# NOTES

# A DUAL SYSTEM OF JUSTICE: FINANCIAL INSTITUTIONS AND WHITE-COLLAR CRIMINAL ENFORCEMENT

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## INTRODUCTION

In 2013, Deutsche Bank established a relationship with Jeffrey Epstein that was estimated to generate revenues of up to $4 million a year.[1] Seven years later, as a result of its dealings with Mr. Epstein, Deutsche Bank agreed to pay a fine of $150 million.[2] New York state regulators accused the bank of allowing "significant compliance failures" when processing hundreds of transactions for the late financier.[3] Throughout the relationship, regulators asserted that the bank had not properly addressed a plethora of red flags: Mr. Epstein's controversial past and criminal history of sexual misconduct, 120 wire transfers totaling $2.65 million to women with Eastern European surnames, suspicious payments to past coconspirators,[4] and suspiciously large cash withdrawals, including a cash withdrawal of $100,000 for "tips and

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1 James B. Stewart, *These Are the Deutsche Bank Executives Responsible for Serving Jeffrey Epstein*, N.Y. TIMES (July 13, 2020), https://nyti.ms/3eroVqg.

2 *Deutsche Bank Faces $150m Fine for Jeffrey Epstein Ties*, BBC NEWS (July 7, 2020), https://www.bbc.com/news/business-53324888.

3 *Id.*

4 *Id.*; *see also* Matthew Goldstein, *Deutsche Bank Settles over Ignored Red Flags on Jeffrey Epstein*, N.Y. TIMES (July 7, 2020), https://nyti.ms/3cDwOdy. Outgoing payments were sent "to three people who had been named as co-conspirators in suits by Mr. Epstein's accusers that were related to his 2008 guilty plea to prostitution charges in Florida." *Id.*

household expenses."[5] Regulators identified a number of control failures that allowed for Mr. Epstein's assets to be used for criminal misconduct. For example, when setting conditions for monitoring Epstein's activity, bank executives poorly communicated the criteria for flagging suspicious transactions, creating confusion within the internal anti–money laundering division.[6] As a result, "specialists interpreted the guidance to mean that unusual activity should be flagged only if it was unusual for Mr. Epstein—which led to an alert about payments to a Russian model and a Russian publicity agent being dismissed because the transactions were 'normal for this client.'"[7]

At first, one might think that such a hefty fine of $150 million would induce Deutsche Bank to correct these failures. Yet, perhaps surprisingly, such fines are not uncommon for the bank.[8] Deutsche Bank, "a symbol of corporate recidivism[,] . . . has paid more than $9 billion in fines since 2008 related to a litany of alleged and admitted financial crimes."[9] In 2016 alone, Deutsche Bank was involved in 7800 different legal disputes, with an esti-

5 *See* Goldstein, *supra* note 4.

6 *Id.*

7 *Id.*

8 There is some nuance worth noting upfront when discussing the blameworthiness of corporations for repeated misconduct. Deutsche Bank, the eighth-largest investment bank globally with over 87,000 employees worldwide, is an organization with incredibly complex business structures and supervisory relationships. F. Norrestad, *Deutsche Bank – Statistics & Facts*, STATISTA (Feb. 3, 2021), https://www.statista.com/topics/1350/deutsche-bank/; F. Norrestad, *Number of Employees at Deutsche Bank Worldwide from 2006 to 2019*, STATISTA (Nov. 25, 2020), https://www.statista.com/statistics/262691/number-of-employees-at-deutsche-bank-since-2006/. While it is easy to look at "Deutsche Bank" as one singular unit responsible for all of its business dealings, proper or otherwise, such behavior can be driven by decisions made in disassociated or rogue business units anywhere around the world. Is it truly fair to hold one person, or more specifically a small group of people in charge of a corporation, responsible for all such decisions? Moral philosophers consider similar questions in IBO VAN DE POEL, LAMBÈR ROYAKKERS & SJOERD D. ZWART, MORAL RESPONSIBILITY AND THE PROBLEM OF MANY HANDS 4 (2015) ("A problem of many hands occurs if there is a gap in a responsibility distribution in a collective setting that is morally problematic." (quoting Ibo van de Poel, Jessica Nihlén Fahlquist, Neelke Doorn, Sjoerd Zwart & Lambér Royakkers, *The Problem of Many Hands: Climate Change as an Example*, 18 SCI. & ENG'G ETHICS 49, 63 (2012))). In terms of corporate accountability, "[u]nderstanding the problem of group responsibility should incentivize companies to have clearer lines of power and communication." Olivia Goldhill, *When a Company Does Something Wrong, How Should We Decide Who to Blame?*, QUARTZ (Dec. 13, 2015), https://qz.com/572723/when-companies-do-terrible-things-who-should-get-the-blame/. Assigning responsibility in such cases can "help give justice to the victims," "deter individuals from behaving the same way again," and help "determine the rules and expectations we have for all groups in society." *Id.*

9 Stewart, *supra* note 1 ("[Deutsche Bank] has paid more than $9 billion in fines since 2008 related to . . . manipulating interest rates, failing to prevent money laundering, evading sanctions on Iran and other countries and engaging in fraud in the run-up to the financial crisis.").

mated litigation reserve of $5.7 billion.[10] Since the relationship between Deutsche Bank and Mr. Epstein began in 2013, the bank agreed to pay the following: $2.5 billion in fines for its involvement in the 2002 LIBOR scandal;[11] $7.2 billion in a settlement over its role in the 2008 financial crisis;[12] $258 million for doing business with Libya, Myanmar, Sudan, Iran, and Syria in violation of U.S. economic sanctions;[13] $425 million for its role in laundering $10 billion out of Russia;[14] and $7.5 million to settle charges of improperly handling "pre-released" American depository receipts.[15]

The relationship between Deutsche Bank and Jeffrey Epstein exemplifies a pattern as old as white-collar crime itself, in which an organization found to have violated the rules designed to protect the public agrees to pay a considerable fine for its wrongdoing. However, Deutsche Bank, like almost all large international banks, is a public corporation. This means that when these fines are levied against the bank, the burden ultimately falls on the corporation's public shareholders, rather than falling on the individuals responsible for breaking the law. As of June 30, 2020, the approximate date

10 *Deutsche Bank: Zwischen Ramsch und Skandalen* [*Deutsche Bank: Between Junk and Scandals*] (Ger.), ARD (May 24, 2016), https://web.archive.org/web/20170404093959/http://boerse.ard.de/aktien/deutsche-bank-zwischen-ramsch-und-skandalen100.html. The litigation reserve of €5.4 billion converts to approximately $5.7 billion using the average conversion rate as of December 31, 2016. *See Euro Exchange Rates for 31/12/2016*, EXCHANGE RATES, https://www.exchangerates.org.uk/historical/EUR/31_12_2016 (last visited Mar. 19, 2021).

11 *See* Ben Protess & Jack Ewing, *Deutsche Bank to Pay $2.5 Billion Fine to Settle Rate-Rigging Case*, N.Y. TIMES (Apr. 23, 2015), https://nyti.ms/3bYeqgi. The LIBOR scandal involved sixteen financial institutions colluding to manipulate the interbank lending rate. *See generally* James McBride, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN RELATIONS (Oct. 12, 2016), https://www.cfr.org/backgrounder/understanding-libor-scandal; Andrew Bailey, Chief Executive of the Financial Conduct Authority, Speech at Bloomberg London (July 27, 2017), https://www.fca.org.uk/news/speeches/the-future-of-libor (questioning the future of LIBOR and the effect it will have on the financial market). Banks colluded to create an artificially low rate, which allowed the bank to appear less risky to investors. *See generally* Bailey, *supra*.

12 *See* Karen Freifeld, Arno Schuetze & Kathrin Jones, *Deutsche Bank Agrees to $7.2 Billion Mortgage Settlement with U.S.*, REUTERS (Dec. 22, 2016), https://reut.rs/3s2ds8y ("As part of the agreement, Deutsche Bank would pay a civil monetary penalty of $3.1 billion and provide $4.1 billion in consumer relief, such as loan forgiveness.").

13 *See Deutsche Bank to Pay US$258m for Violating US Sanctions*, BUS. TIMES (Nov. 5, 2015) https://www.businesstimes.com.sg/banking-finance/deutsche-bank-to-pay-us258m-for-violating-us-sanctions. Like the Epstein fine, this fine was imposed by the New York State Department of Financial Services. *Id.*

14 *See* Landon Thomas Jr., *Deutsche Bank Fined in Plan to Help Russians Launder $10 Billion*, N.Y. TIMES (Jan. 30, 2017), https://nyti.ms/2Qbr1UR; Christine Wang, *Deutsche Bank to Pay $425 Million Fine over Russian Money-Laundering Scheme: New York Regulator*, CNBC (Jan. 30, 2017), https://www.cnbc.com/2017/01/30/deutsche-bank-to-pay-425-million-fine-over-russian-money-laundering.html.

