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# WHITE COLLAR SHORTCUTS

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*In the aftermath of financial and corporate frauds, aggressive government policy is apparent. But while touting a crackdown to correct past prosecution failures, one sees the government using shortcuts in both agency policy and prosecutorial practices. These shortcuts can be seen in the investigative, charging, and plea areas. There is an increased use of search warrants and wiretaps, and there are also increased failures to adhere to criminal discovery obligations. So too, one sees the government charging shortcut offenses such as perjury, obstruction of justice, and false statements as opposed to the underlying conduct that was initially being investigated. Taking advantage of over-federalization and over-criminalization is seen in the stacking of multiple charges, tacking on conspiracy and money-laundering offenses, and adding new plea waivers to secure finality of all issues and avoid future litigation. While these aggressive policy moves may seem efficient, the use of shortcuts has serious consequences that undermine deterrence and legitimacy in the criminal justice process.*

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## I. INTRODUCTION

White collar crime,<sup>1</sup> particularly financial institution misconduct,<sup>2</sup> has become a major national concern that has been at the forefront before,<sup>2</sup> during, and after the recent presidential campaigns and election.<sup>3</sup> Some have focused on individual accountability and the lack of prosecutions for wrongdoing committed by corporate executives.<sup>4</sup> Others have echoed public outrage with a lack

1. The term “white collar crime” was coined by Edwin Sutherland in a speech to the American Sociological Society in 1939. See Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940). Many definitions have been given to describe what the term encompasses. See ELLEN S. PODGOR ET AL., WHITE COLLAR CRIME 1–3 (2013) (noting the progression from the original definition to how the current term is used in criminal prosecutions); David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 LAW & SOC. INQUIRY 63, 63–72 (1993) (examining different definitions of the term white collar crime). The term raises definition problems as statistical reporting of white collar crime is skewed by the fact that there is no Department of Justice definition and no clear indication of what statute violations will be encompassed within the term. See generally Lucian Dervan & Ellen S. Podgor, “*White Collar Crime*”: *Still Hazy After All These Years*, 50 GA. L. REV. 709, 728 (2016) (discussing how some crimes such as RICO may fall in both the white collar and street crime categories as a result of its predicate acts).

2. “Occupy Wall Street,” with a slogan of “[w]e are the 99%! We are the 99%,” highlighted the wealth inequality and also the failure to prosecute financial crimes that some argue caused the economic downturn. See generally Sandra D. Jordan, *Victimization on Main Street: Occupy Wall Street and the Mortgage Fraud Crisis*, 39 FORDHAM URB. L.J. 485, 485 (2011) (advocating for the use of criminal prosecutions as opposed to civil resolutions).

3. A major focus of Democratic candidate Bernie Sanders was “Reforming Wall Street.” See *Reforming Wall Street*, <https://berniesanders.com/issues/reforming-wall-street/> (last visited Mar. 21, 2018).

4. See OFFICE OF SENATOR ELIZABETH WARREN, RIGGED JUSTICE: 2016: HOW WEAK ENFORCEMENT LETS CORPORATE OFFENDERS OFF EASY (Jan. 2016), [https://www.warren.senate.gov/files/documents/Rigged\\_Justice\\_2016.pdf](https://www.warren.senate.gov/files/documents/Rigged_Justice_2016.pdf) (highlighting twenty cases in 2015 that failed to have meaningful individual accountability). But see BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH

of entity prosecutions and the government use of non-prosecution and deferred prosecution agreements in place of proceeding with criminal charges against corporations.<sup>5</sup> It is hard not to notice the few “major” criminal prosecutions against banks coming from the financial downturn.<sup>6</sup>

The executive and legislative branches of government have reacted to the outcry for criminal prosecutions of financial fraud with new legislation,<sup>7</sup> a presidential task force,<sup>8</sup> increased sentencing options,<sup>9</sup> and Department of Justice promises for aggressive enforcement of criminal laws.<sup>10</sup> For example, former Assistant Attorney General and head of the Criminal Division of the Department of Justice, Lanny A. Breuer, noted to the Senate Judiciary Committee that “between October 2009 and June 2010, nearly 3,000 defendants were sentenced to prison for financial fraud, and over 1,600 of these defendants received sentences of more than 12 months.”<sup>11</sup> And although there were prosecutions related to mortgage fraud, the prosecutions against banks and corporate executives were less apparent.<sup>12</sup> Responding to this call for justice in the corporate realm, then-Deputy Attorney General Sally Yates issued a new corporate memoran-

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CORPORATIONS 1 (2014) (discussing the shift from individual to corporate prosecutions and “[h]ow prosecutors compromise with corporations”).

5. See generally David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013) (advocating for criminal prosecution as opposed to nonprosecution and deferred prosecution agreements when the conduct rises to being criminal); see also Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 267 (2014) (discussing rhetoric for increased prosecutions following the financial crisis).

6. See Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAG. (Apr. 30, 2014), <http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html> (noting how DOJ focused on entities as opposed to individuals). It should be noted, however, that claims of fewer white collar prosecutions may be misguided as a result of the lack of a definition of the white collar term and the failure to report white collar statistics that cover all possible crimes. As noted later in this Article, often, fraud may not be charged, and in its place, prosecutors use offenses like obstruction of justice, perjury, or false statements to prosecute these crimes. These generic offenses operate both for white collar and non-white collar conduct. Thus, it is difficult to ascertain whether cases should be categorized as white collar or otherwise. See Dervan & Podgor, *supra* note 1, at 720–21; see also *infra* notes 35–41 and accompanying text.

7. In 1989, President George Bush signed the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”). See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183.

8. On November 2009, President Obama replaced the Corporate Fraud Task Force, which President George W. Bush had established by Executive Order in 2002, calling it the Financial Fraud Enforcement Task Force. Exec. Order No. 13,519, 3 C.F.R. § 13519 (Nov. 17, 2009), <https://www.gpo.gov/fdsys/pkg/CFR-2010-title3-vol1/pdf/CFR-2010-title3-vol1-eo13519.pdf>.

9. See Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (increasing penalty for mail and wire fraud statutes 18 U.S.C. §§ 1341, 1343 (2012) from twenty years to thirty years if the fraud affected a financial institution).

10. See, e.g., Lanny A. Breuer, Assistant Att’y Gen., Statement Before the Senate Judiciary Committee at a Hearing Regarding Financial Fraud Enforcement (Sept. 22, 2010), <https://www.justice.gov/opa/speech/statement-assistant-attorney-general-lanny-breuer-senate-judiciary-committee-hearing>; see also Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 37 (2017) (discussing the Kabuki Crackdown in the wake of a massive financial crisis).

11. Breuer, *supra* note 10.

12. See Todd Haugh, *The Most Senior Wall Street Official: Evaluating the State of Financial Crisis Prosecutions*, 9 VA. L. & BUS. REV. 153, 155 (2015) (discussing the prosecution of Wall Street executive Kareem Serageldin and it not being the high-level prosecution for the financial crisis as touted).

dum in September 2015 that targeted individual liability in the corporate sphere.<sup>13</sup>

But what may appear outwardly as an aggressive federal prosecution policy can also be seen as an example of the increasing use of shortcuts by federal prosecutors. On one hand, there are calls for increased indictments and statements by the government that emphasize an increased focus on combatting white collar criminality. But the mechanics of actually handling the federal prosecution of white collar crime demonstrate conscripting others to carry the prosecution workload, charging easily proved crimes, and overcharging conduct to receive a minimal return.<sup>14</sup> At first blush, this might be seen as an efficient and effective use of prosecutorial tools. But a closer examination demonstrates that behind the mask of aggressiveness is a reality of what might be called a tactical use of shortcuts to achieve a quicker gratification that temporarily placates public concern.

There are many examples that can be used to demonstrate the disparity between the prosecutorial aggressiveness rhetoric and the reality of government shortcuts that undermine the supposedly aggressive policy. For example, touting an increased level of indictments while growing the use of plea agreements as opposed to trials may be argued, on one hand, as providing a more efficient system, or, alternatively, it may be seen as limiting the workload of the prosecutor.<sup>15</sup> After all, a plea requires minimal work in comparison to preparing witnesses and proceeding through a trial. Likewise, the current growth of search warrants in white collar cases provides quick access to materials that might have been produced slowly and with objections if sought through a grand jury subpoena.<sup>16</sup> But less closely scrutinized are the risks that accompany these tactical decisions.

Prosecutors are quick to aggressively insert a conspiracy charge in a federal prosecution as conspiracy opens the door to allow expanded evidence at trial and an increased amount of hearsay evidence, making it easier for the prosecution to secure a conviction.<sup>17</sup> Both the addition of a conspiracy charge

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13. Memorandum from Deputy Att’y Gen. Sally Quillian Yates on Individual Accountability for Corporate Wrongdoing to the Heads of Dep’t Components and U.S. Att’ys (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download>.

14. This Article is not, however, an indictment of any individual prosecutor, but rather, it focuses as an aggregate on recent policy decisions and actions being made across the country in prosecuting white collar crime. Arguments could easily be made that the examples offered in this Article are equally pervasive in non-white collar areas. For example, one could easily argue that the government used aggressive policies when drug prosecutions were the main focus of the DOJ, while the DOJ was also quick to offer 5K1.1 sentencing benefits to those who provided cooperation to the government.

15. There has been a growth of plea bargains throughout the years, from approximately 84% in 1990 to 97% in 2012. See Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012), <http://www.wsj.com/articles/SB10000872396390443589304577637610097206808>; see also George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 893 (2002) (discussing the growth of plea bargaining in the United States).

16. See *infra* notes 99–125 and accompanying text.

17. See FED. R. EVID. 801(d)(2)(E).

and the tacking on of money laundering charges in white collar cases<sup>18</sup> increase the likelihood of a quicker resolution through plea negotiations, but both actions can also divert attention from the actual underlying conduct.

Finally, the prosecution's insertion of additional waivers in plea agreements, such as waivers of prosecutorial misconduct or ineffective assistance of counsel,<sup>19</sup> may be seen as an aggressive policy to assure case finality when the defendant enters into such a plea agreement.<sup>20</sup> But it can also be seen as a shortcut in not having to litigate questionable activity of the prosecutor or defense counsel in appellate review.

But white collar shortcuts are not merely a function of prosecutorial policy and practice in its charging and over-charging of individuals and in making certain that plea agreements provide finality to a case. White collar shortcuts are made possible and enabled by legislation that simplifies what is needed for a conviction. For example, Congress is quick to pass new criminal statutes to combat white collar criminality, but oftentimes these statutes are without a mens rea requirement.<sup>21</sup> The passing of new legislation demonstrates an aggressive approach to combatting new forms of white collar criminality. But it also can be seen as a shortcut in that it is easier to obtain a conviction without having to prove beyond a reasonable doubt that the accused acted with a mens rea when committing the activity in question.

This Article dissects the recent focus on combatting white collar crime and the accompanying aggressive rhetoric seen in agency policy and prosecutorial practice. But it notes that behind the curtain of this aggressive rhetoric is a system that operates on shortcuts with a failure to do the hard work. Some may see these government shortcuts as providing beneficial tactical advantages that produce a more efficient system. This Article, however, offers an alternative construct, claiming that the current environment of using white collar shortcuts undermines legitimacy and deterrence in our criminal justice process. The shortcuts described here are not ones arising from agency or prosecutorial ineptness or inaction, as was seen, for example, in the failure of the Securities Exchange Commission to properly pursue Bernard Madoff when he engaged in

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18. See generally Teresa E. Adams, *Tacking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, and What Are the Courts Doing?*, 17 GA. ST. L. REV. 531 (2000) (discussing the government's addition of money laundering charges in white collar criminal cases).

19. Jane Campbell Moriarty & Marisa Main, "Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation, 38 HASTINGS CON. L.Q. 1029, 1035 (2011) (discussing the difficulty facing defense counsel when waivers concerning the defense counsel are placed in plea agreements).

20. See Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 648 (2013) (discussing plea agreements that include waivers of ineffective assistance of counsel); Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 76–77 (2015) (looking at plea waivers).

21. Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress Is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. (May 5, 2010), <http://www.heritage.org/crime-and-justice/report/without-intent-how-congress-eroding-the-criminal-intent-requirement>.

a massive Ponzi scheme<sup>22</sup> or the failure to recognize misconduct occurring within Wells Fargo.<sup>23</sup> Rather, the prosecutor and agency actions described here look at aggressive rhetoric that serves as a façade for a reality of shortcuts being used in actually pursuing the criminal activity.

The white collar crime landscape is examined on two levels: policy and practice. In Part II, this Article focuses on agency policy, such as a Department of Justice memorandum on corporate prosecutions.<sup>24</sup> It notes that behind the statements to crack down on corporate employees who engage in criminal activity are policies that have the corporation doing the government investigative work or making its prosecutions easier.<sup>25</sup> The Article discusses the long-term consequences of this shortcut policy approach and how it undermines legitimacy and deterrence in the criminal justice process.<sup>26</sup>

Part III looks at prosecutorial practices that express aggressive tactics but that, in reality, use shortcuts that undermine the legitimacy of eradicating white collar and corporate criminality. Three areas are noted here: investigative shortcuts,<sup>27</sup> charging shortcuts,<sup>28</sup> and those related to pleas.<sup>29</sup> From an investigative standpoint, we see shortcuts taken in the movement from a slow, deliberate process of using subpoenas to now sometimes using searches to gather evidence. Likewise, we see a movement from careful investigative work to use of wiretaps. In the charging realm, we continually see aggressive statements of United States Attorneys that purport to prioritize the prosecution of white collar crime such as insider trading and fraud, but the reality is found in the charging of more easily proved offenses such as obstruction of justice, perjury, and false statement crimes.<sup>30</sup> Practice also shows an aggressive use of stacking multiple charges for the same conduct, albeit with different statutory titles, assuring compromise verdicts by juries and convictions without prosecutors having to struggle to prove all of the alleged offenses.<sup>31</sup> These aggressive prosecutorial practices can also be seen in the addition of conspiracy and money laundering charges in white collar cases. Finally, the recent attempts to prohibit claims of prosecutorial misconduct or defense attorney ineffective assistance of counsel

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22. U.S. SEC. & EXCH. COMM'N, REPORT NO. OIG-509, INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF'S PONZI SCHEME (Aug. 31, 2009), <https://www.sec.gov/news/studies/2009/oig-509.pdf>.

23. See Kevin G. Hall, *Regulators Danced with Wells Fargo for Years Before Penalties*, MCCLATCHY (Sept. 20, 2016, 5:19 PM), <http://www.mcclatchydc.com/news/politics-government/congress/article103008152.html> ("Federal regulators were aware of wrongdoing at banking giants Wells Fargo & Co. as early as March 2012 and issued a string of supervisory letters ordering changes over the next three years, holding off on penalties while the creation of phony bank accounts and falsely issued credit cards to pad employee bonuses continued.").

24. See *infra* Section II.A.

25. See *infra* Section II.B.

26. See *infra* Section II.C.

27. See *infra* Section III.B.

28. See *infra* Section III.C.

29. See *infra* Section III.D.

30. See *infra* Subsection III.C.1. For a discussion of the practice of "pretextual charging," see *infra* notes 200-01 and accompanying text.

31. See *infra* Subsection III.C.2.

through plea agreement waivers are a way to shortcut future work of the government in having to prove that the conviction deserves finality. Much of this landscape, especially in the charging and plea area, is made possible by “tough on crime” legislative enactments that provide prosecutors with few restraints in proceeding against white collar offenders.

