law Firm to Pay \$2 Million to Settle Foreclosure Investigation*, MIAMI HERALD, Mar. 25, 2011, available at <http://foreclosuregate.prosepoint.com/story/marshall-c-watson%E2%80%99s-law-firm-pay-2-million-settle-foreclosure-investigation> (reporting on the charges against one of eight law firms implicated in a Florida investigation into shoddy foreclosure practices).

²⁹⁶ Peterson, *supra* note 294, at 1406.

²⁹⁷ *Id.* at 1405.

²⁹⁸ See *id.* at 1375–80 (suggesting that MERS does not actually own legal title to the loans registered on its database and may not have standing to bring foreclosure actions).

²⁹⁹ *60 Minutes: Mortgages: Walking Away*, *supra* note 48.

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.³⁰⁰ 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.”³⁰¹ 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.³⁰² Indeed, early reports in the wake of the foreclosure fraud settlement indicate that the lost documents and failures to modify loans continues.³⁰³

VI. CONCLUSION

The affirmance effect appears evident in the subprime mortgage lending, the financial market crisis of 2007 to 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.³⁰⁴ In contrast, foreclosures continue unabated, except to the extent

³⁰⁰ See Alejandro Lazo & E. Scott Reckard, *Changes Ordered in Home Seizures; Foreclosure Probe Settlement Includes Fines, Compensation*, CHI. TRIB., Apr. 14, 2011, at C21 (reporting that regulators from the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Federal Deposit Insurance Corp. assured critics that their settlement “wouldn’t interfere with a wider-ranging investigation conducted by state attorneys general and other federal agencies, including the Justice, Treasury and Housing departments and the Federal Trade Commission”); Morgenson, *supra* note 293 (discussing the consent orders). The DOJ and forty-nine state Attorneys General have also reached a \$25 billion settlement agreement. Press Release, U.S. Dep’t of Justice, Off. of Pub Affairs, Fed. Gov’t & State Att’ys Gen. Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>.

³⁰¹ Lazo & Reckard, *supra* note 300 (quoting Alys Cohen, staff attorney for the National Consumer Law Center).

³⁰² Two Nobel Prize-winning economists have recognized the corrosive effect of the mortgage foreclosure fraud crisis on the rule of law. See Paul Krugman, *The Mortgage Morass*, N.Y. TIMES, Oct. 15, 2010, at A33 (discussing the implications of and possible governmental responses to illegal home foreclosures); Joseph Stiglitz, *Foreclosures and Banks’ Debt to Society*, GUARDIAN (Nov. 5, 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/nov/05/banking-mortgage-arrears> (discussing how the mortgage debacle has called into question the security of property rights).

³⁰³ See *Foreclosure Settlement Fails to Force Mortgage Companies to Improve*, HUFFINGTON POST, Aug. 7, 2012, available at http://www.huffingtonpost.com/2012/08/08/foreclosure-settlement-fails-mortgage_n_1754018.html (reporting on continued failures by Bank of America to address chaotic mortgage lending practices that include lost documents, and empty assurances).

³⁰⁴ A full assessment of whether elements of the financial crisis of 2007 to 2009 in fact warrant criminal prosecution or strongly suggest an error of prosecutorial discretion is beyond the scope of this

that bankers do not want to write down the losses and further reveal the extent of their financial plight,³⁰⁵ while social programs such as healthcare are cut³⁰⁶ under public pressure to balance a federal budget devastated by the cost of the bailout.³⁰⁷ With such lopsided 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 fortune³⁰⁸ or will use their fortunes to rewrite laws to their favor,³⁰⁹ that others will follow in their path,³¹⁰ and that those not in the top 1% who take in nearly one-

Article. Some published reports have found there is some evidence. See STAFF OF S. COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFAIRS, PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 1–12 (Comm. Print Apr. 13, 2011) (providing an overview of the Subcommittee’s investigation and a number of case studies); FCIC REPORT, *supra* note 2, at xv–xxviii (reporting the Commission’s findings and conclusions regarding the financial crisis); Report of Anton R. Valukas, Examiner at 1–14, *In re Lehman Brothers Holding Inc.*, Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Mar. 11, 2010) (detailing the collapse of Lehman Brothers). This Article seeks to highlight the risks of prosecutorial discretion that has been inappropriately exercised in connection with that crisis.

³⁰⁵ See Robert Lenzner, *US Banks Reporting Phantom Income on \$1.4 Trillion Delinquent Mortgages*, FORBES, Jan. 12, 2011, <http://www.forbes.com/sites/robertlenzner/2011/01/12/us-banks-reporting-phantom-income-on-1-4-trillion-delinquent-mortgages/> (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 sixteen months). Once the property is foreclosed, the anticipated interest income comes off the books, but the banks must acknowledge the loss. *Id.*

³⁰⁶ See FCIC REPORT, *supra* note 2, at 398–400 (explaining how states struggled to close budget shortfalls).