15 *See* Press Release, SEC, Deutsche Bank to Pay Nearly $75 Million for Improper Handling of ADRs (July 20, 2018), https://www.sec.gov/news/press-release/2018-138.

of the Epstein fine, Deutsche Bank had 2.11 billion outstanding shares.[16] Therefore, the $150 million fine imposed on the bank had the ultimate effect of fining each individual shareholder just over seven cents.

However, it is not corporations that commit crimes, it is people.[17] Jim Stewart, a lawyer and *New York Times* columnist, argued that, "Individuals do the bad things. The shareholders didn't do it, and the bank, in the abstract, didn't do it. So I'm all for punishing the people who did it and holding them accountable."[18] Yet, while the fining of corporations is well publicized and often makes front-page news, the individuals who committed the acts behind the fine are rarely held personally accountable.

> It is rare for companies and regulators that are settling allegations of crimes or other misconduct to name the individuals responsible for those misdeeds—a practice that perpetuates the myth that such acts were inadvertently committed by a faceless institution and were not the consequence of decisions made by human beings.[19]

The impact of distributing the burden of the fines to the shareholders, rather than the individual actors, is clear. "When those individuals bear no discernible consequences, the result is an astonishing rate of recidivism."[20] Deutsche Bank is not alone. White-collar crime permeates the financial sector and, as a result, places an immense cost on society.

Using the anecdotal example of Deutsche Bank, it is clear that the current scheme of white-collar enforcement is not effective in deterring white-collar criminal activity. This Note will go on to show that Deutsche Bank is not an anomaly. The government's current approach to white-collar criminal enforcement fails to meet any of the following traditional principles of punishment: specific and general deterrence, incapacitation, rehabilitation, or retributivism. An analysis of white-collar enforcement shows a "story of how the most powerful banks in the world are doing business with the worst

16 DEUTSCHE BANK, INTERIM REPORT AS OF JUNE 30, 2020, at 98 (2020).

17 For an in-depth discussion of the criminal behavior and responsibility of corporations, see Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285 (1985).

18 *New York Times' Jim Stewart on Wells Fargo's Latest Punishment*, CNBC (Apr. 20, 2018), https://cnb.cx/3bWRuOH. In this quote, Jim Stewart specifically refers to the $185 million fine Wells Fargo received when it was found responsible for opening fake accounts for customers to boost sales projections. *Id.* Ultimately, Wells Fargo agreed to pay a total of $3 billion to settle criminal charges and a civil action as a result of committing blatant "fraud" when they "opened millions of accounts in customers' names without their knowledge, signed unwitting account holders up for credit cards and bill payment programs, created fake personal identification numbers, forged signatures and even secretly transferred customers' money." Emily Flitter, *The Price of Wells Fargo's Fake Account Scandal Grows by $3 Billion*, N.Y. TIMES (Feb. 21, 2020), https://nyti.ms/2ufUrXk. Including this fine, Wells Fargo had paid a total of over $18 billion in fines in the previous twelve years. *Id.*

19 Stewart, *supra* note 1.

20 *Id.*

of humanity, helping them move their money around the globe and making a tidy profit for themselves and their shareholders."[21]

Proposing more severe punishment for white-collar criminals is not a new concept. While many argue for the increased prison time of white-collar offenders, others provide "a counter-perspective on the use of prison sentences."[22] Other areas of academic publication support the convergence of sentencing guidelines for white-collar and drug-related criminals, particularly in light of utilitarian and retributivist principles.[23] Rather than simply recommending that white-collar criminals should be punished more, this Note proposes two distinct structural solutions that reevaluate the current policies directing the punishment of white-collar criminal conduct. Specifically, this Note argues that the Department of Justice (DOJ) should reconsider the practice of levying large fines against corporate entities that, through their public structure, pass the fines on to innocent shareholders.

After evaluating how and why the current approaches to the enforcement of white-collar laws are insufficient and fail to meet the fundamental principles of punishment, this Note proposes two solutions. First, FinCEN, the government organization tasked with combatting financial crimes and money laundering, should develop a more thorough and holistic approach to the reporting requirements of financial institutions. Second, judges should become more involved in the approval of Deferred Prosecution Agreements (DPAs). Rather than viewing DPAs as only bilateral agreements between prosecutors and defendants, judges should serve as the representatives of public interest, similar to their role in plea agreements. These two proposals would strengthen the overall response to corporate white-collar crime by deterring future criminal activity.

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21 *Episode One: The Documents*, *Suspicious Activity: Inside the FinCEN Files*, PINEAPPLE STREET STUDIOS (Sept. 20, 2020), https://apple.co/3lsIi7J (quote from Anthony Cormier, reporter at *BuzzFeed News*).

22 Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. ILL. U. L.J. 485, 485 (1999) (recommending the use of intermediate and informal sanctions in lieu of prison sentences); *see also* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410–11 (1980) ("[T]he social *benefits* of punishment are no greater when punishment takes the form of imprisonment than when it takes the form of a fine.").

23 Carl Emigholz, Note, *Utilitarianism, Retributivism and the White Collar-Drug Crime Sentencing Disparity: Toward a Unified Theory of Enforcement*, 58 RUTGERS L. REV 583, 584 (2006) ("[I]f utilitarian and retributivist principles are applied to sentencing of [white-collar and drug] crimes, they should conform to similar models of enforcement."). *But see* Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427, 1455–56 (1982) (arguing that empirical evidence does not clearly support the public perception that white-collar criminals are treated disparately as opposed to other types of criminals).

## I. THE EXPLICIT AND IMPLICIT SOCIETAL COSTS OF WHITE-COLLAR CRIME

### *A. The Severity of White-Collar Crime*

Georgie Weatherby, a professor of sociology and criminology at Gonzaga University, claims that the public has a serious misconception about the seriousness of white-collar crime.[24] The root of the misconception is that people do not feel the costs of white-collar crime directly, even though the overarching cost to society is immense. "How safe [people] feel in their homes, where they can walk at night, these are the issues people feel. They are tangible."[25] White-collar crime does not impact society in such a tangible way. However, not only are the societal costs of white-collar crime severe, but they also have been increasing in recent years.[26] "[O]ver the course of two years in the early [twenty-first] century, annual losses from fraudulent use of identity rose by more than $300 million in the United States."[27] Based on FBI estimates, white-collar crime costs the U.S. economy over $300 billion every year, causing significant negative impacts on people's lives.[28]

For example, consider the effects of one type of white-collar crime: health care fraud. One of the most widespread types of health care fraud is overbilling or "upcoding," where providers change "a patient's diagnosis or treatment code to one reimbursed at a higher level."[29] Other types of health care fraud include providing unnecessary services or billing for "phantom" services not rendered.[30] Not only are the people with tax dollars supporting state Medicare and Medicaid programs victims of such crimes, but also those who pay for health insurance, whether privately or through an employer. Premiums charged by insurance companies directly correlate with the expenses and bills that they are responsible for paying. As fraudulent bills increase, insurance companies charge higher premiums. "Employers, both those that are self-insured and those that buy private insurance, see their health care costs increase every year due to fraud and abuse—and every year

24 George Pierpoint, *Is White-Collar Crime Treated More Leniently in the US?*, BBC NEWS (Mar. 11, 2019), https://bbc.in/3s00Yhs.

25 *Id.*

26 *See* Laurie L. Levenson, *Cost to Society*, BRITANNICA, https://www.britannica.com/topic/white-collar-crime/Cost-to-society (last visited Oct. 26, 2020).

27 *Id. But see* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 392 (1994) ("I am uncertain whether [white-collar] crime has actually increased or perhaps the informational basis for detecting crime has reached a level of sophistication that permits us to see that which we were unable to see before.").

28 *See* Inside the FBI, *Health Care Fraud Costs Billions*, FBI (June 12, 2009) [hereinafter *Health Care Fraud*], https://www.fbi.gov/audio-repository/news-podcasts-inside-health-care-fraud-costs-billions.mp3/view (recording an interview of FBI Special Agent Rob Montemorra, Chief of the FBI Health Care Fraud Unit).

29 *A Bill to Provide Enhanced Penalties for Commission of Fraud in Connection with the Provision of or Receipt of Payment for Health Care Services, and for Other Purposes: Hearing on S. 2652 Before the S. Comm. on the Judiciary*, 102d Cong. 99 (1992) (emphasis omitted) (statement of the American Association of Retired Persons).