Part IV of this Article notes that the policy and practice that form this white collar landscape of shortcuts outwardly demonstrates government aggressiveness that appears to use efficient methods to combat white collar crime, especially criminal activity that has been at the forefront of public concern. But the harsh reality behind the sharp tactical prosecution moves is an approach that conscripts others to do the work, cuts corners in achieving deterrence, and takes advantage of the over-criminalized statutory base. This Article demonstrates that the use of shortcuts can have long-term consequences that undermine criminal justice effectiveness<sup>32</sup> and legitimacy<sup>33</sup> in eradicating white collar and corporate criminality.<sup>34</sup>

## II. AGENCY POLICY

### A. *Agency Shortcuts*

When one thinks of agency laziness, the immediate focus is likely to be on agency policy that allows for inept and inefficient decisions in the prosecution or, more appropriately stated, the lack of prosecution, of white collar crimes. There are, however, two dimensions to agency laziness in its proceeding, and failing to proceed, against white collar criminality. On one level, there is agency ineptness and a failure to focus on white collar misconduct. This may be a function of having insufficient resources, a likely outgrowth of the increased prioritization of street crime and terrorism.<sup>35</sup> Limited resources can also constrain the number of agency personnel used in investigating this type of criminal activity. On a second level, there is aggressive rhetoric espousing strong advocacy in the prosecution of white collar crime, but the policy statements call for the prosecution’s use of a shortcut in that they actually enlist the assistance of others to provide the evidence for their cases. Although the first

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32. See generally Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119 (2012) (discussing the role of legitimacy in criminalizing conduct).

33. See generally Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005) (providing a framework for legitimacy).

34. See *infra* Part IV.

35. See U.S. DEP’T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 04-39, THE INTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION’S REPRIORITIZATION (2004), <https://www.oig.justice.gov/oig/reports/FBI/a0439/final.pdf> (“In direct response to the 9/11 terrorist attacks, the FBI Director initiated a transformation of the FBI that, among other things, established a new set of priorities and formally shifted a significant number of agents from traditional criminal investigative work to counterterrorism and counterintelligence matters.”). See generally Ellen S. Podgor, *White-Collar Crime and the Recession: Was the Chicken or Egg First?*, 2010 U. CHI. LEGAL F. 205 (discussing whether white collar crime caused the recession or the recession resulted in white collar criminality).

level that encompasses ineptness and neglect is important in understanding the failure to prosecute white collar crime, it is the second level, the use of shortcuts in the prosecution of this conduct, that is the focus of this Article.

The slow progress in prosecuting some of the financial frauds, mortgage frauds, and Ponzi schemes provides strong evidence of the lack of attention provided to correcting criminal conduct. The agency missteps are not exclusive to the Department of Justice (“DOJ”) and the Federal Bureau of Investigation (“FBI”). Rather, there is strong evidence of ineffectiveness in other government agencies, such as the Securities Exchange Commission (“SEC”). One need only look at the failure to investigate Ponzi schemer Bernard Madoff for many years to recognize the flaws in detecting white collar criminality.<sup>36</sup>

The 457-page report studying the failure to detect the Madoff Ponzi scheme offers a detailed and thorough examination of what went wrong on the part of the SEC.<sup>37</sup> Although Madoff was eventually indicted and pled guilty in 2009 to all charges, receiving a prison sentence of 150 years, there was misconduct reported to the SEC “going back to at least 1999.”<sup>38</sup> The Office of Inspector General’s Report (“OIG Report”) did not find improper influence resulting from connections that Madoff had with SEC personnel, but it did note “that the SEC received more than ample information in the form of detailed and substantive complaints over the years to warrant a thorough and comprehensive examination and/or investigation of Bernard Madoff” and his company, and it further noted that “despite three examinations and two investigations being conducted, a thorough and competent investigation or examination was never performed.”<sup>39</sup> The OIG Report noted that “despite numerous credible and detailed complaints, the SEC never properly examined or investigated Madoff’s trading and never took the necessary, but basic, steps to determine if Madoff was operating a Ponzi scheme.”<sup>40</sup> The Executive Summary of the Report concluded by noting that “[h]ad these efforts been made with appropriate follow-up at any time beginning in June of 1992 until December 2008, the SEC could have uncovered the Ponzi scheme well before Madoff confessed.”<sup>41</sup>

Thus, in this first dimension of agency laziness, one does not find a deliberate agency action that would amount to corrupt or even aggressive conduct. Rather, one sees an inefficiency and ineptness that may be caused by a host of circumstances, most noticeably a lack of resources provided to the agency so that it might have conducted a closer scrutiny of Madoff’s conduct. Agency malfunction is at the heart of concerns here.

Likewise, the lingering question remains as to whether additional emphasis on mortgage fraud, from an agency perspective, would have alleviated some

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36. See generally U.S. SEC. & EXCH. COMM’N, *supra* note 22.

37. *Id.*

38. *Id.* at 1.

39. *Id.* at 21.

40. *Id.* at 41.

41. *Id.*

of the financial crises that occurred.<sup>42</sup> In the recent Wells Fargo debacle, questions remain as to where the regulators were and whether closer scrutiny of the company would have disclosed this conduct sooner.<sup>43</sup>

But there is another dimension to this agency failure that also warrants examination and that is the focus of this Article. As opposed to a failure to proceed against white collar criminality because of negligence or mishandling, one also finds strong rhetoric stating that the government is clamping down on improper white collar and corporate criminality. On its face, laziness would be the last term one would use in describing the government's response to white collar and corporate criminality, as the language of policy-makers shows a clear indication that white collar crime is a top priority. But the question here is whether, behind the strong policy initiatives against white collar and corporate criminality, there is the reality of the government using shortcuts to secure convictions for this improper conduct. Thus, the focus is not on inaction, but rather on whether the action taken by the agency is really a filtering down by the agency to conscript others to do their investigative work. Examples of such agency policy appear in DOJ memos that restrict the ability of defense counsel to be paid attorney fees by a corporation or that call for individual accountability for corporate misconduct.<sup>44</sup>

### B. Corporate Misconduct Policy

Corporate criminality is not a new problem,<sup>45</sup> although its prominence is currently at the forefront of public concern. The DOJ, in its manual, issued guidelines outlining its approach to prosecuting corporate misconduct.<sup>46</sup> Additionally, the Deputy Attorneys General have provided memoranda offering the specific policies for that administration. These memos typically bear their names. Thus, we see the Holder Memo (1999),<sup>47</sup> the Thompson Memo (2003),<sup>48</sup> the McNulty Memo (2007),<sup>49</sup> the Filip Memo (2008),<sup>50</sup> and the Yates

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42. See generally Podgor, *supra* note 35 (discussing whether white collar crime caused the recession or the recession resulted in white collar criminality).

43. See Hall, *supra* note 23 ("Federal regulators were aware of wrongdoing at banking giants Wells Fargo & Co. as early as March 2012 and issued a string of supervisory letters ordering changes over the next three years, holding off on penalties while the creation of phony bank accounts and falsely issued credit cards to pad employee bonuses continued.").

44. See *infra* notes 47–51 and accompanying text.

45. Even before the landmark decision that allowed for corporate criminality with mens rea offenses, *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 494 (1909), corporations were being prosecuted for strict liability crimes. See PODGOR ET AL., *supra* note 1, at 23 (discussing the evolution of corporate criminal liability).

46. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-28.010 (2015), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

47. Memorandum from Deputy Att'y Gen. Eric Holder on Bringing Criminal Charges Against Corps. to All Component Heads and U.S. Att'ys (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.

48. Memorandum from Deputy Att'y Gen. Larry D. Thompson on Principles of Federal Prosecution of Business Organizations to All Component Heads and U.S. Att'ys (Jan. 20, 2003), [http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20\\_privwaiv\\_dojthomp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf).

Memo (2015), or as former Deputy Attorney General Sally Yates preferred to call it—the “Individual Accountability Policy.”<sup>51</sup> Each of these memoranda provided guidance on the DOJ policy for prosecuting entities that crossed the line into committing criminal conduct. Each has its own idiosyncrasies.

Two examples of DOJ policy demonstrate what may outwardly appear as aggressive government policy. These can be found in the Thompson Memo<sup>52</sup> and the Yates Memo.<sup>53</sup>

Deputy Attorney General Larry Thompson’s memo on *Principles of Federal Prosecution of Business Organizations* focused on “increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”<sup>54</sup> One of the more controversial aspects of this memo was its statement that the government would consider as part of the cooperation whether the corporation had advanced attorney fees for individual constituents within the entity.<sup>55</sup> Thus, corporations that were paying legal counsel for employees were seen as not fully cooperating with the government and were not entitled to the benefits accompanying cooperation status.

With the high cost of representation in a white collar case, the Thompson Memo effectively placed the corporate constituents at odds with the entity. The entity was fearful of advancing legal fees for individuals in the corporation who might be implicated in the investigation. Outwardly, this demonstrated an aggressive government policy because it made it easier for the government to proceed against individuals. But closer scrutiny also shows that this government policy can limit access to defense counsel in cases against the government. This attempt to shortcut the process by curtailing legal counsel for the defendants proved to have serious ramifications for the government.<sup>56</sup>

The Yates Memo also used an aggressive government policy with respect to corporate criminality. Like the Thompson Memo, it focused on what the corporation needed to do in order to obtain cooperation credit; the memo’s opening sentence was: “Fighting corporate fraud and other misconduct is a top pri-

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49. Memorandum from Deputy Att’y Gen. Paul J. McNulty on Principles of Federal Prosecution of Business Organizations to the Heads of Dep’t Components and U.S. Att’ys (July 5, 2007), [https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty\\_memo.pdf](https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf).

50. Memorandum from Deputy Att’y Gen. Mark Filip on Principles of Federal Prosecution of Business Organizations to the Heads of Dep’t Components and U.S. Att’ys (Aug. 28, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.

51. Memorandum from Deputy Att’y Gen. Sally Quillian Yates, *supra* note 13.

52. Memorandum from Deputy Att’y Gen. Larry D. Thompson, *supra* note 48.

53. Memorandum from Deputy Att’y Gen. Sally Quillian Yates, *supra* note 13.

54. Memorandum from Deputy Att’y Gen. Larry D. Thompson, *supra* note 48.

55. The Thompson Memo stated:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, either through advancing of attorney fees, through retaining the employees without sanction for their misconduct, or providing information to the employees about the government’s investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of the corporation’s cooperation.

*Id.* at 7–8.

56. *See infra* Section II.C.

ority of the Department of Justice.”<sup>57</sup> In justifying her *Individual Accountability Policy*, Deputy Attorney General Sally Yates spoke to the prosecution’s challenges, saying, “it is not easy to disentangle who did what within a huge corporate structure—to discern whether anyone had the requisite knowledge and intent.”<sup>58</sup> The Yates Memo, therefore, placed the responsibility on the company to “provide all the facts about individual conduct in order to qualify for any cooperation credit.”<sup>59</sup> Although the Yates Memo did state that DOJ attorneys “should be proactively investigating individuals at every step of the process—before, during, and after any corporate cooperation,” it also stated that “[d]epartment attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case.”<sup>60</sup>

In the short term, this “carrot and stick approach,”<sup>61</sup> as described by Paul Larkin and John-Michael Siebler, appears to provide a benefit to entities trying to avoid prosecution or obtain a deferred (“DPA”) or nonprosecution (“NPA”) agreement. Thus, the Yates Memo and Thompson Memo appear to encourage the entity to “throw its employees under the bus”<sup>62</sup> or to serve its employees to the government “on a silver platter.”<sup>63</sup> Both of these memos, as well as other DOJ memos, offered the corporation diminished criminal liability in return for some action on its part. They also offered the corporation reduced collateral consequences, such as public exposure of wrongdoing that can result in civil actions.<sup>64</sup> If the company is one that does business with the government, an

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57. Memorandum from Deputy Att’y Gen. Sally Quillian Yates, *supra* note 13. *But see* Miriam Baer, *The Stick That Never Was: Parsing the Yates Memo and the Revised Principles of Federal Prosecution of Business Organizations*, COMPLIANCE & ENFORCEMENT (Aug. 31, 2016), [https://wp.nyu.edu/compliance\\_enforcement/2016/08/31/the-stick-that-never-was-parsing-the-yates-memo-and-the-revised-principles-of-federal-prosecution-of-business-organizations/](https://wp.nyu.edu/compliance_enforcement/2016/08/31/the-stick-that-never-was-parsing-the-yates-memo-and-the-revised-principles-of-federal-prosecution-of-business-organizations/) (noting that maybe the Yates Memo is not really a dramatic policy shift).

58. Sally Q. Yates, Deputy Att’y Gen., Remarks at the New York City Bar Association White Collar Crime Conference (May 10, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-remarks-new-york-city-bar-association>.

59. *Id.*; *see also* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2086 (2016) (discussing the government’s imposition of a corporate compliance structure); Miriam Baer, *When the Corporation Investigates Itself*, HANDBOOK OF FINANCIAL FRAUD & MISDEALING (Arlen ed., forthcoming Apr. 2018) (discussing corporate internal investigations).

60. *See* Memorandum from Deputy Att’y Gen. Sally Quillian Yates, *supra* note 13, at 4.

61. *See generally* Paul J. Larkin, Jr. & John-Michael Siebler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 STETSON L. REV. 7 (2016).

62. *See* Ellen S. Podgor, *It’s Official—Throw the Employees Under the Bus*, WHITE COLLAR CRIME PROF BLOG (Sept. 9, 2015), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2015/09/its-official-throw-the-employees-under-the-bus.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2015/09/its-official-throw-the-employees-under-the-bus.html).

63. Lawrence S. Goldman, *Abramowitz Decries Effect of Corporate Prosecutions on Employees*, WHITE COLLAR CRIME PROF BLOG (June 21, 2016), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2016/06/elkan-abramowitz-one-of-the-best-and-most-respected-white-collar-crime-defense-practitioners-in-the-nation-last-week-recei.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2016/06/elkan-abramowitz-one-of-the-best-and-most-respected-white-collar-crime-defense-practitioners-in-the-nation-last-week-recei.html) (quoting Elkan Abramowitz).

64. A collateral consequence of a government investigation can be shareholders and other investors bringing legal actions against the entity. *See* Russ Brit, *WellCare Health Plans Hit with Investor Suit After Federal and States Agents Raid Offices*, ASSOCIATED PRESS FIN. WIRE (Oct. 26, 2007, 8:54 PM), <https://advance.lexis.com/api/permalink/251f01e8-3c4d-42cb-96c7-7a848f3aec80/?context=1000516>.

agreement with the government can be crucial to avoid debarment.<sup>65</sup> Likewise, if the company is involved in healthcare, a criminal conviction risks exclusion from government benefits, a collateral consequence that could likely bankrupt a doctor, hospital, or medical entity.<sup>66</sup>

In a post-Arthur Andersen, LLP world, corporations are quick to accept government offers that will avoid indictment or, more importantly, the collateral consequences that can result from an investigation, indictment, or conviction.<sup>67</sup> Most often the government-corporation resolutions come in the form of these nonprosecution and deferred prosecution agreements, with contract terms that typically include monitoring or beefing up a corporate compliance program.<sup>68</sup> These agreements allow the company to continue without a criminal conviction unless the entity does not comply with the terms of the agreement.<sup>69</sup> Companies do not wish to experience the results suffered by Arthur Andersen, LLP, a company that went to trial on an obstruction of justice charge emanating from the Enron debacle.<sup>70</sup> Although the United States Supreme Court overturned the company's conviction,<sup>71</sup> the collateral consequences of the indictment caused it to lose its ability to effectively serve its clients.<sup>72</sup> The company's success in the Supreme Court proved irrelevant as the company experienced bankruptcy.<sup>73</sup>

But in dangling immunity to prosecution or a nonprosecution or deferred prosecution agreement for a corporation, these DOJ memos award the wealthier and more powerful party—the entity—in return for its sacrificing of corporate

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65. See Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective of Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 539 (2015) (noting how companies can avoid the collateral consequences of a debarment by entering into a resolution with the government).

66. See 42 U.S.C. § 1320a-7 (2012) (Exclusion of Certain Individuals and Entities from Participation in Medicare and State Health Care Programs); see also H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 DEL. J. CORP. L. 1, 26 (2001) (discussing how the collateral consequences of a conviction may be more severe than those imposed under the sentencing guidelines).

67. 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, 563 (2011) (discussing the increased number of nonprosecution and deferred prosecution agreements following the indictment of Arthur Andersen, LLP). In *United States v. Stein I*, 435 F. Supp. 2d 330, 337 n.11 (S.D.N.Y. 2006), an amicus brief noted that there were no major financial services firms that had ever "survived an indictment." Brief for The Sec. Indus. & Fin. Mkts. Ass'n as Amici Curiae Supporting Defendants-Appellees at 16, *United States v. Stein*, 435 F.Supp.2d 330 (2006) (No. 07-3042-cr.), 2008 WL 6109735.