³⁰⁷ See *id.* at 400 (explaining that the federal government’s response to the financial crisis included highly aggressive fiscal policies that “remain controversial to this day”); see also David Espo, *Obama Deficit Speech Eyes Medicare Changes, Tax Increases*, HUFFINGTON POST (Apr. 13, 2011, 10:20 PM), http://www.huffingtonpost.com/2011/04/13/obama-deficit-speech-medicare-tax-increases_n_848479.html (“President Obama coupled a call for \$4 trillion in long-term deficit reductions with a blistering attack on Republican plans for taxes, Medicare and Medicaid.”).

³⁰⁸ 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 broadcast July 27, 2010), available at <http://www.abc.net.au/7.30/content/2010/s2965891.htm> (providing transcript of interview with Nobel Laureate Joseph Stiglitz during which he predicts 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).

³⁰⁹ 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”).

³¹⁰ Derivatives trading continues today, despite the \$182 billion bailout of AIG and the global financial crash. Insured commercial U.S. banks held a total of nearly \$231 trillion in derivatives in the final quarter of 2011, with the top five commercial banks dominating in derivatives: Goldman Sachs, JPMorgan Chase, Citibank, Bank of America, and HSBC, together holding 96% of the total. See COMPTROLLER OF THE CURRENCY, ADMINISTRATOR OF THE NATIONAL BANKS, OCC’S QUARTERLY REPORT ON BANK TRADING AND DERIVATIVES ACTIVITIES FOURTH QUARTER 2011 1, 11, 13, 17 (2011), available at <http://www.occ.gov/topics/capital-markets/financial-markets/trading/derivatives/dq411.pdf>. As of 2011, the international derivatives market reached nearly \$1.7 quadrillion, up from \$1.66 quadrillion in 2010. Press Release, Craig Donner, DTCC Testifies in Support of Bipartisan Legislation to Ensure Transparency into OTC Derivatives Markets (Mar. 28,

quarter of all U.S. income and hold 40% of U.S. wealth³¹¹ will continue to lose faith in the rule of law.

Social meaning in law has evolved to the point that certain individuals, white-collar fraudsters in particular, believe they face little risk of criminal punishment for decidedly criminal acts. When these criminals reframe the debate on prosecutorial discretion by highlighting the costs to society of punishing corporations or their leaders,³¹² or by characterizing the pursuit of justice as a political act of retribution³¹³ rather than as a reasoned decision to deter future conduct, they obfuscate their perverse influence upon prosecutorial discretion by speaking in terms of decisional factors that are largely deemed appropriate in this realm. Allowing money, opportunity, 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.³¹⁴ 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. These laws and the enforcement of them have meaning. Moreover, failure to enforce some laws can undermine the confidence in all laws.³¹⁵ Prosecutors must recognize the social compact formed by law-abiding citizens who obey and respect the laws and expect nothing less of

2012), available at http://www.dtcc.com/news/press/releases/2012/press_release_dtcc_testifies_in_support.php.

³¹¹ Joseph E. Stiglitz, *Of the 1%, By the 1%, For the 1%*, VANITY FAIR, May 2011, at 126, 126.

³¹² See, e.g., Finder & McConnell, *supra* note 174, at 3 n.8 (discussing the disaster of Arthur Andersen’s indictment); Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 165–66 (2008) (discussing Arthur Andersen’s criminal indictment and the collateral consequences to the thousands of employees as necessitating alternatives “somewhere in between the ‘all-or-nothing choice’ between indicting (and destroying) a company and giving it a complete ‘pass’”).

³¹³ See, e.g., Baker, *supra* note 216, at 337–38 (referring to prosecutions after the collapse of Enron and WorldCom).

³¹⁴ See Lessig, *supra* note 168, at 961–63 (discussing how social meaning of laws influences actions).

³¹⁵ “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.” *Soros Would Make It Harder for People Like Him to Make Billions*, NPR.ORG (Mar. 9, 2010), http://www.npr.org/blogs/thetwo-way/2010/03/soros_would_make_it_harder_for.html (interview with George Soros, billionaire investor, commenting on the need for increased financial market regulation).

the rest of society.³¹⁶

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 to skirt the law. Today, America flirts with financial and corporate elites who behave as if they are above the law, and with a public that holds the legal system in contempt. As such, affirmance may lead to future economic lawlessness and catastrophes.³¹⁷ The DOJ's systematic declination to prosecute crimes connected to the financial crisis of 2007 to 2009 amounts to an affirmance of those crimes and invites continued lawlessness in the financial sector and beyond.

³¹⁶ See Kahan, *supra* note 224, at 358 (recognizing that individuals may wish to uphold the law, but do not want to be taken advantage of and that “[w]hen others refuse to reciprocate, submission to a burdensome legal duty is likely to feel more servile than moral”); Lessig, *supra* note 168, at 955–56 (stating that how laws are enforced creates social meanings).

³¹⁷ William K. Black, *2011 Will Bring More de Facto Decriminalization of Elite Financial Fraud*, HUFFINGTON POST (Dec. 28, 2010, 5:29 PM), http://www.huffingtonpost.com/william-k-black/the-role-of-the-criminal_b_802115.html (predicting that state and federal prosecutors will fail to prosecute or reign in the financial market elites).