30 *Id.* at 99–101.

they pass the costs onto consumers in the form of higher prices and lower wages."[31] Individual workers eventually see their health care premiums rise, and their health care benefits decline.[32] It has been estimated that the costs of fraud and abuse range from three to ten percent of national health care spending, which have the "potential to become incredibly large because [of] the trickle-down effect" of those costs to the public.[33]

Contrary to some public perception, white-collar crime is not victimless.[34] A single instance of white-collar criminal activity "can destroy a company, devastate families by wiping out their life savings, or cost investors billions of dollars."[35] Some instances, like the collapse of Enron, which resulted in over 4500 lost jobs and over $1 billion in investment losses, can even accomplish all three.[36] Slowly, however, the public's perception of white-collar crime is changing. "Although white-collar crime has traditionally been viewed as less serious than other types of crime . . . there [has been] a growing recognition of the significant harm it causes."[37] In recognition of that harm, courts awarded nearly $500 million in restitution to victims of white-collar crimes in a single year.[38]

### *B. Misaligned Incentives*

When evaluating the conduct of those who commit white-collar offenses, it is essential to consider the current enforcement scheme from the perspective of the offenders. When employees at banks (and any other public corporation) commit white-collar crimes, any fine levied against the corporation

31 *Id.* at 102.

32 *Id.*

33 *See Health Care Fraud*, *supra* note 28. The "trickle-down theory" is that the benefits and burdens imposed on corporations will ultimately be passed on to the stakeholders (including the customers) of that organization. For an in-depth discussion on the trickle-down effects of certain regulatory policies, see Rosa Brooks, *The Trickle-Down War*, 32 YALE L. & POL'Y REV. 583 (2014), and Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948 (2008).

34 *See, e.g.*, SUSAN P. SHAPIRO, U.S. DEP'T OF JUST., THINKING ABOUT WHITE COLLAR CRIME: MATTERS OF CONCEPTUALIZATION AND RESEARCH 42 (1980) ("However, important characteristics of the nature of illegal activity differ in the contexts of street and white collar crime. It has been observed that in the latter, many crimes are victimless or the parties are unaware of their victimization."); Colin Goff & Nancy Nason-Clark, *Seriousness of Crime in Fredericton, New Brunswick: Perceptions Toward White-Collar Crime*, 31 CAN. J. CRIMINOLOGY 19, 20 (1989) ("In contrast, the public rated white-collar crimes among the least serious crimes, only marginally higher than victimless crimes and public order offenses.").

35 *White-Collar Crime*, FBI, https://www.fbi.gov/investigate/white-collar-crime (last visited Oct. 27, 2020).

36 *See* Brad Foss, *Enron, By the Numbers*, CBS NEWS (June 15, 2002), https://cbsn.ws/2NthGa9; *Enron*, FBI, https://www.fbi.gov/history/famous-cases/enron (last visited Oct. 27, 2020).

37 Levenson, *supra* note 26.

38 *Id.*

will ultimately be passed down and paid by the shareholders.[39] This effect was demonstrated in the Deutsche Bank–Jeffrey Epstein relationship discussed earlier, where the $150 million fine levied against Deutsche Bank ultimately landed on the public shareholders of the corporation. Also consider the 2015 $8.9 billion fine levied against BNP Paribas, discussed in subsection II.B.1 below. In its 2014 annual report, BNP Paribas included a financial statement line item titled "Costs related to the comprehensive settlement with US authorities."[40] Here, the bank deducted €6 billion related to the fine to calculate its Operating Income.[41] In other words, this fine is simply considered a cost of doing business, ultimately flowing down to Net Income Attributable to Equity Holders (i.e., the public shareholders).[42] The shareholders are the people who ultimately bear the burden of the fine incurred by BNP for violating U.S. laws and regulations.[43]

Not only are the people who make the decisions behind the criminal activity not the ones who ultimately face the repercussions for their actions and offenses, but, in most plea agreements, they are also able to remain nameless.[44] Without serious consequences for the specific offenders, the expected outcome can be determined like any financial decision. "Since corporate activity is normally undertaken in order to reap some economic benefit, corporate decisionmakers choose courses of action based on a calculation of potential costs and benefits."[45] To estimate the expected financial impact of engaging in illegal activity, a potential offender would simply balance the probability and size of a potential fine with the expected revenue that the activity would generate.

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39 *See* Andrew Ross Sorkin, *Punishing Citi, or Its Shareholders?*, N.Y. TIMES (Aug. 2, 2010), https://nyti.ms/2NrBlHl ("[T]ake a step back and ask this question: Who is paying that $75 million fine? The answer is Citigroup's shareholders—the same people who were arguably defrauded by its failure to disclose its exposure to subprime mortgages in the first place."); Dorothy S. Lund & Natasha Sarin, Opinion, *Is Corporate Criminal Punishment Just Another Cost of Doing Business?*, REGUL. REV. (July 6, 2020), https://www.theregreview.org/2020/07/06/lund-sarin-corporate-criminal-punishment-another-cost-doing-business/ ("Even if enforcers could levy the optimal fine, the effect would be muted. Dispersed shareholders would bear the brunt of the harm, but collective action problems limit their ability to discipline wayward management. In other words, the managers who agree to pay fines out of shareholders' pockets might not bear any consequences."); *see also* J. Strydom, M. Ward & C. Muller, *The Impact of Regulatory Fines on Shareholder Returns*, 46 S. AFR. J. BUS. MGMT. 85, 85 (2015) (examining the impact of regulatory fines on shareholder returns of public companies).

40 *See* BNP PARIBAS, CONSOLIDATED FINANCIAL STATEMENTS: YEAR ENDED 31 DECEMBER 2014, at 4 (2015).

41 *Id.*

42 *Id.*

43 *See id.* at 46.

44 *See, e.g.*, Stewart, *supra* note 1.

45 *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1235 (1979) [hereinafter *Regulating Corporate Behavior*]. *But see* Brent Fisse, *Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1154–59 (1983).

As a result, corporations simply factor the cost of white-collar crime into the cost of doing business. The disadvantage of the potential fine levied against the corporation would be further mitigated by diffusing the burden across all shareholders. These fines, which are issued with the purpose of deterring criminal activity, are dulled into a simple cost of doing business. Banks, deciding whether or not to engage in forbidden behavior think that (1) the chance of getting caught is low, (2) if they get caught, the financial regulatory fine will ultimately fall to shareholders, and (3) in that event, the cost is distributed across billions of shares. These costs are weighed against the enormous potential revenues that the banks stand to make from allowing illicit transactions to occur. With the benefit of such activity (the revenues) outweighing the potential financial burden, the current regulatory scheme's approach of levying fines against large banks is ultimately dulled into a simple risk-reward analysis for corporations. Since these fines are not paid by those who committed the illegal act but are instead dispersed amongst all shareholders, the criminal benefits currently outweigh the regulatory costs.

### *C. A Dual System of Justice*

Time and time again, the failure to effectively regulate the criminal behavior that produces such significant societal costs negatively impacts societal trust in both our financial institutions and the criminal justice system. A system of justice works only if those subject to it have faith in its design and execution. Sociologists have emphasized that white-collar crimes are particularly harmful to society because they are committed by those in positions of power, those to whom society looks to behave responsibly and set a moral example.[46] Therefore, in addition to the financial costs suffered by society, treating white-collar crime differently from regular "street" crime has the disparaging effect of establishing that all people are not viewed as equals in the eyes of the law, a concept ingrained within our criminal justice system. Not only is such inequality fundamentally discriminatory, but the resulting loss of the public's faith in the criminal justice system also significantly impairs its functionality.

Consider the sentencing of Paul Manafort in 2018. Manafort was tried in the Eastern District of Virginia on eighteen charges, including bank fraud, failing to disclose foreign bank accounts, and tax evasion.[47] Manafort was not the initial target of a white-collar investigation, but rather, these crimes were uncovered during Special Counsel Robert Mueller's "unrelated" investigation into Russia's interference with the 2016 presidential election.[48] Mr. Manafort was convicted of five counts of tax fraud, two counts of bank fraud,

46 *See* Robert F. Meier & James F. Short, Jr., *The Consequences of White-Collar Crime*, *in* WHITE-COLLAR CRIME: AN AGENDA FOR RESEARCH 23, 27–29 (Herbert Edelhertz & Thomas D. Overcast, eds., 1982).

47 United States v. Manafort, 321 F. Supp. 3d 640, 649 (E.D. Va. 2018).

48 *Id.* at 646, 650.

and one count of failure to disclose a foreign bank account.[49] A mistrial was issued on the remaining ten counts after the jury was unable to reach a verdict.[50] After "evaluating all of his options," Manafort entered into a plea deal with prosecutors in which he agreed to forfeit approximately $22 million in real estate.[51] Under the terms of the deal, in addition to the forfeitures, Mr. Manafort agreed to cooperate with the Special Counsel's investigation.[52] Specifically, the arrangement required him to answer questions about "any and all matters" "fully, truthfully, completely and forthrightly."[53] To make matters worse, five months later, a federal judge ruled that Manafort had breached his plea agreement by lying "multiple times" to federal prosecutors.[54] In sentencing, citing the federal sentencing guidelines, prosecutors recommended nineteen-and-a-half to twenty-four years in prison. Instead, Manafort received less than four years in prison, a fine of $50,000, and restitution of just over $24 million.[55] While noting Manafort's "otherwise blameless" life, Judge T. S. Ellis III "was surprised not [to] hear [Manafort] express regret for engaging in wrongful conduct."[56] Judge Ellis's prison sentence, however, was even less than the one recommended by Manafort's own lawyers, which was in the range of four-and-a-quarter to five-and-a-quarter years.[57] To many, Paul Manafort's sentence provided the prototypical example of the dual system of justice that white-collar criminal enforcement had created.