68. See generally Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483 (2017) (discussing corporate settlements).

69. See Candace Zierdt & Ellen S. Podgor, *Corporate Deferred Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 14–16 (2007) (discussing how the government has the role of deciding if there has been noncompliance with a deferred or nonprosecution agreement).

70. *Id.* at 2.

71. *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 698 (2005).

72. See Linda Greenhouse, *Justices Reject Auditor Verdict in Enron Scandal*, N.Y. TIMES (June 1, 2005), <http://www.nytimes.com/2005/06/01/business/justices-reject-auditor-verdict-in-enron-scandal.html> (noting that Andersen "shrunk from 28,000 employees in the United States to a skeleton crew of 200" following the indictment of the company).

73. See also Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 90 (2013).

constituents—its employees. This prosecutorial strategy puts less weight on a diseased entity that may have perpetrated the misconduct through its policies and practices.<sup>74</sup> DOJ memos such as the Thompson Memo and Yates Memo have laudable goals. But these goals can be undermined when one uses prosecutorial shortcuts without first examining the long-term consequences that could defeat the aim of combatting corporate misconduct.<sup>75</sup>

### C. *Ramifications of Department of Justice Policy*

Shortcuts, such as those seen in the Thompson Memo’s attempt to eliminate private defense counsel for a company’s employees and the Yates Memo’s having the entity do the government’s investigative work, come with costs. Each of these shortcuts have ramifications that undermine the aggressive approach being taken.

The Thompson Memo’s attempt to deprive individuals of their counsel was scrutinized in *United States v. Stein*<sup>76</sup> and found to be a deprivation of the individuals’ Sixth Amendment Right to Counsel. The court examined the provision within the Thompson Memo that incentivized the entity not to pay the legal fees of its employees and held that “KPMG’s adoption and enforcement of the Fees Policy amounted to ‘state action’ because KPMG ‘operated as a willful participant in joint activity’ with the government, and because the USAO ‘significantly encouraged’ KPMG to withhold legal fees from defendants upon indictment.”<sup>77</sup> The Second Circuit affirmed the trial court’s finding that “absent pressure from the government, KPMG would have paid defendants’ legal fees and expenses without regard to cost.”<sup>78</sup>

The court in *Stein* noted that some of the defendants were “unable to retain the counsel of their choosing as a result of the termination of fee advancements upon indictment.”<sup>79</sup> The Second Circuit affirmed the lower court’s finding that “these defendants ‘have been forced to limit their defenses . . . for economic reasons and . . . they would not have been so constrained if KPMG paid their expenses.’”<sup>80</sup> In the end, the *Stein* case proved unfavorable for the government as the Second Circuit dismissed the indictment as to all thirteen de-

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74. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1144 (1991) (discussing a corporate ethos standard for determining corporate criminal liability).

75. The Federal Sentencing Guidelines (§ 8C4.1) and Federal Principles of Prosecution (§§ 9-27.001–.760) have traditionally encouraged entities to cooperate with the government and provided incentives for this cooperation. The Federal Sentencing Guidelines Manual § 8C4.1 (U.S. Sentencing Comm’n 2016); U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL §§ 9-27.001 to -27.760 (2018), <https://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution>. The Yates Memo takes it further by placing a stronger focus on the entity specifically implicating the individuals engaged in criminal activity.

76. 541 F.3d 130, 142–45 (2d Cir. 2008).

77. *Id.* at 147.

78. *Id.* at 135.

79. *Id.* at 157.

80. *Id.* at 157 (citing *United States v. Stein*, 495 F. Supp. 2d 390, 419 (S.D.N.Y. 2007)).

defendants because of the deprivation of their right to counsel under the Sixth Amendment.<sup>81</sup>

Thus, the government's aggressive use of the Thompson Memo to combat alleged criminal liability by eliminating the company's payment of attorney's fees for individual employees ended with a dismissal of the charges.<sup>82</sup> The government's shortcut failed to achieve increased corporate compliance and backfired in precluding individual prosecutions from proceeding, not to mention the stain on the government for its actions in depriving defendants of their right to counsel.<sup>83</sup>

The Yates Memo's attempt to react to the current outcry against corporate misconduct also has serious ramifications due to its shortcut approach. Under the Yates Memo, the government has the corporation turn over evidence against culpable individuals within the entity, thus pitting the corporation against its constituents.<sup>84</sup> This approach fails to recognize the importance of the corporate entity and individual employee working together to combat misconduct within a company. It presupposes a negative culture between the corporation and its employees and fails to account for the fact that they might be striving to achieve corporate compliance.

The 1981 Supreme Court decision in *Upjohn Co. v. United States*<sup>85</sup> told the story of a company and its employee-constituents aligned in efforts against the government's attempt to pierce the attorney-client privilege and the work-product doctrine.<sup>86</sup> In *Upjohn*, the pharmaceutical company conducted an internal investigation and refused to produce the documents from that investigation to the government.<sup>87</sup> The Supreme Court, in reviewing this document request, focused on the importance of the attorney-client privilege and the work-product doctrine.<sup>88</sup> The Court held that a lawyer's communications with a company's employees would be respected, but the Court did not premise this protection upon the "control group" test some lower courts used.<sup>89</sup> The *Upjohn* opinion reinforced companies performing internal investigations in order to achieve corporate compliance.<sup>90</sup>

The Yates Memo, however, disregarded the collaborative working environment the *Upjohn* opinion created by incentivizing the entity to turn over to the government evidence of corporate employee misconduct. It reinforced current case law that gives control of the attorney-client privilege to the corpora-

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81. *Id.* at 136. It is uncertain, however, whether the language of the Thompson Memo caused the issue in *Stein*, or rather whether the problem rested with the government's interpretation of this memo.

82. *Id.*

83. See generally Crystal Joy Carpenter, *Federal Prosecution of Business Organizations: The Thompson Memorandum and Its Aftermath*, 59 ALA. L. REV. 207, 222-25 (2007).

84. Larkin & Seibler, *supra* note 61, at 23.

85. 449 U.S. 383, 386 (1981).

86. See Green & Podgor, *supra* note 73, at 95-96.

87. *Id.*

88. *Id.* at 96.

89. *Upjohn*, 449 U.S. at 386.

90. Green & Podgor, *supra* note 73, at 95.

tion,<sup>91</sup> and it used this setting to entice the entity to provide information about its constituents to the government.<sup>92</sup> It, thus, becomes irrelevant whether an attorney-client privilege exists as described in *Upjohn*<sup>93</sup> because the entity has the control of the privilege and the government is now providing it with the incentive to tell on its constituents to reduce its own criminal liability and collateral exposure.<sup>94</sup>

This shortcut allows the government to more easily obtain individual indictments and convictions by conscripting the corporation to provide the evidence against its employees. In practice, corporate constituents are threatened with being fired if they fail to cooperate in a corporation's internal investigation.<sup>95</sup>

Lost here is the trust between the corporation and its constituents and the unity of them jointly rooting out misconduct within the entity. The Yates Memo analysis never factored in whether employees would continue to cooperate with corporate counsel on a regular basis or whether the corporate employee would seek advice from counsel in the future on the legality or illegality of prospective conduct.<sup>96</sup>

Making the corporate entity its government agent<sup>97</sup> may appear to be taking an aggressive approach, but a ramification of this policy is that it diminishes the entity and individual working together to eradicate corporate misconduct. Thus, although the Yates Memo appears to be an aggressive government policy that will provide valuable information to the government, it is, in fact, an example of prosecutorial shortcutting as it has the entity gathering its evidence against corporate individuals. In asking the entity to do the government's investigative work, one finds less likelihood in the long-term that individuals will provide necessary assistance to the entity to assist in eradicating corporate criminal behavior.

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91. Courts typically follow the approach taken in *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 123 (3d Cir. 1986), which requires an individual to prove five factors in a claim for the privilege. "This test places a near-insurmountable burden on the individual employee seeking to show that he or she is entitled to assert attorney-client privilege." Green & Podgor, *supra* note 73, at 101.

92. See *United States v. Norris*, 419 F. App'x 190, 195 (3d Cir. 2011) (finding that information provided by a corporate executive to legal counsel could be used as evidence in indicting him).

93. Yates, *supra* note 58.

94. Larkin & Seibler, *supra* note 61, at 33 (arguing that the Yates Memo requires defendants to prosecute themselves).

95. Griffith, *supra* note 59, at 2097.

96. See *United States v. Kumar*, 617 F.3d 612, 617 (2d Cir. 2010) (charging a former CEO and chair of the board with lying during an internal investigation); see also James J. Farrell & Jeremy G. Suiter, *The Cooperation Conundrum*, 8 WALL ST. LAW.: SEC. ELECTRONIC AGE (2004) (discussing the Computer Associates case).

97. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 23 (2010) (discussing how corporations have to routinely assist prosecutors in their investigations).

### D. *Agency Shortcuts Disguised as Aggressive Policy*

When companies are facing extinction or grave collateral consequences as was seen in the Arthur Andersen, LLP prosecution that caused the company to go bankrupt,<sup>98</sup> the DOJ's policy offer of a benefit in return for the company's helping the government to secure convictions against individuals can be a huge incentive for a corporation to aid the government. The enormous increase in DPAs and NPAs is staggering proof of their value to corporations.<sup>99</sup> In return for its cooperation, the entity often escapes with either no prosecution or a lesser fine than it would have received if it failed to cooperate.<sup>100</sup> Whether one agrees or disagrees on the use of NPAs and DPAs between the government and the entity, it is clear that the corporation often cannot take a risk of going to trial. So, the corporation is left with cooperating with the government, which means providing information for the prosecution of individuals.

Even if one designates this corporate-government alliance as a beneficial tactical approach for securing criminal evidence, it is clear that the government is taking a quieter role in an important stage of the process, the investigation of the alleged criminality. The government is enticing—or, as some see it, extorting<sup>101</sup>—the entity to do the investigative work for the government. In the Thompson Memo scenario, it is removing a barrier to obtaining that conviction by having the corporation cease attorney payments for its employees. This shortcutting is not a function of neglect or ineptness, conduct that sometimes is a result of a failure to act aggressively. Rather, this is a clear, aggressive enforcement policy, and one that might outwardly be seen as efficient. But the use of shortcuts by the agency in asking others to do the work for it, or making the government prosecution easier, comes with more systemic problems.

## III. PROSECUTORIAL PRACTICES

### A. *Shortcuts in Prosecutorial Practices Overview*

Although agency policies can drive the manner of practice of the attorneys within a particular U.S. Attorney's Office, many practices develop outside of a deliberate policy. Thus, the practices described in this next Section may not be endemic in all U.S. Attorney's Offices. But what is apparent is that there are a growing number of shortcut practices across the country and only in a few

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98. See Lawrence A. Cunningham, *Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels*, 106 COLUM. L. REV. 1698, 1710 (2006) (discussing the demise of Arthur Andersen as being proximately related to the criminal prosecution).

99. GARRETT, *supra* note 4, at 6–7; see also Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, U. VA. SCH. LAW, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/about.html> (last visited Mar. 21, 2018). But see Alexander & Cohen, *supra* note 65, at 566–69 (looking at empirical evidence on the numbers of DPAs, NPAs, and pleas).

100. Alexander & Cohen, *supra* note 65, at 550.

101. Michael S. Greve, *Deferred Prosecution: Meet the Fokkers*, LAW & LIBERTY (Apr. 14, 2016), <http://www.libertylawsite.org/2016/04/14/deferred-prosecution-meet-the-fokkers/> (discussing how charges brought that result in DPAs may be preposterous and brought for reasons bordering on extortion).

instances is the DOJ issuing mandates to curtail prosecutors' shortcut activities. It is equally important to note that many of the shortcuts described here are not specific to white collar crime. That said, the uniqueness of white collar crime, as will be discussed, makes some of these practices more problematic.

Most of the practices described here represent tactical decisions in the pretrial and trial stages, with several focused on the charging process, a discretionary function for prosecutors. For purposes of this Article, the prosecutorial practice of using shortcuts is divided into three groups: investigative shortcuts,<sup>102</sup> charging shortcuts,<sup>103</sup> and plea shortcuts.<sup>104</sup>

With regard to investigative tools, an example of a shortcut is the increased use of searches as opposed to solely using grand jury subpoenas, the norm in earlier white collar cases.<sup>105</sup> One also sees wiretaps suddenly being used in white collar cases, most noticeably in insider trading cases, with defense claims that their use exceeds the permissible boundaries of wiretap law.<sup>106</sup> The final example of shortcutting offered in the investigative stage relates to discovery practices by prosecutors.<sup>107</sup> Here, we see prosecutors failing to do the work necessary to timely provide favorable evidence to the defense and using document dumps that obstruct the ability of the defense to properly prepare for trial.<sup>108</sup>

In the category of charging practices, the examples offered to demonstrate the use of shortcuts by the government are: (1) government charging of offenses such as perjury, obstruction of justice, and false statements as opposed to charging crimes directly related to the fraudulent conduct;<sup>109</sup> (2) aggressive charging practices of using multiple counts for the same conduct;<sup>110</sup> and (3) the use of conspiracy and money laundering charges to assure a conviction or plea.<sup>111</sup> This Section of the Article also considers shortcuts in the arena of plea agreements, as some prosecutors asked for plea agreement terms precluding later claims of prosecutorial misconduct and ineffective assistance of counsel. In several instances, ethical concerns contributed to voiding this practice.

This Section of the Article concludes by noting the ramifications of using shortcuts in the investigation, charging, and plea areas. It discusses not only the direct consequences of these practices by prosecutors, but also the missed opportunities in failing to properly focus on difficult white collar cases, such as improper computer and technology use.

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102. See *infra* Section III.B.

103. See *infra* Section III.C.

104. See *infra* Section III.D.

105. See *infra* Subsection III.B.1.

106. See *infra* Subsection III.B.2.

107. See *infra* Subsection III.B.3.

108. See *infra* Subsection III.B.4.

109. See *infra* Subsection III.C.1.

110. See *infra* Subsection III.C.2.

111. See *infra* Subsection III.C.3-4.

## B. *Investigative Shortcuts*

### 1. *From Subpoenas to Searches*

The typical white collar case is a case that proceeds through a slow and deliberate grand jury process.<sup>112</sup> In a homicide or street crime case, we typically see police, FBI, or other members of law enforcement at the heart of the investigation.<sup>113</sup> Once their investigation is complete, the street crime case proceeds to a grand jury, and, in short order, the grand jury can then return an indictment if the case merits prosecution.<sup>114</sup> In contrast, in a white collar case, the investigative function typically occurs within the walls of the grand jury room.<sup>115</sup>

The prosecutor's control over the grand jury process, coupled with the secrecy it offers,<sup>116</sup> provides an advantage to the government for reviewing the extensive documentation that can accompany a white collar case. The exclusion of the defense from the process makes it a particularly inviting forum for the government.<sup>117</sup> The "cornerstone of the grand jury's investigative power is its ability to use the subpoena authority of the court that impaneled it."<sup>118</sup> In white collar cases, the subpoena *duces tecum* for production of documents plays a crucial role in building the evidence to support a case,<sup>119</sup> with Federal Rules of Criminal Procedure, Rule 17 providing the mechanics of the subpoena process.<sup>120</sup> Although the grand jury subpoena powers are not unlimited, the prosecutor has wide breadth in its use of these subpoenas in the grand jury process.<sup>121</sup> It is rare that a Fourth Amendment challenge to a subpoena, premised

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112. Randall Eliason, "What's Taking So Long?" *Former DC Mayor Vincent Gray and the Pace of White Collar Investigations*, SIDEBARS (Mar. 23, 2015), <https://sidebarsblog.com/whats-taking-so-long-former-dc-mayor-vincent-gray-and-the-pace-of-white-collar-investigations-2/>.

113. *The Criminal Justice System*, NAT'L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system> (last visited Mar. 21, 2018).