Manafort's plea agreement immediately drew an intense and negative reaction. As noted by Democratic Congresswoman Alexandria Ocasio-Cortez, "Paul Manafort getting such little jail time for such serious crimes lays out for the world how it's almost impossible for rich people to go to jail for the same amount of time as someone who is lower income. In our current broken system, 'justice' isn't blind. It's bought."[58] A former attorney with the U.S. Sentencing Commission remarked that "Manafort's sentence was less than half of what people who plead guilty and cooperate with the govern-

49 Sharon LaFraniere, *Paul Manafort, Trump's Former Campaign Chairman, Guilty of 8 Counts*, N.Y. TIMES (Aug. 21, 2018), https://nyti.ms/38O6mfZ.

50 *Id.*

51 *Id.*; *see* Julia Jacobs, *Paul Manafort Forfeits $22 Million in New York Real Estate in Plea Deal*, N.Y. TIMES (Sept. 15, 2018), https://nyti.ms/3bXPyFG.

52 *See* Sharon LaFraniere & Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate with Special Counsel; Pleads Guilty to Reduced Charges*, N.Y. TIMES (Sept. 14, 2018), https://nyti.ms/3eQoTfN.

53 *Id.* (quoting Plea Agreement at 6, United States v. Manafort, No. 1:17-CR-00201-ABJ (D.D.C. Sept. 14, 2018), ECF No. 422).

54 *See* Sharon LaFraniere, *Manafort Lied After Plea Deal, Judge Says*, N.Y. TIMES (Feb. 13, 2019), https://nyti.ms/3vx56rH.

55 Sarah N. Lynch, Andy Sullivan & Jan Wolfe, *U.S. Judge Gives Trump Ex-Aide Manafort Leniency: Under Four Years in Prison*, REUTERS (Mar. 7, 2019), https://reut.rs/30SWFIX.

56 *Id.*

57 *Id.*

58 Alexandria Ocasio-Cortez (@AOC), TWITTER (Mar. 7, 2019, 9:42 PM), https://twitter.com/AOC/status/1103848541443817472.

ment typically get in similar cases."[59] Laurence Tribe, Professor Emeritus of Constitutional Law at Harvard Law School, specifically commented on the considerations that the federal judge took into account when determining Manafort's sentence. "Judge Ellis's assessment that Manafort led an 'otherwise blameless life' was proof that he's unfit to serve on the federal bench. I've rarely been more disgusted by a judge's transparently preferential treatment to a rich white guy who betrayed the law and the nation."[60] Rebecca Kavanagh, a criminal defense and civil rights attorney, commented, "The prosecutor in Paul Manafort's case recommended a [nineteen] to [twenty-five] year prison sentence. Judge Ellis just sentenced him to under [four] years. Judges almost never sentence my clients to less prison time than prosecutors recommend. Compassion is a quality shown only to some."[61] Each of these comments represents the losing of faith in the criminal justice system as a result of the disparate administration of justice expressed to some white-collar criminals.

Senator Ron Wyden, a member of the Senate Intelligence Committee, sensed this disparate enforcement to be a theme within the current state of corporate white-collar criminal enforcement. To him, current enforcement "reinforces the fact that we now have two systems of law enforcement and justice in the country. . . . If you're wealthy and well-connected, you can figure out how to do an enormous amount of harm to society at large and ensure that it accrues to enormous financial benefit for . . . you."[62] Other observers have commented that while "[d]rug cartels move millions through [U.S.] banks; poor people go to jail for possession."[63]

## II. Evaluating the Current Effectiveness of Criminal Enforcement

### *A. The Response to HSBC's "Pervasive" Failures*

In 2012, a subcommittee within the U.S. Senate issued a report detailing and evaluating the vulnerabilities of the U.S.'s current response to money laundering, drugs, and terrorist financing, specifically through the case example of HSBC.[64] HSBC's wrongdoings were clear. According to the

59 Lynch et al., *supra* note 55.

60 Laurence Tribe (@tribelaw), Twitter (Mar. 7, 2019, 7:16 PM), https://twitter.com/tribelaw/status/1103811760501522432.

61 Rebecca Kavanagh (@DrRJKavanagh), Twitter (Mar. 7, 2019, 7:08 PM), https://twitter.com/DrRJKavanagh/status/1103809627869843456.

62 Jason Leopold et al., *The FinCEN Files*, BuzzFeed News (Sept. 20, 2020) [hereinafter *The FinCEN Files*], https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks.

63 *Id.*

64 *See* Staff of S. Comm. on Homeland Sec. & Gov't Affairs, 112th Cong., U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History (Comm. Print 2012). The report specifically focused on five main areas of abuse: (1) servicing high risk affiliates even though red flags indicated proceeds contained illegal drug sales in the United States; (2) actively circumventing U.S. safeguards designed to block transactions involving terrorists, drug lords, and rogue regimes; (3) disregarding

report, HSBC had helped a Saudi bank with links to al-Qaeda launder and transfer money into the United States, laundered billions of dollars for Mexican drug cartels, and violated U.S. economic sanctions by doing business with Syria, Sudan, and Iran.[65] Based on the evidence received by the congressional committee, federal wiretaps overheard drug lords of the Sinaloa cartel, who were responsible for tens of thousands of murders, recommend HSBC as "*the* place to bank."[66] The committee's report described how HSBC's "systemic weaknesses" led to these offenses and how their failures were not merely individual one-off shortcomings.[67]

Senator Carl Levin, chairman of the report's subcommittee, stated that HSBC was "pervasively polluted" and "used its U.S. bank as a gateway into the U.S. financial system . . . while playing fast and loose with U.S. banking rules."[68] HSBC serves as "a major conduit for illicit money flows unless U.S. laws to prevent money laundering are followed."[69] Although it was clear that HSBC's transgressions were severe, the ultimate sentence HSBC received is an example of what many corporate white-collar criminal offenders have become accustomed to. No criminal charges were filed. No executives were indicted for turning a willful blind eye toward money laundering, drug trafficking, and terrorist financing. Instead, the Justice Department made sure that HSBC was "held accountable for stunning failures of oversight—and worse—that led the bank to permit narcotics traffickers and others to launder hundreds of millions of dollars through HSBC subsidiaries, and to facilitate hundreds of millions more in transactions with sanctioned countries" by entering into a DPA and fining them $1.256 billion.[70] This fine was about the equivalent of three weeks' profit for the bank.[71]

In 2015, the DOJ released the "Yates Memo," issued by former Deputy Attorney General Sally Yates, which highlighted a series of policy changes that would result in individual accountability for corporate wrongdoing.[72]

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terrorist financing links; (4) clearing obviously suspicious bulk travelers checks; and (5) offering bearer share corporations accounts despite the high risk of money laundering. *Id.*

65 *Id.* at 7, 38, 115.

66 *Id.* at 68 (emphasis added).

67 *Id.* at 58, 86.

68 *HSBC Exposed U.S. Financial System to Money Laundering, Drug, Terrorist Financing Risks*, HOMELAND SEC. & GOV'T AFFS.: PERMANENT SUBCOMM. ON INVESTIGATIONS (July 16, 2012), https://www.hsgac.senate.gov/subcommittees/investigations/media/hsbc-exposed-us-finacial-system-to-money-laundering-drug-terrorist-financing-risks.

69 *Id.*

70 Press Release, U.S. Dep't of Just., HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanction Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.

71 In 2012, HSBC's global profit before taxation was $20,649 million. HSBC, ANNUAL REPORT AND ACCOUNTS 2012, at 2 (2013). On average, in three weeks, the bank earned a profit of $1.19 billion. *See id.*

72 Memorandum from Sally Q. Yates, Deputy Att'y Gen., U.S. Dep't of Just., to All Component Heads and U.S. Att'ys (Sept. 9, 2015) [hereinafter Yates Memorandum], https://www.justice.gov/archives/dag/file/769036/download; *see also New DOJ Guidance*

The DOJ's new policy would emphasize the identification of the culpable individuals in corporate individual investigations, while also instituting a strict cooperation credit policy that would require corporations to provide *all* relevant facts about the individuals involved in corporate misconduct to receive *any* cooperation credit in civil and criminal cases.[73] In support of this updated recommendation, Yates cited multiple reasons for identifying individual wrongdoers: "[I]t deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system."[74] In 2018, however, Deputy Attorney General Rod J. Rosenstein stated that the DOJ would take a step back from the rigid approach set forth in the Yates Memo because "the policy was not strictly enforced in some cases because it would have impeded resolutions and wasted resources."[75] Mr. Rosenstein announced that the policy would be revised "to restore some of the discretion that civil attorneys traditionally exercised."[76] The future of the Yates Memo is uncertain,[77] and Mr. Rosenstein's remarks could imply that the DOJ is returning to a more "business-friendly" enforcement.[78]

### *B. Achieving Criminal Law's Fundamental Objectives*

Punishment generally has five recognized justifications and purposes: deterrence (both specific and general), incapacitation, rehabilitation, restitution, and retribution.[79] In the area of corporate white-collar crime, observers sometimes claim that deterrence is the only relevant objective.[80] However,

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*Puts Emphasis on Identifying Culpable Individuals in Corporate Internal Investigations*, SIDLEY (Sept. 11, 2015), https://www.sidley.com/en/insights/newsupdates/2015/09/new-doj-guidance-puts-emphasis-on-identifying.