114. Some states, however, do not use the grand jury for charging individuals with crimes. Rather, the prosecutor may issue an information, and the matter may never proceed to a grand jury. The Supreme Court has not incorporated the grand jury indictment to the states via the Fourteenth Amendment. *See Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that there is no due process violation when the accused is not indicted by a grand jury in a state court); *see also* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO L.J. 253, 253 (1982) (discussing the selective incorporation of the Bill of Rights under the Fourteenth Amendment).

115. Eliason, *supra* note 112.

116. *See* FED. R. CRIM. P. 6(e)(2)(B) (providing the list of individuals who cannot divulge information occurring before the grand jury).

117. Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 267 (1995) (discussing the power provided to the government in the grand jury process).

118. JEROLD H. ISRAEL ET AL., *WHITE COLLAR CRIME: LAW AND PRACTICE* 354 (4th ed. 2015).

119. *See Branzburg v. Hayes*, 408 U.S. 665, 675, 678 (1972) (describing the broad authority of the grand jury to compel information). There is also a subpoena *ad testificandum* for prosecutors to request live testimony from an individual in front of the grand jury.

120. There can also be statutory provisions for specific subpoenas, such as subpoenas directed to financial institutions. *See* 12 U.S.C. §§ 3401–3403 (2012).

121. *See United States v. R. Enterprises, Inc.* 498 U.S. 292, 300 (1991) (discussing the reasonableness standard, a standard that does not require the government to broadly disclose the nature of the investigation); *see also* Roger A. Fairfax, *Does Grand Jury Discretion Have a Legitimate (and Useful) Role to Play in Crimi-*

upon it being unreasonably broad, is granted.<sup>122</sup> Likewise, a prosecutor has no obligation to present exculpatory evidence to the grand jury, which greatly enhances the ability of the prosecutor to control the evidence being examined in this investigative stage of the process.<sup>123</sup>

Despite the wide latitude given to the government in the grand jury process, it is a slow process that often allows individuals and companies the opportunity to challenge the subpoena.<sup>124</sup> There have been challenges to subpoenas requesting personal papers,<sup>125</sup> sole proprietorship records,<sup>126</sup> and corporate documents.<sup>127</sup> Issues regarding the Fifth Amendment privilege and the role of immunity<sup>128</sup> have also faced judicial review as actions of the government have come into question.

Recently, the government has been resorting to a quicker process for accessing evidence in some white collar cases, that being the use of searches.<sup>129</sup> Although search warrants may initially require more work in securing judicial approval based on probable cause, they allow the government to receive documents nearly instantaneously.<sup>130</sup> A request for a search warrant is heard *ex parte*, so possible defense objections may not be considered when the judge issues the warrant.<sup>131</sup> Even during and following the search, the accused party has less of an ability to immediately contest the breadth of a search, and there are few remedies when the government exceeds permissible boundaries. As such, the use of a search warrant can have fewer immediate remedies available than the use of the grand jury process, which affords the quashing of subpoenas or the narrowing of the scope of materials that need to be provided to the grand

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*nal Justice?*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 57–92 (Roger Anthony Fairfax, Jr., ed., 2011) (discussing the role of discretion in the grand jury process).

122. See, e.g., *In re Grand Jury Subpoena Duces Tecum Dated November 15, 1993*, 846 F. Supp. 11, 12 (S.D.N.Y. 1994) (finding the subpoena overbroad); see also PODGOR ET AL., *supra* note 1, at 544 (“Courts generally give grand juries considerable leeway in judging relevancy.”).

123. See *United States v. Williams*, 504 U.S. 36, 53 (1992) (discussing how a prosecutor does not have to present exculpatory evidence to the grand jury). It should be noted that the Department of Justice’s U.S. Attorneys’ Manual recommends providing the grand jury with exculpatory evidence. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-5.001 (2010), <https://www.justice.gov/usam/usam-9-5000-issues-related-trials-and-other-court-proceedings#9-5.001>.

124. See cases cited *infra* notes 125–27.

125. *Fisher v. United States*, 425 U.S. 391, 402 (1976) (“[C]ompelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself.”).

126. *United States v. Doe*, 465 U.S. 605, 606 (1984) (finding that although business records were not privileged, the act of producing the records would constitute compelled self-incrimination protected by the Fifth Amendment).

127. *Braswell v. United States*, 487 U.S. 99, 108–09 (1988) (holding that the government could compel corporate records).

128. *United States v. Hubbell*, 530 U.S. 27, 42 (2000) (holding that once immunity has been granted, the government cannot use the produced documents as if they “magically appear[ed] in the prosecutor’s office, like ‘manna from heaven’”).

129. David Horan, *Breaking the Seal on White-Collar Criminal Search Warrant Materials*, 28 PEPP. L. REV. 317, 318–19 (2001).

130. *Id.* at 321–22.

131. *Id.* at 343–44.

jury. The rare instances when the government may be stalled in the use of search warrants in white collar cases involve instances when there is a necessity to protect something such as an attorney-client privilege, as has been seen when the government decides to search a law office, particularly the law office of a criminal defense attorney.<sup>132</sup>

As a justification for using search warrants, as opposed to subpoenas, the government can claim that accessing the documents through a search provides less likelihood for destruction of the evidence.<sup>133</sup> It offers the surprise factor<sup>134</sup> in addition to encompassing more possible materials under the plain view doctrine.<sup>135</sup> Finally, there is always the possibility that witnesses will make incriminating statements during the search, opening up the possibility of easily securing evidence for an indictment.<sup>136</sup> A mere false statement to an FBI agent during a search may result in a prosecution under the false statement statute.<sup>137</sup> A case with insufficient evidence of healthcare fraud, for example, may survive in the form of a conviction for violating a false statement statute.<sup>138</sup>

The hard work necessitated in presenting a case through the grand jury process is significantly shortened when the government uses search warrants to obtain its evidence. Unlike a grand jury that is shrouded in secrecy, the public, through the press, immediately sees and hears of a search.<sup>139</sup> From a public perspective, this is an aggressive approach that demonstrates quick action to investigate and prosecute white collar criminality.

At first blush, the use of a search warrant fits the bill of efficiency and aggressiveness on the part of the government in proceeding against white collar criminality. But shortcutting the grand jury process comes with certain costs, both financial and nonfinancial in nature.

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132. U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-13.420 (2012), <https://www.justice.gov/usam/usam-9-13000-obtaining-evidence#9-13.420>; see also Michael A. Mogill, *Avoiding "The Big Chill": Protecting the Attorney-Client Relationship from the Effects of Zurcher*, 21 CONN. L. REV. 293, 294 (1989).

133. Mogill, *supra* note 132, at 325.

134. See PODGOR ET AL., *supra* note 1, at 672 (discussing the advantages of using a search warrant as opposed to issuing a grand jury subpoena).

135. *Id.*

136. See *United States v. Clay*, 832 F.3d 1259, 1293 (11th Cir. 2016) (discussing a raid 200 federal investigators conducted on a healthcare company that resulted in individuals making incriminating statements to federal agents, leading to convictions under the false statement statute).

137. 18 U.S.C. § 1001 (2012).

138. See *United States v. Natale*, 719 F.3d 719, 725 (7th Cir. 2013) (noting that the defendant was acquitted of healthcare fraud charges, but convicted of violating 18 U.S.C. § 1035 for a false statement).

139. In *United States v. Clay*, the Eleventh Circuit described how "[o]n October 24, 2007, over 200 federal investigators raided WellCare's Corporate Headquarters in Tampa and executed a search warrant of the premises." 832 F.3d at 1293. The press following the search of a corporation can be extensive. See, e.g., Mitch Stacy, *Federal Agents Raid Headquarters of WellCare, Provider of Medicare Plans; Stocks Halted*, ASSOCIATED PRESS FIN. WIRE (Oct. 24, 2007, 9:50 PM), <https://advance.lexis.com/api/permalink/be9ec2cd-e0ae-4300-95c1-566f5>

4f41f7d?context=1000516; *Agents Raid Healthcare Provider WellCare*, UPI (Oct. 24, 2007, 5:55 PM), <https://advance.lexis.com/api/permalink/b20d8a3f-5761-4f8c-b89b-b9612c0b371f?context=1000516>.

Bypassing the lengthy grand jury process and using searches presents a greater financial expenditure by the government. The use of searches costs more, especially when contrasted with the low monetary cost of the grand jury process, where the witness, typically the custodian of the records, provides the evidence to the grand jury for review.<sup>140</sup> In a search, one has a variety of government agents suddenly entering the premises where the documents are located and retrieving them. An added cost is that the government may not know the location of the documents on the premises, which can require an increased number of agents to assure that all appropriate documents are retrieved.<sup>141</sup> It also can mean that important documents will not be found or will bypass scrutiny because the entity is not a part of the search process and is therefore not giving the documents to the government—something that would occur under a subpoena ordering the entity to do so.

Because the grand jury provides secrecy and a search is open and high-profile for the press, outwardly, we see the government hard at work in combating white collar crime when the government uses a search warrant to obtain evidence from an individual or entity. But under this supposed aggressive policy, what is less noticeable are the significant risks that accompany the failure to do the hard work that comes with proceeding through the grand jury process. This failure may compromise the case.

Perhaps the most significant risk to a white collar case in using a search, as opposed to a subpoena, is in the fact that searches require probable cause,<sup>142</sup> and a failure to secure sufficient probable cause may defeat the entire case and all documents and evidence that accrue from that search. A search with an improper search warrant risks losing the success of an entire prosecution. Because a subpoena *duces tecum* does not necessitate probable cause, there is no risk of losing the case on a faulty move, such as can happen when drafting or executing a search warrant.<sup>143</sup> Likewise, the parties may litigate any deficiency in a subpoena *duces tecum* prior to the production of documents, providing the government with clearer authorization for its actions.<sup>144</sup>

The government's claim that documents may be destroyed or materials lost if they are not retrieved instantly in a search is a meritless claim when closely examined. For one, the government should know of the existence of these materials if it is claiming there is a probable cause basis for the search.<sup>145</sup>

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140. See ISRAEL ET AL., *supra* note 118, at 493–94 (discussing the advantages and disadvantages of searches and subpoenas).

141. *Id.* at 494. There is also the cost to the business as a search of a premises can cause the business to cease doing business, or at least disrupt the typical routine. See *United States v. Maali*, 346 F. Supp. 2d 1226, 1239–40 (M.D. Fla. 2004) (discussing an unsuccessful challenge to a search warrant of businesses on the basis of overbreadth).

142. See *In re Grand Jury Investigation Concerning Solid State Devices, Inc. v. United States*, 130 F.3d 853, 857 (9th Cir. 1997) (finding a search warrant too broad and lacking probable cause).

143. See ISRAEL ET AL., *supra* note 118, at 476–77.

144. *Id.* at 480.

145. See *United States v. Zemlyansky*, 945 F. Supp. 2d 438, 452–54 (S.D.N.Y. 2013) (“The Fourth Amendment requires that warrants state with particularity the items to be searched and seized.”).

If the materials are then destroyed, the government has the safety net of being able to charge for the obstruction conduct.<sup>146</sup> As will be shown later, the use of shortcut offenses like obstruction of justice is a routine practice of government prosecutors.<sup>147</sup>

It is equally offensive to think of the media resulting from a search serving as a deterrent for the alleged wrongful conduct. Deterrence should not be premised on investigative conduct, but rather on convictions attained after a trial or plea. In this same vein, the stinging effect of a search on a company that may later be found not guilty can never be repaired. The secrecy of the grand jury process protects those who may not have engaged in wrongful conduct, and it certainly provides protection until such time as the government has proven that an individual or entity has crossed the line into criminality. The aggressive use of a shortcut, such as using a search warrant as opposed to the traditional means of using subpoenas to gather evidence in white collar cases, presents a strong aggressive statement to society that the government is investigating white collar crime. But this practice has consequences that warrant reevaluation of the government's actions of using search warrants as opposed to subpoenas.

## 2. *Moving to Wiretaps*

One of the newest tools seen in the government arsenal in investigating alleged white collar crime is the use of wiretaps. Although wiretaps have traditionally been common in drug-related or terrorism prosecutions, they were seldom seen in white collar cases. Moving from their use in cases such as those involving drugs or terrorism,<sup>148</sup> government prosecutors can now claim that activities on Wall Street are receiving equal treatment with criminal conduct outside the white collar realm.<sup>149</sup> Its growth as an investigative tool in the white collar world is seen most noticeably in the insider trading realm.<sup>150</sup>

Title III of the Omnibus Crime Control and Safe Street Acts of 1968, now codified as 18 U.S.C. §§ 2510–2522 (2012), is the source allowing for the use of wiretaps. The wiretap application needs to have “a full and complete state-

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146. Numerous obstruction of justice statutes exist within the federal code, many of which cover the destruction of items during a pending investigation. *See, e.g.*, 18 U.S.C. § 1503 (2012) (“Influencing or Injuring Officer or Juror Generally”); 18 U.S.C. § 1505 (“Obstruction of Proceedings Before Departments, Agencies, and Committees”); 18 U.S.C. § 1510 (“Obstruction of Criminal Investigations”); 18 U.S.C. § 1511 (“Obstruction of State or Local Law Enforcement”); 18 U.S.C. § 1516 (“Obstruction of Federal Audit”); 18 U.S.C. § 1518 (“Obstruction of Criminal Investigations of Health Care Offenses”); 18 U.S.C. § 1519 (“Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy”).

147. In this regard, an obstruction charge when there is no evidence to proceed with charging the offense being investigated differs from using an obstruction charge as a shortcut to avoid having to prove the charge that directly relates to the initial illegal conduct.

148. *See* Andrew P. Atkins, *New Methods of Financial White-Collar Criminal Investigation and Prosecution: The Spillover of Wiretaps to Civil Enforcement Proceedings*, 33 PACE L. REV. 716, 717 (2013).

149. *See* Kenneth Herzinger & Mark Mermelstein, *On Tap: The Government's Use of Wiretaps in Insider Trading Prosecutions Shows a Willingness to Use Nontraditional Methods of Investigation*, 35 L.A. LAW. 30, 30 (Apr. 2012).

150. *Id.*

ment of the facts and circumstances relied upon by the applicant”<sup>151</sup> to establish the required probable cause. Wiretapping requires authorization by the government, with specific legislative authority existing as to when the government may obtain the “authorization for interception of wire, oral, or electronic communication.”<sup>152</sup> Many criminal offenses are included here in what is often termed Title III, allowing the government extensive permission to seek a wiretap. For example, crimes of money laundering, terrorism, and child pornography are some of the crimes explicitly listed in the long list of offenses for which the statute gives law enforcement authorization to seek authority for a wiretap.<sup>153</sup> Some of the included offenses are clearly white collar related activity, such as bribery,<sup>154</sup> wire fraud,<sup>155</sup> bank fraud,<sup>156</sup> and, more recently, money laundering.<sup>157</sup> What is not included within this list are insider trading offenses.

Despite this omission, wiretapping proved crucial to the government in several recent insider trading prosecutions.<sup>158</sup> Although there is secrecy in initially using a wiretap, the eventual disclosure of the evidence in court is significantly damaging to the defendant, making the wiretap an incredible tool in securing a white collar conviction. Its use is not limited to the criminal process, but rather, one sees government agencies using wiretaps in investigations in parallel proceedings.<sup>159</sup>

Wiretaps demonstrate an aggressive government practice that, so far, courts have found legally sound.<sup>160</sup> Two recent insider trading cases, *United States v. Rajaratnam*<sup>161</sup> and *United States v. Gupta*,<sup>162</sup> were cases in which the government relied heavily on evidence obtained via wiretaps. Both cases resulted in convictions.<sup>163</sup>

The uniqueness of using wiretap evidence in these white collar cases raised significant legal issues. In *Rajaratnam*, the district court allowed the wiretap, finding that the “misstatements and omissions in the wiretap application” were not material.<sup>164</sup> The district court also found that “the omission of

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151. 18 U.S.C. § 2518(1)(b) (2012).

152. See 18 U.S.C. § 2516 (2012).

153. *Id.*

154. 18 U.S.C. § 2516 includes both bribery of public officials and witnesses under § 201 and sports officials under § 224.