73 Yates Memorandum, *supra* note 72.

74 *Id.*

75 Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

76 *Id.*

77 *See* Patrick F. Linehan, Galen Kast & Elizabeth Pericak Ginsburg, *What Lies Ahead for the Yates Memo?*, 5 PRATT'S GOV'T CONTRACTING L. REP. 201 (2019).

78 *See id.* at 204*; see also* Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1605 (2018); *DOJ Announces Important Changes to Yates Memo*, SIDLEY (Nov. 30, 2018), https://www.sidley.com/en/insights/newsupdates/2018/11/doj-announces-important-changes-to-yates-memo.

79 *See generally* Fisse, *supra* note 45 (discussing the justifications of punishment in the context of corporate criminal law); *see also* STANTON WHEELER, KENNETH MANN & AUSTIN SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 10 (1988) ("[S]ome minimal consensus on the legitimate purposes of sentencing has been reached—the usual litany includes deterrence, incapacitation, rehabilitation, and some form of either 'desert' or 'retribution.'").

80 Fisse, *supra* note 45, at 1146 (of "the traditional utilitarian aims of individual criminal law, . . . deterrence is the only one that is important in corporate criminal law"); *see also Regulating Corporate Behavior*, *supra* note 45, at 1236.

trends show that merely focusing on deterrence, particularly through the avenue of regulatory fines, is unsuccessful.[81] Therefore, a more holistic outlook claims that "a broader view of the goals of corporate criminal law should be adopted" in order to attain the goal of effectively combatting white-collar crime.[82] As the existing prosecutorial scheme currently functions, these broader objectives are not met.

### 1. General Deterrence

One of the primary justifications for imposing a punishment on a criminal is that it will deter both the defendant and others from engaging in future criminal acts because the cost of committing a crime will exceed the benefit. General deterrence is the imposition of a punishment that serves "to discourage people from committing crime."[83] It is the idea that when an observer reads the newspaper and sees the punishment that John Q. Public received for committing a certain crime, they would think to themselves, "I am never going to do that." This justification is often cited by judges when conferring punishments on defendants.

Take, for example, the sentencing of a defendant who conducted the largest private Ponzi scheme in history. According to charging documents, based on the amounts in the accounts of the firm's 4800 clients, the fraud's size was estimated at around $64.8 billion. Prosecutors recommended a sentence of fifty years, which would effectively serve as a life sentence for the seventy-one-year-old man. The judge disregarded the prosecutor's recommendation and sentenced the defendant to the statutory maximum: 150 years behind bars. That defendant was Bernie Madoff.[84]

When imposing the sentence, Judge Denny Chin referenced the deterrent effect the punishment would have on the public, highlighting the sentence's importance to others.[85] "[T]he strongest possible message must be sent to those who would engage in similar conduct that they will be caught and that they will be punished to the fullest extent of the law."[86] If the message is received by its intended audience, "then deterrence provides a meaningful avenue to ensure that punishments reflect the judicial goal of

81 Fisse, *supra* note 45, at 1243; *see* Peter J. Henning, *Is Deterrence Relevant in Sentencing White-Collar Criminals?*, 61 WAYNE L. REV. 27, 27–29 (2015).

82 Fisse, *supra* note 45, at 1145.

83 *General Deterrence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

84 *See* Robert Frank, Amir Efrati, Aaron Lucchetti & Chad Bray, *Madoff Jailed After Admitting Epic Scam*, WALL ST. J. (Mar. 13, 2009), https://www.wsj.com/articles/SB123685693449906551; Martha Graybow, *Madoff Mysteries Remain as He Nears Guilty Plea*, REUTERS (Mar. 11, 2009), https://reut.rs/2NraRpq; Diana B. Henriques, *U.S. Proposes 150 Years for Madoff*, N.Y. TIMES (June 26, 2009), https://nyti.ms/30U49vu.

85 Transcript of Sentencing Hearing at 47, United States v. Madoff, No. 09-CR-213 (S.D.N.Y. June 29, 2009) [hereinafter Madoff Sentencing], https://www.justice.gov/sites/default/files/usao-sdny/legacy/2012/04/16/20090629sentencingtranscriptcorrected.pdf.

86 *Id.*

preventing future crimes regardless of whether there is any real impact on those who might succumb to the temptation to commit a crime."[87]

The argument for imposing fines as punishment for corporate white-collar misconduct is that the nonfinancial impact of such fines on the company's image, brand, and reputation would deter others from committing similar crimes.[88] However, because of the widespread negative publicity across the entire financial sector, the brand impact on major financial institutions is nominal. One would be hard-pressed to find a major bank that has not engaged in criminal behavior similar to that in the examples of Deutsche Bank and HSBC provided above. Take, for example, the brand and image of BNP Paribas, the world's ninth-largest bank by assets.[89] In 2014, the bank was investigated for their involvement in a massive money laundering scheme.[90] BNP Paribas actively concealed its transactions for clients in Sudan, Iran, and Cuba, countries on which the United States placed economic sanctions.[91] BNP Paribas served as the "central bank for the government of Sudan," and concealed its activity in order to avoid detection.[92] BNP actively "stripp[ed] information from wire transfers so they could pass through the U.S. system without raising red flags."[93] As a result of this behavior, BNP paid a fine of $8.9 billion to regulators.[94] One would think that such behavior would shock the public and destroy the community's faith in the bank. Instead, business went on as usual. In fact, excluding the fine, the bank's net income rose 8% from 2014 to 2015 and 15.2% from 2015 to 2016.[95] BNP's stock price tells a similar story. Although the stock fell when news of the fine initially broke, the stock price fully recovered and ended up rising 21.8% from the beginning of 2015 to the end of 2016, compared to the

87 Henning, *supra* note 81, at 32–33.

88 *See, e.g.*, John Armour, Colin Mayer & Andrea Polo, *Regulatory Sanctions and Reputational Damage in Financial Markets*, 52 J. FIN. & QUANTITATIVE ANALYSIS 1429, 1429 (2017) ("We find that reputational losses are nearly nine times the size of fines."); Thomas Sehested, *Compliance Can Make or Break Your Company's Reputation*, FORBES (July 10, 2018), https://www.forbes.com/sites/forbestechcouncil/2018/07/10/compliance-can-make-or-break-your-companys-reputation/.

89 *See* Zarmina Ali, *The World's 100 Largest Banks, 2020*, S&P GLOB. MKT. INTEL. (Apr. 7, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/the-world-s-100-largest-banks-2020-57854079.

90 *See* Jennifer Rankin, *BNP Paribas Braced for $8.9bn Fine*, THE GUARDIAN (June 30, 2014), https://www.theguardian.com/business/2014/jun/30/bnp-paribas-fine-us-justice-department.

91 *Id.*; Nate Raymond, *BNP Paribas Sentenced in $8.9 Billion Accord over Sanctions Violations*, REUTERS (May 1, 2015), https://reut.rs/3cNevm6.

92 Raymond, *supra* note 91.

93 *Id.*

94 *Id.*

95 *See* BNP PARIBAS, CONSOLIDATED FINANCIAL STATEMENTS: YEAR ENDED 31 DECEMBER 2015 (2016); BNP PARIBAS, CONSOLIDATED FINANCIAL STATEMENTS: YEAR ENDED 31 DECEMBER 2016 (2017).

S&P's gain of only 9.5% in that same timeframe.[96] BNP's nonfinancial brand image appeared to be relatively unimpaired as well. In 2015, the same year the fine was incurred, BNP Paribas served as the official sponsor of the French Open, one of the most prestigious Grand Slam tournaments.[97] Although BNP was paying billions of dollars in fines to U.S. regulators for doing business with sanctioned countries, the bank's logo was prominently displayed under the lights at Roland-Garros.[98]

Furthermore, from a public image perspective, agreeing to pay a fine for alleged wrongdoing is more preferable to the bank than being forced to draw out an uncertain and embarrassing extended trial. "Large corporations have demonstrated a willingness to pay eye-popping sums, at [their] shareholders' expense."[99] This principle makes sense for "[p]rosecutors with limited resources, no matter how dedicated to justice they may be."[100] Prosecutors "can't ignore the attractions of such negotiated settlements: more headlines, more money for victims and federal coffers, less risk of failure, and better statistics with which to impress bosses and potential employers in the private sector."[101] However, such agreements protect banks from the bad publicity that might occur if they were instead prosecuted. "If executives can buy impunity using shareholders' money, punishment loses its deterrent effect."[102] As such, more severe action must be taken to ensure the general deterrent effect of white-collar criminal enforcement is met.