155. 18 U.S.C. § 2516 includes wire fraud under § 1343.

156. 18 U.S.C. § 2516 includes bank fraud under § 1344.

157. 18 U.S.C. § 2516 includes both money laundering statutes, namely 18 U.S.C. §§ 1956–1957.

158. See Gail Shifman, *Wall Street Meets “The Wire,”* WHITE COLLAR CRIME PROF BLOG (Oct. 19, 2009), [http://lawprofessors.typepad.com/whitecollarcrime\\_blog/2009/10/wall-street-meets-the-wire.html](http://lawprofessors.typepad.com/whitecollarcrime_blog/2009/10/wall-street-meets-the-wire.html); see also Brief for Rajaratnam as Amicus Curiae Supporting Appellant, *United States v. Chiesi & Rajaratnam*, 2012 WL 453986 (2d Cir. 2012) (No. 11-4416-cr).

159. Atkins, *supra* note 148, at 736.

160. See Michael Bobelian, *Court Endorses Use of Wiretaps in Affirming Gupta’s Conviction*, FORBES (Mar. 27, 2014, 1:07 PM), <https://www.forbes.com/sites/michaelbobelian/2014/03/27/court-endorses-use-of-wiretaps-in-affirming-guptas-conviction/#2006f18d47e9>.

161. 719 F.3d 139 (2d Cir. 2013).

162. 747 F.3d 111 (2d Cir. 2014).

163. *Gupta*, 747 F.3d at 140; *Rajaratnam*, 719 F.3d at 160.

164. *Rajaratnam*, 719 F.3d at 149–50.

the SEC's investigation of Rajaratnam was made with 'reckless disregard for the truth.'"<sup>165</sup> That said, the district court did not suppress the wiretap because Rajaratnam "failed to show that the omission was 'material' to the Court's determination of 'necessity.'"<sup>166</sup> On appeal to the Second Circuit, the court agreed that suppression of the wiretap was unnecessary, but it disagreed with the lower court's finding of "reckless disregard for the truth."<sup>167</sup> The Second Circuit in *Rajaratnam* agreed that materiality was not established.<sup>168</sup> So too, in *United States v. Gupta*,<sup>169</sup> the Second Circuit upheld the use of wiretap evidence in an insider trading case using its decision in *Rajaratnam* as the basis.<sup>170</sup>

The "leisurely pace" of document production through subpoenas *duces tecum* may be history as the government resorts to the investigative tactics of street crime drug cases, such as the use of wiretaps, in pursuit of white collar activity.<sup>171</sup> Like search warrants, the request for a wiretap can initially be cumbersome for the government.<sup>172</sup> But once the government receives approval for the wiretap, the burden is significantly alleviated.

In the short term, this aggressive government approach will assist in sending the message to the public that white collar criminals are being aggressively pursued. But the long-term ramifications are less clear. Like search warrants, wiretaps require probable cause.<sup>173</sup> One has to wonder if future cases may be destroyed if premised on a wiretap with questionable probable cause. In this regard, the use of subpoenas *duces tecum* offers a safer approach to securing needed evidence.

Additionally, white collar criminals typically have a higher education level, and providing an increased awareness of the possibility of the government's use of wiretaps will cause illegal conduct to use alternative methods in order to assure secrecy and avoid exposure to criminal charges.<sup>174</sup> This white collar activity may also become more secretive without the use of telephones, e-mails, or Twitter. One also has to question whether those engaging in activities such as insider trading will thwart the routine investigative tools by moving to operations that will not leave the trails that have long been the evidence used in criminal prosecutions. Technological advances, such as Snapchat, may make it

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165. *Id.* at 150.

166. *Id.*

167. *Id.* at 156.

168. *Id.* at 156–57. The Second Circuit also held that the district court was correct in analyzing the misstatements and omissions in the government's Title III wiretap application under the analytical framework prescribed by the Supreme Court in *Franks v. Delaware*, 438 U.S. 154 (1978).

169. 747 F.3d 111 (2014).

170. *Id.* at 124.

171. J. Bradley Bennett, *White Collar Crime, Blue Collar Tactics: A Defense Lawyer's Perspective*, 28 W. ST. U. L. REV. 65, 65–66 (2001).

172. *Id.* at 67.

173. See *United States v. Donovan*, 429 U.S. 413, 422–23 (1977) (discussing probable cause needed for a judicially approved wiretap).

174. *Profiling a White Collar Criminal: Gender, Age, and Job Role Among Key Factors in Occupational Fraud, ACFE Report Finds*, ASS'N CERTIFIED FRAUD EXAMINERS (Sept. 10, 2008), <http://www.acfe.com/press-release.aspx?id=4294968561>.

more difficult for the government to investigate this conduct. Thus, aggressive government policy may be an immediate shortcut for prosecuting white collar crime, but it could, in the long term, have ramifications that make it more difficult to pursue wrongful conduct, as educated insider traders move to newer methods for hiding their illegalities.

One also has to wonder whether the government's stretching of the authorization of electronic evidence statute will have long-term ramifications. As criminal defense attorney Gail Shifman noted, "[e]lectronic surveillance is one of the most intrusive means of investigation. Indeed, the inherent intrusiveness of wiretapping is the cornerstone of the so-called 'necessity requirement.'"<sup>175</sup> When wiretapping became a reality for law enforcement, there were deep concerns about invading individuals' privacy rights. Justice Clark, in *Berger v. New York* stated, "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain."<sup>176</sup>

In evaluating government practices, it is apparent that there is an increased use of wiretaps in white collar cases, most noticeably in the insider trading area. The question remains whether there will be long-term consequences for shortcutting the investigative process through wiretaps, something that might appear on its face to be a more efficient and aggressive approach.

### 3. *Discovery Missteps*

One of the key concerns of criminal defense counsel in recent years is the receipt of, and failure to receive, discovery materials. Unlike many street crime cases, the discovery in a white collar case can involve massive amounts of data and documents. Under the *Brady*<sup>177</sup> and *Giglio*<sup>178</sup> Supreme Court cases, as well as ethical mandates,<sup>179</sup> prosecutors are required to provide to the defense evidence favorable to the accused. The failure to properly provide this discovery

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175. See Shifman, *supra* note 158.

176. 388 U.S. 41, 63 (1967).

177. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

178. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972) (requiring disclosure of impeachment material).

179. ABA Model Rule of Professional Conduct Rule 3.8(d) provides that:

The prosecutor in a criminal case shall: . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]

MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8(d) (AM. BAR ASS'N 2017).

evidence resulted in the dismissal of a landmark case.<sup>180</sup> Courts have taken notice of the government shortcomings in the discovery realm and have issued some harsh opinions chastising prosecutors for their failure to provide timely discovery to the defense.<sup>181</sup>

In addition to meeting its *Brady* requirements, the government is also required to provide *Jencks* materials to the defense,<sup>182</sup> although the rules and case law allow for a later time in providing this material.<sup>183</sup> A statement previously made by a witness is required to be given to the defense no later than immediately after the witness has testified in court, allowing the defense to use these statements for purposes of impeachment in cross-examination.<sup>184</sup>

With increased computer technology, one finds the government having greater access to materials, and their use of searches and wiretaps also allows for an increased number of documents and other materials being available to the prosecution. This increase in materials to the government, obtained in its investigative process, places an increased obligation and workload on them to sift through these documents to find pertinent material not only for their benefit, but also that which would be favorable to the defense.<sup>185</sup>

In balancing the preparation for trial, and complying with their *Brady*, *Giglio*, and *Jencks* obligations, the government may find themselves in a difficult, time-intensive position of sifting through everything to make certain their legal and ethical obligations are met. In this regard, we see shortcuts sometimes being used to try and satisfy these obligations.

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180. See generally ROB CARY, NOT GUILTY: THE UNLAWFUL PROSECUTION OF U.S. SENATOR TED STEVENS (2014) (discussing the government's dismissal of former Senator Ted Stevens's convictions following the disclosure that material evidence had not been provided to the defense).

181. See, e.g., *United States v. Hernandez-Meza*, 720 F.3d 760, 769 (9th Cir. 2013) (remanding case to determine if government's failure to provide discovery was willful); *United States v. Cestoni*, 185 F. Supp. 3d 1184, 1193 (N.D. Cal. 2016) (ordering a new trial for a *Brady* violation and stating that "[t]he Court is disappointed that government counsel have tried so hard to sweep away a clear-cut *Brady* violation rather than confess error").

182. See Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 653 (1999) (stating that 18 U.S.C. § 3500, commonly referred to as the Jencks Act, codified much of the holding in *Jencks v. United States*, 353 U.S. 657 (1957), and specified that statements would not be the "subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case").

183. See *United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986) (holding that even assuming that "rough notes" were *Jencks* statements, there was no violation when the government failed to produce them prior to trial); *United States v. Algie*, 667 F.2d 569, 570–72 (6th Cir. 1982) (holding that a backlog in court cases does not warrant requiring prosecutors to produce *Jencks* material in advance); *United States v. Spagnuolo*, 515 F.2d 818, 821 (9th Cir. 1975) (holding that courts can encourage but cannot compel the government to disclose *Jencks* material in advance of statute's disclosure deadline).

184. Podgor, *supra* note 182, at 672–73 (explaining that most prosecutors provide *Jencks* material before trial, but some prosecutors explicitly follow the requirements of the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure and refuse to release witness statements until after the witness has testified).

185. See Eric H. Holder, Jr., *In the Digital Age, Ensuring That the Department Does Justice*, 41 GEO. L.J. ANN. REV. CRIM. PROC. iii, iv (2012) (stating that prosecutors must disclose *Jencks* and *Brady* material regardless of whether it comes in the form of electronically stored information ("ESI") or traditional documents).

Discovery contests can arise over failure to provide defense counsel with exculpatory material,<sup>186</sup> providing material late,<sup>187</sup> and providing material in a format that makes it difficult for defense counsel to properly perform the job of representing the clients.<sup>188</sup> Although these issues come up outside the context of a white collar case, they can be more pronounced in this forum due to the extensive documentation that often accompanies a white-collar crime case. Since massive amounts of documents can be involved in a white collar case, when the government provides this material days before trial, defense counsel may find it necessary to move for a continuance or precede with minimal preparation.

An issue that has come to the forefront is when the government uses a “document dump” to provide discovery to the defense. This occurs when the government gives opposing counsel massive amounts of materials in an unusable or difficult to use format.<sup>189</sup> Thus, a document may be hidden under layers within a computer disk or drive, making it near impossible for the defense to find the materials.<sup>190</sup> A point of contention here is whether the government needs to organize the discovery given to the defense or whether a “document dump” will be acceptable to meet the government’s discovery obligations.<sup>191</sup>

An aggressive approach taken by the government to amass many materials, whether it is by subpoena, search, or wiretap, can result in a discovery nightmare as the government attempts to meet its obligations of providing necessary materials to the defense. The use of shortcuts in the investigative stages makes timely discovery to the defense an added burden. Increased technology presents additional concerns as it becomes an issue not only to provide discov-

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186. See, e.g., *Miller v. United States*, 14 A.3d 1094, 1123 (D.C. 2011) (holding that the Government suppressed exculpatory evidence in violation of *Brady* and the Due Process Clause).

187. See, e.g., *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009) (“It would eviscerate the purpose of the *Brady* rule and encourage gamesmanship were we to allow the government to postpone disclosures to the last minute, during trial.”).

188. *United States v. Warshak*, 631 F.3d 266, 295–99 (6th Cir. 2010) (defense counsel unsuccessfully arguing that “the district court erroneously permitted the government to produce titanic amounts of electronic discovery in formats that were simultaneously disorganized and unsearchable”).

189. Sharon D. Nelson & John W. Simek, *Data Dumps: The Bane of E-Discovery*, 71 OR. ST. B. BULL., Aug./Sept. 2011, at 36, 36 (“It is fairly common to hear complaints about federal government data dumps.”).

190. *Id.* (“[I]n criminal law, attorneys frequently report . . . that the prosecution will do a data dump on defense counsel, effectively burying any exculpatory information in a sea of data.”); see also Sara Kropf et al., *The ‘Chief’ Problem with Reciprocal Discovery Under Rule 16*, CHAMPION, Sept./Oct. 2010, at 20, 21 (explaining that Fed. R. Crim. P. 16 allows the government to bury its “evidence-in-chief” within its overall discovery) (“In other words, if there are 100 boxes of documents that may be material to preparing the defense, and 75 documents in those boxes that the government intends to use at trial, the government has met its obligations under Rule 16 when it turns over the 100 boxes. . . . Rule 16 literally mandates that defendants go fish through the warehouse for the government’s evidence-in-chief but serve the government their own evidence-in-chief on a silver platter.”). The government may also provide counsel the discovery material in an off-site location, such as a warehouse or other storage facility. See *United States v. Kennedy*, 64 F.3d 1465, 1469 (10th Cir. 1995) (“During pretrial discovery, the government provided the defense access to the 800 bankers boxes of documents that it had amassed during its investigation, 539 of which contained WMC records. The boxes were placed in a repository in two rooms of a government building . . .”).

191. See *United States v. Salyer*, 271 F.R.D. 148, 153 (E.D. Cal. 2010) (discussing whether the government needs to organize discovery material provided to the defense).

ery material, but also to provide this material with sufficient organization and indexes that will facilitate the defense's ability to categorize the discovery materials and present a defense.<sup>192</sup>

#### 4. *Ramifications of Investigative Shortcuts*

The use of searches and wiretaps can place the government's case at risk as both searches and wiretaps require that the probable cause standard be met. Subpoenas may offer a slower and more deliberate process, but one in which there is a lesser risk of losing an entire case because of a misstep in the investigative stage. Searches and wiretaps also provide massive amounts of unorganized materials. This contrasts with materials provided to a grand jury via a subpoena *duces tecum*. The materials come to the grand jury as responses to specific requests the government outlined.

The net result of shortcutting the subpoena process results in greater work for the government in organizing discovery for the defense. Failing to use the traditional investigative tools of a white collar case can result in the government having massive amounts of material that now has to be reviewed to assure compliance with the government's discovery obligations. Although some of the missteps on properly providing discovery result from deliberate actions by the government, some may result from mere negligence caused by the overabundance of material the government acquired. In this regard, investigative shortcuts can seriously erode due process obligations.

### C. *Charging Shortcuts*

#### 1. *Charging Perjury, Obstruction of Justice, and False Statements*

Prosecutors can pick and choose who to charge, for what crimes,<sup>193</sup> and when to bring those charges.<sup>194</sup> Whether it be charges of perjury, obstruction of

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192. In *United States v. Kennedy*, 64 F.3d 1465, 1468–69 (10th Cir. 1995), after a five-year investigation that resulted in a 109-count indictment alleging a “massive Ponzi scheme to defraud numerous precious metals investors,” the government provided the defense with access to 800 bankers boxes of documents, of which 539 pertained to the defendant. Indigent defense counsel requested additional support services including paralegals, airfare, and an accounting firm, all of which the court denied. *Id.* at 1469. This decision was affirmed on appeal with a finding that there was no abuse of discretion under the Criminal Justice Act and no violation of the defendant's due process rights. *Id.* at 1470–74.

193. See *United States v. Batchelder*, 442 U.S. 114, 115 (1979) (discussing the broad prosecutorial power to select charges); see also Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 *FORDHAM L. REV.* 1511, 1513 (2000) (discussing prosecutorial discretion); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1523–37 (1981) (discussing the breadth of the prosecutorial power to charge).