### 2. Specific Deterrence, Incapacitation, and Rehabilitation of the Offender

Specific deterrence, in contrast with general deterrence, "pertains to the effects of the legal punishment on those who have suffered it."[103] In other words, specific deterrence has the goal of discouraging the person who committed the wrongdoing from committing it again in the future. Incapacitation seeks to prohibit the wrongdoer from performing future wrongful acts, whereas rehabilitation focuses on the reformation and restoration of the criminal offender. For the purposes of corporate white-collar crimes, since each of these justifications is focused on the individual offender, the objectives of specific deterrence, incapacitation, and rehabilitation go hand in hand. Together, these justifications hope to achieve the ultimate objective of

96 *BNP Paribas SA (BNP.PA)*, YAHOO! FIN., https://finance.yahoo.com/quote/BNP.PA (last visited Nov. 4, 2020).

97 *See French Open Serves up Renewal with Main Sponsor*, SPORTBUSINESS SPONSORSHIP (Feb. 14, 2017), https://sponsorship.sportbusiness.com/news/french-open-serves-up-renewal-with-main-sponsor/.

98 *Id.*

99 Editorial Board, *The Case of the Missing White-Collar Criminal*, BLOOMBERG (June 22, 2014), https://bloom.bg/3bWASGu.

100 *Id.*

101 *Id.*

102 *Id.*

103 Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RSCH. CRIM. & DELINQ. 123, 123 (1993).

reducing the criminal's future misconduct.[104] The current approach to white-collar criminal enforcement of banks does not adequately achieve any of these justifications.

In corporate white-collar crime, there are two "individuals" that punishment is intended to deter: the corporation and the individual. Levying huge fines against banks fails on both counts. As discussed earlier, consider the recidivism rates of major banks, this time viewed through the lens of J.P. Morgan Chase. Within the last two decades, the bank paid over $135 million in fines for aiding and abetting Enron's securities fraud;[105] $410 million in penalties for illegal manipulation of the energy market;[106] $5.3 million to settle allegations that it violated Cuban Assets Control Regulations, Iranian sanctions, and Weapons of Mass Destruction sanctions;[107] and $135 million for charges of improper handling of "pre-released" American depository receipts.[108] The list goes on and on. If J.P. Morgan's "rap sheet" was that of an individual offender, the DOJ would surely design a punishment that deters and prohibits the offender from conducting future wrongdoing.

Current punishment schemes are just as ineffective in deterring the individual actors who commit the wrongdoing. Banks go to great lengths to shield their corporate executives, choosing to "happily pay a big fine as long as senior managers are protected."[109] By using DPAs, banks agree to pay large fines, to which prosecutors, in return, agree not to file official charges. In such cases, "it is difficult for a prosecutor ever to justify the release of the evidence which might suggest wrongdoing."[110] With banks regularly agreeing to pay such fines in order to forgo criminal charges, the individual offenders often remain shrouded behind a cloud of anonymity.

After the exposure and fine of Deutsche Bank's illicit relationship with Jeffrey Epstein, the bank "declined to publicly identify any individuals involved—and the authorities didn't demand it."[111] The consent order that was made available to the public used references like "RELATIONSHIP

104 *See* Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 43 (2008).

105 Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges J.P. Morgan Chase in Connection with Enron's Accounting Fraud (July 28, 2003), http://www.sec.gov/litigation/litreleases/lr18252.htm.

106 *See* Scott DiSavino, *JPMorgan to Pay $410 Million to Settle Power Market Case*, REUTERS (July 30, 2013), https://reut.rs/3eX6zSh.

107 Pete Schroeder, *J.P. Morgan to Settle Allegations of Violating Sanctions: U.S. Treasury*, REUTERS (Oct. 5, 2018), https://reut.rs/2QhViBC.

108 Press Release, U.S. Sec. & Exch. Comm'n, *JPMorgan to Pay More Than $135 Million for Improper Handling of ADRs* (Dec. 26, 2018), https://www.sec.gov/news/press-release/2018-306.

109 Stewart, *supra* note 1.

110 Jack Katz, *Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes*, 13 LAW & SOC'Y. REV. 431, 457 n.17 (1979) (quoting Richard L. Thornburgh, Assistant Att'y Gen., Address to the State Bar of Wisconsin at Its Annual Meeting (June 18, 1976)).

111 Stewart, *supra* note 1.

MANAGER-1 and EXECUTIVE-2" to identify the guilty culprits.[112] However, through the use of investigative techniques, the *New York Times* was able to identify the previously unnamed parties.[113] While offenders across the criminal spectrum face irreparable injury from punishments they receive, the individuals behind Deutsche Bank's $150 million fine went largely unharmed. One offender, Jan Ford, Deutsche Bank's head of compliance in the Americas, even remained in her position with the bank, despite her hands-on involvement in Mr. Epstein's relationship with the bank.[114] Paul Morris, the relationship manager who brought Epstein into the bank, went to work as a private wealth adviser at Merrill Lynch.[115] Charles Packard, the head of the bank's American wealth-management division and the supervisor of Mr. Morris, went on to join Bridgewater Associates, the hedge fund founded by Ray Dalio.[116] By avoiding personal responsibility and accountability, such executives remained undeterred, unprohibited, and unrehabilitated from committing future wrongdoing.

### 3. Restitution

The next justification for punishment is the restoration of the victims. Judge Chin, when sentencing Bernie Madoff to 150 years imprisonment, highlighted the symbolic importance of the severe term for the victims.[117] In Madoff's case, the victims included individuals from "all walks of life," comprised of charities and academic institutions, pension funds and retirement accounts, the rich, and the not-so-rich.[118] The detrimental and widespread cost of white-collar crime is severe, and it has the ability to leave victims devastated. In the instances of white-collar crimes that are traceable to the injured victims, restitution is, generally, adequately satisfied. A significant percentage of the fines levied against the banks goes to the restitution of the victims who were harmed by those actions, as long as those victims are identifiable.[119] However, restitution becomes much more challenging when victims are not as easily identifiable. Relevant restitution statutes define victims as

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* Bridgewater's firm culture has been likened to that of a cult, one where employees, under Dalio's insistence, should do "whatever it takes to make the company great." Stefan Stern, Opinion, *Time to Toughen Up and Embrace the Joys of Conflict*, FIN. TIMES (Jan. 14, 2008), https://on.ft.com/2ONeF4Z; *see* John Cassidy, *Mastering the Machine*, NEW YORKER (July 18, 2011), https://www.newyorker.com/magazine/2011/07/25/mastering-the-machine.

117 Madoff Sentencing, *supra* note 85, at 47–49.

118 *Id.* at 47.

119 *See, e.g.*, Jeff Blumenthal, *TD Bank Fined $122M for Enrolling Customers in Overdraft Service Without Consent*, PHILA. BUS. J. (Aug. 20, 2020), https://www.bizjournals.com/philadelphia/news/2020/08/20/td-bank-fined-122m-for.html; *North American Banks Pay High Price for Governance Failings*, FITCHRATINGS (Oct. 29, 2020), https://www.fitchratings.com/research/banks/north-american-banks-pay-high-price-for-governance-failings-29-10-2020.

those that are "*directly* and *proximately* harmed as a result of the commission of an offense."[120] The complication in white-collar cases, as described earlier, is that it is difficult to trace the behavior of large international corporate financial fraud to the individuals that were personally harmed.

Consider, for example, health care fraud in the form of upcoding, providing unnecessary services, or charging patients for phantom services not provided.[121] The ultimate harm suffered by these offenses can take the form of increased health care premiums, more expensive employer-provided health coverage plans, and the deteriorating quality of health care coverage.[122] These harms are extreme when considering the prevalence of such crimes across the nation, but they can be attenuated and difficult to assign to individual defendants. Imagine the DOJ was able to prove, beyond a reasonable doubt, that health care coverage across the country is more expensive and lower in quality because of one instance of such a crime. It would be a significant leap from there to assign this widespread harm to one individual defendant.

Additionally, courts will generally award restitution only in cases with monetary damages. The damages of societal loss of faith in our judicial system or the harm indirectly caused by the deterioration of health care coverage would be difficult to monetize in the form of harm suffered by an individual victim. Moreover, if restitution were the only justification of punishment adequately met, without the elements of deterrence, incapacitation, or rehabilitation, the criminal behavior is likely to recur and continue harming victims again in the future.

### 4. Retribution

Retribution is the traditional notion of punishment that a criminal must be punished in proportion to their blameworthiness, or their "moral desert." Retributivism, as a principle of punishment, traces its roots to Immanuel Kant's *The Metaphysics of Morals*, written in 1785.[123] Retribution was another principle referenced in the sentencing of Bernie Madoff. When imposing the 150-year sentence, Judge Chin stated that "the message must be sent that Mr. Madoff's crimes were extraordinarily evil, and that this kind of irresponsible manipulation of the system is not merely a bloodless financial crime that takes place on paper, but that it is instead, . . . one that takes a staggering human toll."[124] He went on to state that "[t]he symbolism is important because the message must be sent that in a society governed by the rule of

120 18 U.S.C. § 3663(a)(2) (2018) (emphasis added).

121 *See supra* Section I.A.

122 *Id.*

123 Guyora Binder, *Punishment Theory: Moral or Political?*, 5 BUFF. CRIM. L. REV. 321, 350 (2002); *see* IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE (John Ladd trans., Hackett Publ'g Co. 2d ed. 1999).

124 Madoff Sentencing, *supra* note 85, at 47.

law, Mr. Madoff will get what he *deserves*, and that he will be punished according to his *moral culpability*."[125]

Retribution in many white-collar cases, however, does not look like the story of Bernie Madoff. Compare this to the story of another white-collar criminal, Ty Warner. Warner founded the company that sold "Beanie Babies," the plush toys that swept the nation in the late 1990s.[126] In 2013, Mr. Warner pleaded guilty to tax evasion, using a hidden Swiss bank account to evade over $5 million in taxes.[127] While the prosecutor recommended a prison sentence, the judge imposed no jail time. Instead, the judge delivered a modest probationary period, community service, and a fine that was less than two percent of the amount he evaded in taxes.[128] In his sentencing, the judge pointed to Mr. Warner's philanthropic history and "private acts of kindness."[129] The judge considered "whether society would be better off with Mr. Warner in jail," and determined that the world would be better served from Mr. Warner "utilizing his talents and beneficience [sic]" elsewhere.[130] The Seventh Circuit affirmed his sentence.[131]

At times, however, courts have rejected the premise that a white-collar criminal deserves less jail time because of their social status. In another white-collar case, Matthew Sample pleaded guilty to one count of fraud and two counts of wire fraud.[132] Sample diverted over $1 million from investors for his personal use.[133] Some victims "lost their entire life savings, others were unable to retire as planned, and many [suffered] profound emotional distress."[134] The prosecutor's recommended sentence was between six and eight years. Instead, the judge sentenced Mr. Sample to no prison time. "I want you to keep your job, because I want you to have a good job to pay these victims back," the federal district court judge told the defendant, imposing instead a five-year term of probation.[135] The district judge was not ambiguous about the effect that the defendant's wealth had on his sentence: "[I]f Sample did not have his 'current job and [his] ability to make these payments, I might be doing something different' and . . . 'one of the reasons I'm

125 *Id.* (emphasis added).

126 *See* Henning, *supra* note 81, at 29; Anne Vandermey, *Lessons from the Great Beanie Babies Crash*, FORTUNE (Mar. 11, 2015), https://fortune.com/2015/03/11/beanie-babies-failure-lessons/.

127 *Henning*, *supra* note 81, at 29.

128 *Id.* at 29–30; *see* Janet Novack, *Appeals Court Decides Beanie Babies Billionaire Tax Evader Ty Warner Won't Go to Jail*, FORBES (July 11, 2015), https://www.forbes.com/sites/janetnovack/2015/07/11/appeals-court-decides-beanie-babies-billionaire-tax-evader-ty-warner-wont-go-to-jail/?sh=115906b71bb7.

129 Henning, *supra* note 81, at 30 (quoting Sentencing Hearing Transcript at 50–51, United States v. Warner, No. 13-CR-731 (N.D. Ill. Jan. 14, 2014), ECF No. 33).

130 *Id.*

131 *Id.*

132 United States v. Sample, 901 F.3d 1196, 1197 (10th Cir. 2018).

133 *Id.*

134 *Id.* at 1197–98.

135 *Id.* at 1198.

willing to place the defendant on probation was because of this job and his earning capacity.' "[136]

On appeal, the Tenth Circuit soundly rejected this argument. "We are puzzled by the court's implicit suggestion that if the defendant were poor and unemployed, he might get a prison term."[137] To support this contention, the appellate court cited circuits from around the country.[138] The Tenth Circuit highlighted a Seventh Circuit case that noted "[b]usiness criminals are not to be treated more leniently than members of the 'criminal class' just by virtue of being regularly employed or otherwise productively engaged in lawful economic activity."[139] Therefore, this appellate court ruling demonstrated that it is critical for enforcement to recognize and account for the moral desert of the offenders based on retributivist ideals. Further, the enforcement should not be modified based on the social class and status of the offender.

## III. Reevaluating the Tools That Undermine Effective Criminal Enforcement

### *A. Suspicious Activity Reports (SARs)*

It is clear that banks fail to stop the transfer of money that stems from criminal activity, but, if not even more worrisome, the government is failing to effectively regulate the banks. The Financial Crimes Enforcement Network ("FinCEN") is the government organization within the Department of Treasury tasked with the safeguarding of the financial system from illicit use, combatting money laundering, preventing terrorist financing, and "promot[ing] national security through the strategic use of financial authorities and the collection, analysis, and dissemination of financial intelligence."[140] One of the tools that FinCEN employs to achieve this objective is the use of Suspicious Activity Reports (SARs), uniform reports that allow financial institutions to report suspicious activity to the organization. When reporting a transaction, institutions can tag a specific transaction with a categorical description, such as "Fraud," "Money Laundering," "Terrorist Financ-

136 *Id.* (first alteration in original).

137 *Id.* at 1199.

138 *Id. See, e.g.*, United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013) ("The Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status.").

139 *Sample*, 901 F.3d at 1200 (quoting United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999)). Judges recognize the difficulty in balancing each of these moral justifications when sentencing. *See* Wheeler et al., *supra* note 79, at 165 ("In sentencing white-collar offenders, judges are torn between leniency and severity. While deterrence pulls judges in the direction of incarceration, consideration of the effects of incarceration on the offender and on his immediate social network pulls in the opposite direction.").

140 *Mission*, Fin. Crimes Enf't Network, https://www.fincen.gov/about/mission (last visited Mar. 26, 2021).

ing," and/or "Casinos."[141] The quantity of SARs submitted to FinCEN is enormous. According to Dynamic Securities Analytics, 2.3 million SARs were filed in 2019, representing a 6% increase from the previous year.[142] Depository institutions filed 48% of all SARs.[143] In order to incentivize financial institutions to file SARs, federal laws and FinCEN offer banks immunity for the subject matter contained in the reports.[144] SARs are also rarely released to the public, but they can become available through the Freedom of Information Act.[145]

In recent news reports, journalists were able to obtain thousands of SARs, claiming that they offered "an unprecedented view of global financial corruption, the banks enabling it, and the government agencies that watch as it flourishes."[146] Specifically, the documents purportedly "expose the hollowness of banking safeguards," and the ease by which banks can manipulate their reporting requirements.[147] Documents showed that SARs could be used as a way for banks to appease government regulators while still allowing for the money underlying those transactions to be moved, which allowed the bank to collect its fees.[148] Examples of the reported transactions include Standard Chartered moving money on behalf of a Dubai-based business that was accused of laundering cash for the Taliban;[149] Bank of America, Citibank, J.P. Morgan Chase, American Express, and other banks processing millions of dollars for the family of Viktor Khrapunov, even after Interpol issued a Red Notice for his arrest;[150] and HSBC allowing WCM777, a Ponzi

141 FIN. CRIMES ENF'T NETWORK, THE FINCEN SUSPICIOUS ACTIVITY REPORT: INTRODUCTION & FILING INSTRUCTIONS 11, https://www.fincen.gov/sites/default/files/shared/TheNewFinCENSAR-RecordedPresentation.pdf.

142 Alison Jimenez, *2019 SAR Insight: Suspicious Activity Report Annual Analysis*, DYNAMIC SEC. ANALYTICS, INC. (Jan. 29, 2020), https://securitiesanalytics.com/2019-sar-insight-suspicious-activity-report-annual-analysis/.

143 *Id.*

144 31 U.S.C. § 5318(g)(3) (2018) (a financial institution, and its directors, officers, employees, and agents, that make a disclosure of any possible violation of law or regulation, including in connection with the preparation of suspicious activity reports, "shall not be liable to any person under any law or regulation of the United States, any constitution, law, or regulation of any State or political subdivision of any State, or under any contract or other legally enforceable agreement (including any arbitration agreement), for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or any other person identified in the disclosure").