194. See *United States v. Mandujano*, 425 U.S. 564, 595 (1976) (discussing prosecutorial authority in when to bring criminal charges). Prosecutorial power extends beyond the charging function in that the government also decides who will be offered a plea, who will receive immunity, and who will receive a cooperation benefit. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 *J. CRIM. L. & CRIMINOLOGY* 717, 744 (1996) (discussing decisions within prosecutorial discretion including immunity grants). For example, only prosecutors have the discretion of whether a defendant will receive a 5K1.1 motion for substantial assistance. Julie Gyurci, Note, *Prosecutorial Discretion to Bring a Substantial Assistance Motion Pursuant to a Plea*

justice, or false statements, the use of these statutes is well within the realm of prosecutorial discretion. There are few restrictions to this prosecutorial power.<sup>195</sup>

The use of shortcut offenses<sup>196</sup> against individuals and entities is common in the white collar world. For example, a prosecutor may use charges of perjury,<sup>197</sup> obstruction of justice,<sup>198</sup> and false statements<sup>199</sup> when the actual conduct is securities fraud. Some have called this practice “pretextual charging,”<sup>200</sup> and others have focused on these being “process-crime prosecutions.”<sup>201</sup> The debate about this charging practice is not new to the discussion among criminal law scholars.

After all, investigating, presenting to a jury, and obtaining a conviction in an intricate fraudulent transaction can be extremely difficult. White collar criminality can require not only long investigations, but also lengthy trials as the prosecution provides the accumulated evidence to the fact finder.<sup>202</sup> In this regard, prosecutors value shortcuts.

A key difficulty the prosecutor faces in a complicated white collar case is getting the jury to comprehend what may be a convoluted and intricate fraudulent transaction.<sup>203</sup> Not only is it necessary for the government to educate the jury on the transaction, but also on the illegality of that conduct. In contrast, presenting a simplistic case of an individual destroying documents or lying to a federal officer provides a quick and easy conviction. For example, in *United States v. Stewart*, the government chose not to charge Martha Stewart with insider trading, although the essence of the initial conduct being investigated re-

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*Agreement: Enforcing a Good Faith Standard*, 78 MINN. L. REV. 1253, 1259–60 (1994) (discussing the discretion afforded to prosecutors in filing a motion that serves as an exception to the legislative restrictions of mandatory-minimum sentences).

195. See Vorenberg, *supra* note 193, at 1523–37 (discussing the breadth of the prosecutorial power to charge).

196. See Ellen S. Podgor, *The Tainted Federal Prosecutor in an Overcriminalized Justice System*, 67 WASH. & LEE L. REV. 1569, 1580 (2010) (discussing how prosecutors will select charges that require less proof than fraudulent conduct).

197. 18 U.S.C. § 1621 (2012).

198. 18 U.S.C. §§ 1503–1505 (2012).

199. Although there are many false statement statutes, the most common one is found in 18 U.S.C. § 1001. See PODGOR ET AL., *supra* note 1, at 291–313.

200. “Pretextual prosecutions” pertain to the “use of federal prosecutorial discretion to target persons based on conduct or characteristics of the defendant other than the conduct involved in the charged offense.” Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1137 (2004). Pretextual prosecutions were common with organized crime cases where the government routinely used tax offenses to convict those engaged in mob-related activity. See Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 588 (2005). It should be noted here that prosecutors had limited crimes in charging the activities in pre-RICO days. The passage of the Racketeer Influenced and Corrupt Organization Act in 1970 provided new legislation that allowed for prosecution under a statute clearly created to address organized criminal activity. See 18 U.S.C. §§ 1961–68 (2012).

201. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1435 (2009) (discussing “‘process crime’—an offense not against a particular person or property; but against the machinery of justice itself”).

202. *Id.* at 1495.

203. *Id.*

volved around whether anyone had improperly traded on unpublished stock information.<sup>204</sup> Instead, the government used a shortcut offense and presented at trial a case premised on her lying under oath at an SEC hearing. The charges here were conspiracy, obstruction of justice, and perjury.<sup>205</sup>

Perjury allows for prosecutions when an individual has knowingly and willfully made a material false statement under oath, before a competent tribunal, officer, or person.<sup>206</sup> Typically, one sees perjury cases arising from false statements made in court testimony. A similar statute, the false declarations statute,<sup>207</sup> also allows for shortcut prosecutions, although its elements differ somewhat from those in the perjury statute.<sup>208</sup> False declarations cover a wider breadth of proceedings and do not require the two-witness rule of perjury,<sup>209</sup> but the law allows the witness a recantation defense.<sup>210</sup> Some cases, such as *Bronston v. United States*,<sup>211</sup> have placed limits on the government, disallowing perjury or false declaration charges for statements that are literally true.<sup>212</sup> Thus, when the government fails to follow up in questioning a witness to assure that a statement given under oath is false and responsive to the question asked, a perjury or false declaration case may not stand.<sup>213</sup> But even with these limits, the government has a relatively easy case when there is strong evidence of a perjurious statement.<sup>214</sup>

Prosecutorial conduct that is more controversial is when a prosecutor deliberately subpoenas an individual to testify in a grand jury when the purpose of obtaining this testimony is predominantly for charging the individual with the crime of perjury.<sup>215</sup> Nicknamed a “perjury trap,”<sup>216</sup> courts have been reluctant

204. 433 F.3d 273, 280 (2d Cir. 2006) (using false statements and obstruction types of statutes).

205. See Superseding Indictment at 21, *United States v. Stewart*, 305 F. Supp. 2d 368 (S.D.N.Y. 2004) (No. S1 03 Cr. 717 (MGC)), 2003 WL 25730072 [hereinafter *Stewart Superseding Indictment*].

206. See PODGOR ET AL., *supra* note 1, at 315–43.

207. 18 U.S.C. § 1623 (2012).

208. False declarations are limited to a mens rea of knowledge, as opposed to also requiring willfulness. The statute encompasses more proceedings, such as grand jury matters and civil depositions, and includes documents where an individual may not have testified. PODGOR ET AL., *supra* note 1, at 316–17.

209. 18 U.S.C. § 1623(e).

210. 18 U.S.C. § 1623(d).

211. 409 U.S. 352, 362 (1973).

212. PODGOR ET AL., *supra* note 1, at 324–32 (discussing the many nuances to the “literally true” doctrine).

213. “The Supreme Court instructs “that any special problems arising from the literally true but unresponsive answer are to be remedied through the ‘questioner’s acuity’ and not by a federal perjury prosecution. . . . The burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry.” *United States v. Lighte*, 782 F.2d 367, 374 (2d Cir. 1986) (quoting *Bronston v. United States*, 409 U.S. 352, 362 (1973)).

214. See *United States v. Sarwari*, 669 F.3d 401, 407 (4th Cir. 2012) (looking at the context of the statement to determine if it was “fundamentally ambiguous”).

215. See *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991).

216. See generally Bennett L. Gershman, *The Perjury Trap*, 129 U. PA. L. REV. 624 (1981) (discussing “the deliberate use of the grand jury to secure perjured testimony”).

to dismiss these charges when a prosecutor can show that the information is part of a legitimate investigation.<sup>217</sup>

Prosecutors may use obstruction of justice charges for the destruction of documents without charging the underlying fraudulent conduct that might have been the impetus of the investigation.<sup>218</sup> By focusing on the “cover-up” conduct,<sup>219</sup> the government avoids having to prove complicated white collar criminality. It also provides for an increased ability to obtain a plea resolution to the case. The lower cost and increased efficiency highlight the benefits of this approach. After all, obstructive conduct that thwarts an investigation is clearly deserving of punishment, and if this result is obtained sooner and at a lower cost, it would seem more beneficial to society.

Like perjury, crimes of obstruction of justice often prove easier to explain to a jury than complicated white collar conduct.<sup>220</sup> Like perjury, there are many obstruction of justice statutes for prosecutors to select from should they wish to prosecute an individual or entity premised on illegal obstructive behavior.<sup>221</sup> The ease of securing an obstruction of justice conviction is enhanced by the fact that courts have not required that the obstruction be successful.<sup>222</sup> Further, an actual obstruction does not have to have occurred, as a mere “endeavor” to obstruct justice can be sufficient.<sup>223</sup>

Recently, the Supreme Court placed a limit on an obstruction of justice statute emanating from the 2002 Sarbanes-Oxley Act.<sup>224</sup> In *United States v. Yates*,<sup>225</sup> the Court refused to allow prosecutors to use 18 U.S.C. § 1519, a statute “designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation,”<sup>226</sup> to prosecute a fisherman who threw fish overboard after being instructed by an officer of the Florida Fish and Wild-

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217. See *United States v. Alvarez*, 489 F. Supp. 2d 714, 723 (W.D. Tex. 2007) (“[I]f information is sought, which is useful to a legitimate investigation, that scenario renders the perjury trap doctrine inapplicable.”). *But see* *Brown v. United States*, 245 F.2d 549, 555–56 (8th Cir. 1957) (reversing a conviction when prosecutors used the grand jury merely to get an individual indicted for perjury); see also PODGOR ET AL., *supra* note 1, at 336.

218. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005) (prosecutors proceeding with an obstruction of justice charge for the shredding of documents arising from the Enron debacle); see Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality Be an Element of Obstruction of Justice?*, 44 WASHBURN L.J. 583, 601 (2005).

219. See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 9–13 (2005) (discussing the government’s use of cover-up statutes and its relation to moral blameworthiness).

220. PODGOR ET AL., *supra* note 1, at 163; see also Katrice Bridges Copeland, *In-House Counsel Beware!*, 39 FORDHAM URB. L.J. 391, 409–12 (2011) (discussing pretextual prosecutions and cover-up crimes).

221. PODGOR ET AL., *supra* note 1, at 163–87 (discussing the many criminal obstruction of justice statutes).

222. See, e.g., *United States v. Neiswender*, 590 F.2d 1269, 1273 (4th Cir. 1979) (holding that the accused need only have “knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice”).

223. PODGOR ET AL., *supra* note 1, at 169–70.

224. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

225. 135 S. Ct. 1074 (2015).

226. *Id.* at 1079.

life Conservation Commission<sup>227</sup> to bring the undersized grouper fish back to shore. The Court found that fish are not “tangible objects” prohibited by a statute designed to protect against financial document-related obstructions.<sup>228</sup> In the end, the Court did not accept the expansive definition the government attempted to use in their arguing that “fish” are tangible objects under this statute.<sup>229</sup>

Even though courts have stepped in on occasion to limit prosecutors’ use of obstruction statutes,<sup>230</sup> the growth of the number of statutes<sup>231</sup> and charges under these statutes has increased. One now finds statutes specifically criminalizing obstructive conduct in criminal healthcare investigations<sup>232</sup> and during an examination of a financial institution.<sup>233</sup>

In addition to perjury and obstruction of justice, false statements statutes are enormously useful as shortcut offenses in white collar matters.<sup>234</sup> The generic false statement statute, 18 U.S.C. § 1001, allows for false statement charges without the need for a statement under oath.<sup>235</sup> Additionally, a mere exculpatory “no” can be sufficient for a false statement conviction.<sup>236</sup> Although a false statement or concealment is required for a prosecution under § 1001, a material statement made within the jurisdiction of the executive, legislative, or judicial branch will suffice.<sup>237</sup>

Thus, in white collar cases, one finds false statement charges used for statements made by individuals to the FBI or SEC during the course of an investigation.<sup>238</sup> The government can close a complicated, lengthy investigation by charging the individual with the making of a false statement to the government official who is conducting the investigation. The ease of using this statute makes it a jewel for the government among the many available white collar crimes.

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227. The state officer had been “deputized as a federal agent by the National Marine Fisheries Services,” providing the basis here for federal jurisdiction. *Id.*

228. *Id.* at 1088–89.

229. *Id.* at 1084–85.

230. *See, e.g.,* United States v. Quattrone, 441 F.3d 153, 178–79 (2d Cir. 2006) (reversing a conviction on an improper jury instruction as the “defendant must know that his corrupt actions ‘are likely to affect the . . . proceeding’”).

231. In 1982, as part of the Victim and Witness Protection Act of 1982, Congress added 18 U.S.C. §§ 1512 and 1513, statutes that permitted the government to prosecute for witness tampering and retaliation. *See* PODGOR ET AL., *supra* note 1, at 177–182.

232. 18 U.S.C. § 1518 (2012).

233. 18 U.S.C. § 1517 (2012).

234. PODGOR ET AL., *supra* note 1, at 291.

235. 18 U.S.C. § 1001 (2012).

236. *See* Brogan v. United States, 522 U.S. 398, 408 (1998) (rejecting recognizing an “exculpatory no” as an exception under the false statement statute). Department of Justice internal policy recommends that prosecutors should not bring a case under this statute merely based upon an exculpatory “no.” U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-42.160 (1997), <https://www.justice.gov/usam/usam-9-42000-fraud-against-the-government#9-42.160>.

237. PODGOR ET AL., *supra* note 1, at 306–09.

238. *See* United States v. Clay, 832 F.3d 1259, 1294 (11th Cir. 2016) (charging a false statement crime for alleged lies to government officers during a search warrant).

## 2. *Aggressive Stacking of Charges*

Prosecutors often take advantage of the wealth of criminal statutes that they have available, an advantage enabled by the system's over-criminalization. With over 4,500 federal statutes,<sup>239</sup> and an even greater number of administrative regulations with criminal penalties, prosecutors have many choices in their charging discretion. It has become a routine occurrence to see prosecutors stack on several counts of different crimes for the same conduct. Thus, when a defendant has made a false statement to the grand jury, one is likely to see charges not only of perjury, but also obstruction of justice for obstructing the conduct of the grand jury. So, not only do we see the use of shortcut offenses, but we also see the use of multiple counts of shortcut offenses for the same conduct.<sup>240</sup>

The late Professor Michael L. Seigel and Professor Christopher Slobogin studied the fact that the prosecution charged Martha Stewart with five counts and the "redundancy" of those charges.<sup>241</sup> The prosecution charged her with conspiracy to obstruct justice,<sup>242</sup> false statements,<sup>243</sup> and perjury.<sup>244</sup> There was also a securities fraud charge,<sup>245</sup> but the innovative nature of this charge did not survive court scrutiny.<sup>246</sup> Judge Miriam Cederbaum immediately dismissed this count as there was no evidence supporting a charge of securities fraud.<sup>247</sup> Thus, not only was Martha Stewart not charged with the crime of insider trading,<sup>248</sup> but she also had multiple counts for the same conduct. As Professors Seigel and Slobogin noted, the use of redundant charges does not violate the Constitution's prohibition against double jeopardy.<sup>249</sup>

The Martha Stewart case is not the lone case with multiple counts of shortcut offenses being used for the same conduct. This is a common practice used by the government. For example, the government initially charged David H. Safavian with three counts of concealing material facts and making false statements, violations under 18 U.S.C. § 1001, and obstruction of justice, under 18 U.S.C. § 1505, all arising from alleged conduct involving a golfing trip with

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239. John G. Malcolm, *Hook, Line & Sinker: Supreme Court Holds (Barely!) That Sarbanes-Oxley's Anti-Shredding Statute Doesn't Apply to Fish*, 2014 CATO SUP. CT. REV. 227, 248 (citing Brief of Eighteen Criminal Law Professors as Amici Curiae Supporting Petitioner, *Yates v. United States*, 135 S. Ct. 1074 (2015) (No. 13-7451)).

240. See Michael L. Seigel & Christopher Slobogin, *Prosecuting Martha: Federal Prosecutorial Power and the Need for a Law of Counts*, 109 PENN ST. L. REV. 1107, 1109–1113 (2005).

241. *Id.* at 1117–18.

242. 18 U.S.C. § 1505 (2012); see Stewart Superseding Indictment, *supra* note 205, at 21.

243. 18 U.S.C. § 1001 (2012); see Stewart Superseding Indictment, *supra* note 205, at 21.

244. 18 U.S.C. § 1621 (2012); Stewart Superseding Indictment, *supra* note 205, at 22.

245. See 15 U.S.C. §§ 78j(b), 78(ff) (2012); 18 U.S.C. § 2 (2012); Stewart Superseding Indictment, *supra* note 205, at 36; 17 C.F.R. § 240.10b-5 (2017).

246. See *United States v. Stewart*, 305 F. Supp. 2d 368, 379 (S.D.N.Y. 2004).

247. The district court found that "no reasonable juror can find beyond a reasonable doubt that the defendant lied for the purpose of influencing the market for the securities of her company." *Id.* at 370.

248. It is not the intent of this author to say or imply in any way that Stewart was guilty of insider trading charges. It is merely to note that the conduct the Securities Exchange Commission originally examined related to insider trading.

249. Seigel & Slobogin, *supra* note 240, at 1121–23.

lobbyist Jack Abramoff.<sup>250</sup> Although the D.C. Circuit Court reversed the initial conviction of the chief of staff of the General Services Administration on two counts and ordered that the convictions on three other counts be vacated and remanded for a new trial,<sup>251</sup> the reversal was not premised on the redundancy of these charges.<sup>252</sup>

The government charged former baseball player Barry Bonds with four counts of making false statements and one count of obstruction of justice.<sup>253</sup> All of the charges emanated from his being questioned for approximately three hours before a grand jury on his suspected use of steroids, although the indictment was premised on one particular statement.<sup>254</sup> Bonds was not charged with improper use of steroids, but rather faced multiple counts for shortcut offenses for alleged false statements to the grand jury.<sup>255</sup> He was convicted on one count, and the jury was hung on the remaining counts.<sup>256</sup> Here, again, the conviction was not reversed premised on the number of counts charged. Rather, the court reversed the conviction because “a rambling, non-responsive answer to a simple question” proved insufficient for the materiality element required by the false statement statute.<sup>257</sup>

### 3. *Adding a Conspiracy Charge*

In addition to the use of shortcut offenses and the stacking of multiple charges for the same conduct, prosecutors may also include a conspiracy charge in a white collar indictment. This additional count can provide a strong incentive to the accused to enter a plea agreement with the government. It also can serve as a benefit for the government as it can offer a shortcut offense to bypass the need to prove complicated criminal conduct to a jury. Conspiracy also offers a host of prosecutorial advantages from a tactical and evidentiary perspective, including a hearsay exception,<sup>258</sup> increased venue options, and more culpable defendants to create a guilt by association at trial.<sup>259</sup>

Although there are many conspiracy statutes found in the criminal code,<sup>260</sup> the generic conspiracy statute, 18 U.S.C. § 371, is a common crime

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250. *United States v. Safavian*, 528 F.3d 957, 959 (D.C. Cir. 2008).

251. *Id.* at 969.

252. The D.C. Circuit court reversed the convictions because “Safavian had no legal duty to disclose and that his concealment convictions cannot stand.” *Id.* at 965.

253. *See United States v. Bonds*, 784 F.3d 582, 582 (9th Cir. 2015).

254. *Id.* at 582–83.

255. *Id.* at 582.

256. *Id.* at 582–83. On appeal, the Ninth Circuit discussed the obstruction statute’s breadth and the need for prosecutors to present evidence of materiality to properly limit the statute’s reach. *Id.* at 585.

257. *Id.* at 582.

258. *See* FED. R. EVID. 801(d)(2)(E) (allowing conspiracy statements as an exception to the hearsay rule).

259. *See* PODGOR ET AL., *supra* note 1, at 51–53 (discussing the advantages to using a conspiracy charge).

260. One finds conspiracy statutes for a host of specific conduct that fall under the rubric of white collar crime. *See, e.g.*, Conspiracy in Restraint of Trade, 15 U.S.C. § 1 (2012); Conspiracy to Commit Securities Fraud Offenses, 18 U.S.C. § 3301 (2012).

used when the conduct involves an agreement with two or more individuals.<sup>261</sup> Conspiracy under § 371 allows for two different types of conduct, conspiracies to commit a specific offense or those to defraud the government.<sup>262</sup> Conspiracies to commit specific offenses can include both white collar and non-white collar activity in that the government can select from most criminal statutes when the elements of the crime are met. Thus, one finds white collar offenses, such as mail fraud and wire fraud, also charged with a conspiracy to commit these crimes when the activity includes an agreement between two or more individuals.<sup>263</sup> Under federal law, the underlying substantive offense and conspiracy charge do not merge, allowing prosecutors the luxury of proceeding with two separate counts for basically the same conduct.<sup>264</sup>

Conspiracy to defraud the government is also a particularly attractive add-on crime as it can be charged without requiring the violation of a specific statutory offense. One commonly sees it used when there is a defense procurement fraud or other type of fraud against the United States.<sup>265</sup>

Courts have interpreted the term “defraud” more broadly than the term used in the mail and wire fraud statutes.<sup>266</sup> For example, in *Hammerschmidt v. United States*,<sup>267</sup> the Supreme Court stated, “It is not necessary that the government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane, or the overreaching of those charged with carrying out the governmental intention.”<sup>268</sup>

#### 4. *Tacking on Money Laundering Charges*<sup>269</sup>

The key money laundering statutes,<sup>270</sup> 18 U.S.C. §§ 1956<sup>271</sup> and 1957,<sup>272</sup> present equally advantageous crimes for the government. Created in 1986, the

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261. In addition to an agreement, conspiracy under 18 U.S.C. § 371 also requires the elements of an unlawful object, knowledge and intent, and an overt act. PODGOR ET AL., *supra* note 1, at 53–64. An overt act is not, however, a necessary element in many of the conspiracy statutes, such as a conspiracy under the money laundering statute (18 U.S.C. § 1956(h)). See *Whitfield v. United States*, 543 U.S. 209, 219 (2005).

262. 18 U.S.C. § 371 (2012).

263. Michael Edmund O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221, 233 n.56 (2003) (“In many jurisdictions, it is possible for a defendant to be convicted and sentenced for both conspiracy and the underlying crime.”).

264. See *Ocasio v. United States*, 136 S. Ct. 1423, 1425–26 (2016) (having the defendant charged with both Hobbs Act—18 U.S.C. § 1951—and conspiracy to commit Hobbs Act 18 U.S.C. § 371).

265. See *Dennis v. United States*, 384 U.S. 855, 859–60 (1966) (holding that the indictment properly charged a conspiracy to defraud).

266. See generally Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 441–48 (1959) (discussing vagueness in the conspiracy to defraud statute).

267. 265 U.S. 182 (1924).

268. *Id.* at 188.

269. See generally Adams, *supra* note 18 (discussing the growth of money laundering counts in white collar prosecutions).

270. See generally PODGOR ET AL., *supra* note 1, at 378–89 (discussing the key money laundering statutes).

271. The statute targets financial transactions undertaken for the purpose of hiding the proceeds of criminal activity, or to promote further criminal activities. *Id.* at 378–86.

money laundering statutes have moved past their origins of focusing on drug trafficking and organized crimes to become charges prosecutors use in proceeding with a white collar case.<sup>273</sup> With fairly simplistic elements to these crimes, it provides a handy chip for the government when it comes time to negotiate a plea agreement. Money laundering under § 1956 covers a wide breadth of conduct as it allows for prosecutions related to: (1) transactional money laundering; (2) international transportation or transmission money laundering; and (3) sting operations.<sup>274</sup>

An example of the breadth of the money laundering statutes is seen in *United States v. Mooney*,<sup>275</sup> where the government used § 1957 as an additional charge to securities violations and mail fraud.<sup>276</sup> The Eighth Circuit rejected the defendant-appellant's argument that the government had failed to prove that the money in a certain bank account was proceeds of insider trading and that a sufficient amount of money in the account was "dirty money."<sup>277</sup> The Eighth Circuit stated "that the government need not trace each dollar to a criminal source to prove a violation of 18 U.S.C. § 1957."<sup>278</sup> To hold otherwise, the court stated, "would allow wrongdoers to evade prosecution for money laundering simply by commingling criminal proceeds with legitimate funds."<sup>279</sup>

##### 5. *Ramifications of Charging Shortcuts*

As can be seen, charging shortcuts come in different forms. Some use more simplistic statutes to avoid the necessity of proving the criminality of the complicated conduct, as was seen with the use of charges such as perjury, obstruction of justice, and false statements. As stated by Professor Daniel C. Richman and the late William J. Stuntz, "[t]he overexpansion of the federal criminal code and the current judicial obsession with the bounds of federal criminal jurisdiction, taken together, invite pretextual enforcement."<sup>280</sup> Others add on charges through aggressive stacking of counts. Finally, one sees counts of conspiracy or money laundering added in an indictment. All of these charging practices are well within the province of prosecutorial discretion. But all also have ramifications, although perhaps not easily discernable at first blush. Each of these charging decisions moves the focus from the initial underlying

272. The statute targets the use of proceeds of criminal activity in excess of \$10,000. *Id.* at 387–89.

273. *Id.* at 378.

274. The elements for a § 1956(a)(1) can be summarized as:

(1) the defendant took part in a financial transaction; (2) the defendant knew that the property involved in the transaction involved funds that were the proceeds of some form of unlawful activity; (3) that the property involved was in fact the proceeds of that illegal activity; and (4) the defendant engaged in the financial transaction knowing that the transaction was designed in whole or in part to conceal or disguise the nature, source, location, ownership, or control of the illegal proceeds.

*See id.* at 378–79.

275. 401 F.3d 940, 942 (8th Cir. 2005); *see also* PODGOR ET AL., *supra* note 1, at 388.

276. *Mooney*, 401 F.3d at 946.

277. *Id.* at 946–47.

278. *Id.* at 946.

279. *Id.* at 947.

280. Richman & Stuntz, *supra* note 200, at 639.

conduct to the shortcut or add-on offense.<sup>281</sup> In failing to focus on the actual criminal conduct of the perpetrator, the government breaks the causal connection between the underlying conduct and the deterrence sought to be achieved. Likewise, skirting the initial conduct in the charging process presents issues of legitimacy, as discussed in Section IV.B.<sup>282</sup>

#### D. Plea Shortcuts

##### 1. Improper Waiver Shortcuts

Plea agreements by their very nature are a shortcut, as they resolve a case without the need for a trial.<sup>283</sup> Avoiding the necessity of presenting evidence and witnesses to a jury, and having an assurance of a conviction, albeit a lesser one, are important advantages of the plea bargain process. Equally important for the defense is the finality and certainty of the sentence to be given.<sup>284</sup> The “trial penalty”<sup>285</sup> has been the subject of some concern, as proceeding to trial can often result in a greater sentence to an individual in contrast to the defendant having entered into a plea agreement with the government.<sup>286</sup> Statistically, there has been a growth of pleas in recent years and a decrease in the number of federal defendants proceeding to trial.<sup>287</sup> Currently 97.1% of federal cases are

281. See *infra* Part IV.

282. See *infra* Section IV.B.

283. The prosecution and defense are the key players in most of the plea negotiation process. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1230–33 (2016) (discussing the marginal role played by judges in the plea process).

284. See Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 84–85 (2010). Statistically, sentences for those pleading guilty tend to be lower than for those who go to trial. According to the 2015 U.S. Sentencing Commission Report, of the 97.1% who pleaded guilty, “50.7% received a sentence below the applicable sentencing guideline range.” Of this number, “59.3% of these below range sentence were requested by the government.” “In comparison, in the 2.9% of cases where the offended did not plead guilty, 46.7% received a sentence below the guideline range, although only 10.6 percent of those below range sentence were requested by the government.” U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2015 4 (June 2016), [http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf).

285. Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 62–63 (2012); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 14 (2013); Vanessa A. Edkins & Lucian E. Dervan, *Pleading Innocents: Laboratory Evidence of Plea Bargaining’s Innocence Problem*, 21 CURRENT RES. SOC. PSYCHOL. 14, 18–19 (2013).

286. Dervan & Edkins, *supra* note 285, at 14; see Podgor, *supra* note 284, at 82–85 (comparing the sentences of Jeffrey Skilling, who went to trial, and Andy Fastow, who did not go to trial); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) (discussing “shadows of trials” that produce inequities in plea bargaining).

287. In the last five years, the number of jury trials has gone from 3.1% to 2.9%. See U.S. SENTENCING COMM’N, 2011–2015 DATAFILES, USSCFY11 – USSCFY15 Fig.C, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureC.pdf> (last visited Mar. 21,

2018) [hereinafter U.S. SENTENCING COMM’N—Fig.C]. In 2002, 3.5% of cases were determined by trial. See U.S. SENTENCING COMM’N, CHAPTER THREE ADJUSTMENTS, USE OF SPECIFIC OFFENSE CHARACTERISTICS, UPWARD DEPARTURES AND TRIAL RATES: FISCAL YEAR 2002,

resolved via a plea agreement,<sup>288</sup> a contrast to the approximately 84% of cases being pleaded in 1990.<sup>289</sup>

From the prosecutor's perspective, having finality with a plea is an important benefit of the agreement. Knowing that certain issues cannot be raised through the appellate process assures this result. Under Rule 11 of the Federal Rules of Criminal Procedure, it is common for defendants to waive certain rights upon entry of a plea. For example, we see the waiver of "the right to a jury trial,"<sup>290</sup> "the right at trial to confront and cross-examine adverse witnesses,"<sup>291</sup> the right "to be protected from compelled self-incrimination,"<sup>292</sup> and the right "to compel the attendance of witnesses."<sup>293</sup> But the waiver of these rights does not necessarily authorize the government to insert other waivers that they may desire in these agreements. Yet that happened in several jurisdictions.

Prosecutors in a few jurisdictions began a practice of requiring, as part of their plea agreement process, that the defendant waive the right to a claim of prosecutorial misconduct and the right to later argue the ineffective assistance of his or her defense counsel.<sup>294</sup> Defendants, anxious to obtain these plea agreements and wanting to avoid the risk of going to trial, were placed in the untenable position of signing these agreements or losing the plea offer. Counsel for these defendants were placed in an even more problematic position as it was a waiver of their possible ineffectiveness that they were being asked to obtain from their clients.

Waiving a right to allege prosecutorial misconduct or ineffective assistance of counsel seemed to assure prosecutors that there was finality on these issues once a plea was entered. The defendants would not be allowed to later reopen their cases when they were dissatisfied with their attorney or when they believed that the government had withheld evidence against them, thus committing prosecutorial misconduct. Waiving these two potentially contested items for the future promoted efficiency and shortcut the possibility of protracted future litigation on the case.

These two waivers, however, are different.<sup>295</sup> When a prosecutor is asking a defendant to waive the right to claim that the prosecutor acted improperly, it

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[http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2002/02\\_chapter3.pdf](http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/guideline-application-frequencies/2002/02_chapter3.pdf) (last visited Mar. 21, 2018).

288. See U.S. SENTENCING COMM'N, 2011-2015 DATAFILES, USSCFY11-USSCFY15, *supra* note 287, at Fig.C.

289. See Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012, 10:30 PM), <http://www.wsj.com/articles/SB10000872396390443589304577637610097206808>; see also George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 860 (2002) (discussing the growth of plea bargaining in the United States).

290. FED. R. CRIM. P. 11(b)(1)(C).

291. FED. R. CRIM. P. 11(b)(1)(E).

292. *Id.*

293. *Id.*

294. See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 77 (2015).

295. *Id.* at 93; King, *supra* note 20, at 648 (discussing plea agreements that include waivers of ineffective assistance of counsel).

raises questions of whether the waiver is similar to an attorney asking a client not to sue that attorney for malpractice.<sup>296</sup> Likewise, a defense attorney asking his or her client to waive the right to claim ineffective assistance of counsel places that counsel in the position of asking the client to accept the defense attorney's representation as being effective.

Waivers of prosecutorial misconduct and defense counsel ineffectiveness have come under ethics scrutiny in recent years, and many government prosecutors have moved away from these practices, recognizing that they fly in the face of ethical mandates.<sup>297</sup> For example, the Florida Bar issued an ethics opinion that explicitly precludes a prosecutor requesting these waivers. Opinion 12-1 of the Florida Bar states, "[a] prosecutor may not make an offer that requires the defendant to expressly waive ineffective assistance of counsel and prosecutorial misconduct because the offer creates a conflict of interest for defense counsel and is prejudicial to the administration of justice."<sup>298</sup> Many states have done likewise.<sup>299</sup>

Former Deputy Attorney General James M. Cole issued a memorandum to federal prosecutors in 2014 explicitly stating that "[f]ederal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal."<sup>300</sup> The memorandum also instructed Assistant United States Attorneys to "decline to enforce the waiver when defense counsel rendered ineffective assistance resulting in prejudice or when the defendant's ineffective assistance claim raises a serious

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296. MODEL RULES OF PROF'L CONDUCT r. 1.8(h) (AM. BAR ASS'N 2017) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement.").

297. Several state ethics commissions have explicitly precluded such conduct. *See, e.g.*, Mo. Bar, Formal Op. 126 (2009), <http://www.mobar.org/ethics/formalopinions/frontpage.htm> ("It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel."); N.C. Bar, Formal Op. 129 (1993), <https://www.nbar.gov/for-lawyers/ethics/adopted-opinions/rpc-129/?opinionSearchTerm=waiver>; The Supreme Court of Ohio, Formal Op. 2001-6 (2001) ("It is unethical under the Ohio Code of Professional Responsibility for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or post-conviction claims of ineffective assistance of trial counsel or prosecutorial misconduct.").

298. *See* Fla. Bar, Formal Op. 21-1 (2012), <https://www.floridabar.org/etopinions/etopinion-12-1/>.

299. *See* Vt. Bar, Op. 95-04, [https://www.vtbar.org/User Files/files/Webpages/Attorney%20Resources/ae opinions/Advisory%20Ethics%20Opinions/Plea%20Bargains/95-04.pdf](https://www.vtbar.org/User%20Files/files/Webpages/Attorney%20Resources/ae%20opinions/Advisory%20Ethics%20Opinions/Plea%20Bargains/95-04.pdf) ("[A]n attorney may not recommend that a client enter into a plea agreement in a criminal case that contains provisions waiving post-conviction rights or remedies that would be based on allegations of ineffective assistance of counsel or prosecutorial misconduct"); Va. Bar, Formal Op. 1857 (2011), <https://www.vsb.org/docs/LEO/1857.pdf> ("[T]o the extent that a plea agreement provision operates as a waiver of the client's right to claim ineffective assistance of counsel, a defense lawyer may not ethically counsel his client to accept that provision."); *But see* Tex. Ctr. for Legal Ethics, Formal Op. 571 (2006), <https://www.legalethicalstexas.com/getattachment/bb6cf458-f026-4935-9b53-3e9197f1894b/>

Opinion-571(recommending that a lawyer decide on a case-by-case basis whether there is a conflict).

300. Memorandum from Deputy Att'y Gen. James M. Cole on Department Policy on Waivers of Claims of Ineffective Assistance of Counsel to All Fed. Prosecutors (Oct. 14, 2014), <https://www.justice.gov/file/70111/download>.

debatable issue that a court should resolve.”<sup>301</sup> Although this memorandum found these waivers to be “both legal and ethical[,]” it advised prosecutors, in this informal and not legally binding opinion, to cease use of this practice.<sup>302</sup>

Defendants have also been asked to waive the receipt of discovery. Thus, prosecutors are asking defendants to claim guilt for conduct without first seeing all the evidence the prosecutors hold against them. Although this places defense counsel in the difficult position of exposing him or herself to a possible malpractice claim, there has been little relief given for such waivers.<sup>303</sup>

## 2. *Ramifications of Using Plea Shortcuts*

Plea agreements are a major component of the criminal justice process.<sup>304</sup> As stated by the Court, “ours ‘is for the most part a system of pleas, not a system of trials.’”<sup>305</sup> To some extent, pleas are the epitome of efficiency as they reduce court backlog and offer a quicker processing of cases in the criminal justice system. But when the government goes beyond the bounds of the established criminal justice rules and stretches the plea bargaining process to preclude certain appellate rights of the defendant, it threatens the system’s due process protections. Waiving the right to a jury trial or compulsory process during that trial is warranted as the waiver is not crossing into an unethical realm for the attorney representing the defendant. Waiving the right to contest the defense attorney’s ineffectiveness or the prosecutor’s misconduct are different waivers that should be prohibited. These latter waivers look at a short-term gain without reflecting on the long-term ramifications of depriving a defendant the opportunity to challenge an ineffective attorney or prosecutorial misconduct that might have induced the defendant to accept a plea that was unfair. This practice can delegitimize our criminal justice process.

## IV. DETERRENCE AND LEGITIMACY

Prosecutorial shortcuts offer efficiency to the criminal justice system. Those accused of crimes are often handcuffed into accepting the pleas because they cannot take the risk of going to trial. Whether it is an NPA, a DPA, or an offer of a plea, companies are also quick to accept agreed-upon monetary resolutions to avoid the results and collateral consequences that might be forthcoming after an indictment or trial.<sup>306</sup>

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301. *Id.*

302. *Id.*

303. See generally R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011) (discussing whether prosecutors have to disclose impeachment evidence prior to the defendant pleading).

304. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (describing plea bargaining: “It is not some adjunct to the criminal justice system; it *is* the criminal justice system.”) (emphasis in original).

305. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)).

306. See Podgor, *supra* note 284, at 77.

*A. Deterrence*

But what is omitted in this discussion is whether there is a correlation between the shortcut offense and the initial wrongdoing. In this regard, one has to question whether this shortcut strategy achieves a general deterrence to future criminality. A prosecution of perjury informs the public that lies under oath are improper. But does it deter the fraudulent conduct that was reflected by the false statement?<sup>307</sup> Using a shortcut offense fails to offer the deterrence that comes with a prosecution for the real criminal conduct. When the parties enter into a plea agreement, both the prosecution and defense are typically assured finality with a set fine or prison sentence. But because the original criminality remains anonymous to the public, there is no deterrent value added for that specific conduct.

Contrast the white collar plea with those in street crime cases, where the crimes often have included offenses of the initial charged statute. For example, a drunk driving charge (“DUI” or “DWI”) may be pleaded to a lesser offense of reckless driving. Both offenses involve improper driving, and drinking can fit within the realm of reckless driving. Likewise, the defendant charged with murder may be offered a plea to the lesser-included offenses of voluntary or involuntary manslaughter. In all instances, there is a death and the perpetrator is being punished for causing that death. Although the punishment and charge may vary depending on whether the mens rea was purposely, recklessly, or negligently, the public sees the direct deterrence from the perpetrator’s act to the killing. This can also be seen with street crimes such as theft that may eventually become a conviction to a lesser offense of possession of stolen property. In each of these instances, the initial criminal conduct is tangentially tied to the eventual plea. Likewise, in each of these instances, the charges assure the public deterrence for the main conduct.

White collar crimes seldom have lesser-included offenses attached to them.<sup>308</sup> There are no underlying crimes for the fraud statutes, such as mail or wire fraud. Thus, the use of a shortcut offense, like false statements, perjury, or obstruction of justice, has a minimal relation to the initial criminality and offers no deterrent value to the perpetrator’s conduct. The individual defendant and the public are being told not to lie or destroy documents, as opposed to being told not to create a fraudulent company, backdate materials, or mishandle the books.

Deterrence, both general and specific, is the centerpiece of punishment in white collar crime cases. Unlike many street crime cases, it is rare that it is necessary to incapacitate the defendant or protect society. The indictment of the

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307. See Richman & Stuntz, *supra* note 200, at 604.

308. See Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 757–58 (2007) (discussing how white collar offenses differ from street crimes because there are seldom lesser included offenses). One could claim that charges of extortion under the Hobbs Act (18 U.S.C. § 1951 (2012)) might have lesser offenses in bribery or gratuities (18 U.S.C. § 201 (2012)), but none of these charges clearly represent the shortcut offenses being discussed here.

accused typically puts a stop to the ability of the person or entity to engage in future conduct. In white collar cases, individuals who are convicted lose their license and are terminated from their employment, and companies are debarred from doing future business with the government. Thus, the ability to repeat the same offense is seldom possible. Placing the white collar offender in prison seldom has as its main goal the protection of society, a goal that is common in drug, rape, or homicide cases. Rather, a message of deterrence to society is typically the theme sought to be accomplished by imprisoning a white collar offender.<sup>309</sup>

Recidivism by the white collar offender is also low. Sentencing statistics show that white collar offenders are typically level-one offenders under the sentencing guidelines, a designation indicating that they have no criminal history.<sup>310</sup> For example, 71.3% of the section 2B1 offenders, the offense level most commonly used in fraud cases, had a category-one criminal history.<sup>311</sup> Comparing this to street crime offenses presents a different picture. For example, only 48% of drug offenders had a category-one criminal history,<sup>312</sup> and heroin trafficking brought the number of level-one offenders even lower to 42.2%.<sup>313</sup> Likewise, fraud offenders were seldom in a high criminal-history category, such as category four, for having significant prior criminal activity.<sup>314</sup> Yet, 28.9% of crack cocaine offenders were there, and one fifth of crack cocaine offenders were classified as career offenders.<sup>315</sup> These figures correlate with re-

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309. One could argue that the sole function achieved is retribution, but sentencing policy would not confirm this approach. One finds discussion of retribution when examining the policy basis for mandatory-minimum penalties. See U.S. SENTENCING COMM'N, POLICY VIEWS ABOUT MANDATORY MINIMUM PENALTIES 88, [https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_05.pdf](https://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_05.pdf) (last visited Mar. 21, 2018) (discussing policy views about mandatory-minimum penalties).

310. A recent report of the U.S. Sentencing Commission noted that “[a] federal offender’s criminal history was closely correlated with recidivism rates.” See U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (Mar. 2016), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism\\_overview.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf).

311. U.S. SENTENCING COMM'N, QUICK FACTS: THEFT, PROPERTY DESTRUCTION, AND FRAUD OFFENSES (2015), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft\\_Property\\_Destruction\\_Fraud\\_FY15.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Theft_Property_Destruction_Fraud_FY15.pdf).

312. U.S. SENTENCING COMM'N, QUICK FACTS: DRUG TRAFFICKING OFFENSES (2015), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick\\_Facts\\_Drug\\_Trafficking\\_2015.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Drug_Trafficking_2015.pdf).

313. U.S. SENTENCING COMM'N, QUICK FACTS: HEROIN TRAFFICKING OFFENSES (2015), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Heroin\\_FY15.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Heroin_FY15.pdf).

314. U.S. SENTENCING COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW, *supra* note 310.

315. U.S. SENTENCING COMM'N, QUICK FACTS: CRACK COCAINE TRAFFICKING OFFENSES (2015), [https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack\\_Cocaine\\_FY15.pdf](https://www.uscc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Crack_Cocaine_FY15.pdf). Criminal histories can vary significantly when one compares powder cocaine to crack cocaine, where “58.3 percent of powder cocaine offenders were assigned to Criminal History I (offenders with a criminal history score under the sentencing guidelines of zero or one) while just 18.6 percent of crack cocaine offenders were assigned to that category.” See U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2015, *supra* note 284, at 8.

cidivism studies which show that rearrests for fraudulent conduct were at 34.2%, while rearrests for crimes involving firearms were at 68.3%.<sup>316</sup>

These statistics emphasize the importance of deterrence as a punishment theory in white collar cases. This is not to argue for lighter sentences or less prison time. Rather, this observation is to stress the importance of correlating the crime with the punishment as a specific and general deterrent.

### B. Legitimacy

Using shortcut offenses also undermines legitimacy in the criminal justice process. It is difficult to accept the value of using a shortcut when its correlation to the actual conduct is tenuous at best. As noted by Anthony Bottoms and Justine Tankebe, “the concept of legitimacy is elusive and multifaceted.”<sup>317</sup> It has been approached from a sociological perspective<sup>318</sup> as well as from legal and philosophical approaches.<sup>319</sup> The specific legal construct being examined can also change the complexion on the discussion. For example, Richard Fallon, Jr. looked at constitutional legitimacy as a “legal concept,” “sociological concept,” and “moral concept.”<sup>320</sup> Legitimacy can also be approached by examining “audience legitimacy” that looks at both “criteria for legitimacy” and its corresponding form of nonlegitimate power.<sup>321</sup> One could easily get mired in the quicksand of rhetoric surrounding the term “legitimacy.”<sup>322</sup> But the essence of normative legitimacy is an acceptance of the government action and its ensuing obedience.<sup>323</sup>

Achieving legitimacy necessitates that conduct conform to the set rules and that those rules represent societal norms and “shared beliefs.”<sup>324</sup> Consent to the rules is managed as part of the executive function through its enforcement powers. When the enforcers select tangential rules, by not focusing directly on the statutes created for the pertinent criminality, legitimacy is undermined.

Having a white collar criminal justice process that is entrenched with shortcuts is enticing to prosecutors who seek easy statistics and an increased number of criminal convictions. A key problem here is that “real” criminality may be escaping because the prosecutor is not anxious to do the hard work necessitated in investigating and prosecuting a difficult-to-understand criminal statute. Complicated cases are put on the sidelines as the “low hanging fruit” becomes the prosecution’s choice when bringing cases.

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316. See U.S. SENTENCING COMM’N, POLICY VIEWS ABOUT MANDATORY MINIMUM PENALTIES, *supra* note 309, at 20.

317. Bottoms & Tankebe, *supra* note 32, at 168.

318. See generally MAX WEBER, ECONOMY AND SOCIETY (Geunther Roth & Claus Wittich eds., 1978).

319. See JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 128 (2009).

320. See Fallon, *supra* note 33, at 1794–97.

321. Bottoms & Tankebe, *supra* note 32, at 132–33; see generally DAVID BEETHAM, THE LEGITIMATION OF POWER (1991); JEAN-MARC COICAUD, LEGITIMACY AND POLITICS: A CONTRIBUTION TO THE STUDY OF POLITICAL RIGHT AND POLITICAL RESPONSIBILITY (David A. Curtis ed. & trans., 2002).

322. Fallon, *supra* note 33, at 1789–90.

323. Bottoms & Tankebe, *supra* note 32, at 129.

324. See BEETHAM, *supra* note 321, at 19–20.

With the increased number of shortcut offenses Congress is creating and prosecutors are charging, there is little inclination to present the complicated white collar cases that focus on the underlying criminality. Prosecutors may find it easier to push aside these tougher cases because they are difficult to investigate and prove, or because of the fact that prosecuting tougher cases may require expending significant resources. Computer-related crimes often fall in this category as tracking misconduct can be difficult and involve international perpetrators.<sup>325</sup> When a government prosecutor can rack up easier statistics with crimes of perjury, mail fraud, or obstruction of justice, it is difficult to imagine him or her spending significant time investigating and analyzing such computer-related conduct. The same is true for massive financial crimes that may have a web of intricacies surrounding the conduct. The shortcut crimes will certainly be easier to pursue, as a prosecutor might only need to show a lie to a government agent or that someone shredded key documents in an attempt to avoid detection.

Clearly, from a policy perspective, one can find justifications for the use of shortcuts. But equally important from a long-term basis is whether the punishment goals of deterrence will be achieved and whether the disconnect between the conduct and the crimes will defeat legitimacy in the criminal justice process.

## V. CONCLUSION

When one thinks of white collar crime in our current society, an immediate response will likely include a failure to prosecute criminal activity that has set back our economy. Were the “banks too big,” and was CEO misconduct being overlooked? But the lack of prosecutorial action discussed in this Article is of a different genre. It shows the dichotomy between what appears on its face to be aggressive government policy and practice. But the reality is that it demonstrates an environment looking for easy convictions with little respect for the long-term consequences. Ratcheting up statistics that will play well in the press does little to correct misconduct in the boardroom, corruption in government offices, and computer crimes that plague the Internet. On the surface, white collar shortcuts provide a bandage to a wound that has become very infected. To achieve true deterrence, it is important to go back to basics and prosecute the actual conduct of the perpetrator. Relying on shortcuts to incapacitate a white collar offender fails to expose the real criminality and to provide a general deterrence to others that would serve to correct criminality in society. Most of all, it fails to offer true legitimacy to our criminal justice process.

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325. As stated by former Attorney General Janet Reno, “[a] hacker needs no passport and passes no checkpoints.” Janet Reno, Former U.S. Attorney General Keynote Address at the Meeting of the P-8 Senior Experts’ Group on Transnational Organized Crime (Jan. 21, 1997), <http://www.irational.org/APD/CCIPS/agfranc.htm>; see also Catherine Pelker et al., *Computer Crimes*, 52 AM. CRIM. L. REV. 793, 845 (2015) (explaining that computer crimes are difficult to prosecute because cyber crime often goes unreported and prosecutors face “technological, jurisdictional, and evidentiary hurdles to bringing charges”).