145 *See* Alex C. Lakatos & Mark G. Hanchet, *Confidentiality of Suspicious Activity Reports*, 124 BANKING L.J. 794, 795 (2007); *see also* 31 U.S.C. §§ 5318(g)(2)(A)(i), 5321–22 (2018) (explaining that SARs cannot be disclosed to anyone and providing sanctions for violations).

146 *The FinCEN Files*, *supra* note 62.

147 *Id.*

148 *Id.*

149 *Id.*

150 *Id.* Khrapuvnov, the former mayor of Kazakhstan's most populous city, "was later convicted in absentia on charges that included bribe-taking and defrauding the city through the sale of public property." *Id.*

scheme that stole over $80 million from investors, to move more than $15 million in assets.[151] The most alarming concern with each of these examples was not just that the banks allowed the transaction to occur, but that they allowed them to occur after having received notice (actual or constructive) that these individuals were persons involved in criminal activity. Rather than freezing the transactions, the bank "kept the money moving and kept collecting their fees," while making sure to file the SARs necessary to comply with FinCEN's reporting requirements.[152]

In response to this exposé, the Bank Policy Institute (BPI) responded by claiming that the report disregarded the proper use and purpose of SARs.[153] Generally, the activity that causes a SAR to be reported to the government needs only to be "suspicious" and does not reflect any kind of finding by the bank that criminal activity ensued. Based on studies BPI has conducted, only about four percent of SARs result in any follow-up from law enforcement, which means that closing customer accounts in every instance in which the bank identifies suspicious activity is untenable.[154] Doing so would, over time, block off an entire part of the world from crucial access to the world's financial system.[155] Brian Reardon, a former White House official, argues that the current ineffectiveness of FinCEN Reports are not a reflection of the design of SARs themselves, but rather how the government is using and analyzing them.[156]

One thing is clear: the use of SARs alone is not sufficient to achieve FinCEN's purpose and objective. In a recent report, the Government Accountability Office recommended that "FinCEN develop policies and procedures to promote greater law enforcement use of the Bank Secrecy Act reports."[157] While a step in the right direction, this recommendation should be strengthened by shifting FinCEN's current approach of solely relying on reports submitted by the financial institutions to requiring a higher level of holistic compliance on the banks' parts. This can be achieved by looking to more than just financial fines as remedies for a bank that fails to effectuate an adequate internal compliance program.

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151 *Id.* WCM777 "stole at least $80 million from investors, mainly Latino and Asian immigrants, and the company's owner used the looted funds to buy two golf courses, a [7000]-square-foot mansion, a 39.8-carat diamond, and mining rights in Sierra Leone." *Id.*

152 *Id.*

153 *See* BANK POL'Y INST., THE TRUTH ABOUT SUSPICIOUS ACTIVITY REPORTS (2020), https://bpi.com/wp-content/uploads/2020/09/The-Truth-about-Suspicious-Activity-Reports.pdf.

154 *Id.*

155 *Id.*

156 Brian Reardon, Opinion, *REARDON: Beneficial Ownership and the FinCEN Files*, DAILY CALLER (Sept. 25, 2020), https://dailycaller.com/2020/09/25/reardon-beneficial-ownership-and-the-fincen-files/.

157 *Anti–Money Laundering: Opportunities Exist to Increase Law Enforcement Use of Bank Secrecy Act Reports, and Banks' Costs to Comply with the Act Varied*, U.S. GOV'T ACCOUNTABILITY OFF. (Sept. 22, 2020), https://www.gao.gov/products/gao-20-574.

Consider the example of BNP Paribas, mentioned earlier.[158] In 2014, BNP paid a monetary fine of $8.9 billion for failing to prevent billions of dollars in money laundering transactions. Even though the fine BNP Paribas received was considered steep when compared against those levied against many of their peers, it was still a "discount" when considering the number of financial transactions BNP allowed.[159] When assessing the $8.9 billion fine, prosecutors cited approximately $30 billion in financial transactions, meaning the fine was less than thirty cents to the dollar of the illicit transactions that BNP actively stripped identifying information from to avoid detection.[160] Regulators should have sought a much more effective penalty in the form of temporary license revocation. "The only penalty that would have permanently damaged BNP Paribas would have been a ban on clearing dollar transactions."[161] Even if temporary, it would force BNP to clean up their procedures in place to detect and deter money laundering.

As is standard in fines across corporate white-collar penalties, the fine placed on BNP Paribas did not deter future wrongdoing. In 2017, BNP Paribas was again fined over weaknesses in anti–money laundering controls.[162] This fine was for conduct uncovered during an investigation conducted in 2015, only one year after the $8.9 billion fine was imposed.[163] Only two years after 2017 fine, BNP Paribas was again fined for shortcomings in their anti–money laundering program and supervisory failures.[164] When the financial benefits of doing business as is outweighs the costs of compliance, the current systems in place are unlikely to change.

When the government threatens monetary fines when a bank fails to effectively execute heightened compliance requirements, banks are happy to pay the fines if they are less than the cost of compliance. This is particularly true if banks can use SARs to acquiesce FinCEN by submitting reports every time they detect a potentially suspicious transaction, but doing little else. If failure of internal controls implementation would carry with it more severe nonfinancial penalties (such as a ban on clearing dollar transactions), compliance is much more likely to follow. Such a loss of license would directly impair a bank's relationship with customers, and ultimately have a long-term impact on the institution's bottom line, a result that current fines do not have. By tipping the financial scale in favor of implementing a more effective

158 *See supra* subsection II.B.1.

159 *See* Nils Pratley, *BNP Paribas's $8.9bn Fine is Hefty but It's Still Only a Third of the Dodgy Deals*, THE GUARDIAN (June 30, 2014), https://www.theguardian.com/business/nils-pratley-on-finance/2014/jun/30/bnp-paribas-us-banking-fine.

160 *Id.*

161 *Id.*

162 *See BNP Paribas Fined over Weaknesses in Anti-Money Laundering Controls*, REUTERS (June 2, 2017), https://reut.rs/30U36f2.

163 *See id.*

164 *See FINRA Fines BNP Paribas $15 Mln for Anti-Money Laundering Program Failures*, NASDAQ (Oct. 24, 2019), https://www.nasdaq.com/articles/finra-fines-bnp-paribas-%2415-mln-for-anti-money-laundering-program-failures-2019-10-24.

internal control system, banks would be more incentivized to combat the control failures that result in the financing of crimes all over the world.

### *B. Deferred Prosecution Agreements*

DPAs are contractual agreements between the United States government (e.g., the DOJ) and a defendant who is facing a criminal or civil charge.[165] Under such an agreement, the government agrees to postpone prosecution to allow the defendant to demonstrate good conduct, cooperation, and remediation.[166] If a defendant complies with the terms of the DPA, the agency would move to dismiss the relevant charges and not pursue the matter again.[167] DPAs date back to the early 1900s and were used for the purposes of offering first-time juvenile offenders with no criminal history a method of obtaining counseling and job-placement programs in lieu of strict prosecution.[168] DPAs for the purpose of handling serious misconduct by corporate entities and the individuals that run them is a much more recent phenomenon, however, with the first such DPA signed in 1994.[169] Each party's incentives for entering into a DPA is clear. The government is able to obtain a guilty plea and monetary fine while avoiding the significant costs and risks associated with a long and drawn-out trial. For the corporation, a DPA also represents less risk and cost by alleviating the threat of criminal prosecution. The DOJ hails DPAs as "an important middle ground between declining prosecution and obtaining the conviction of a corporation."[170] Many other countries, however, choose not to employ DPAs "because the agreements fail to adhere to basic rule-of-law principles such as transparency of process, judicial oversight, public interest accountability, and separation-of-powers."[171]

While DPAs can be seen as a win-win between the prosecutor and defendant, the loser of such an agreement is the public. When the government enters into a DPA, "the government acts as accuser, judge, and jury."[172] In the white-collar context particularly, DPAs have been criticized for making a "mockery of [America's] criminal justice system" when considering the lenient deals being offered to some defendants.[173] While there is no easy solution, there are ways to constructively reform the DPA process. One solution

165 *Deferred Prosecution Agreement (DPA)*, Westlaw Glossary (database updated 2021).

166 *Id.*

167 *Id.*

168 Peter R. Reilly, *Sweetheart Deals, Deferred Prosecution, and Making a Mockery of the Criminal Justice System: U.S. Corporate DPAs Rejected on Many Fronts*, 50 ARIZ. ST. L.J. 1113, 1115–16 (2018).

169 *Id.*

170 U.S. DEP'T OF JUST., UNITED STATES ATTORNEYS' MANUAL § 9-28.200 (2020), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.200.

171 Reilly, *supra* note 168, at 1116.

172 *Id.* at 1117.

173 Carrick Mollenkamp & Brett Wolf, *Exclusive: HSBC Might Pay $1.8 Billion Money Laundering Fine – Sources*, REUTERS (Dec. 2, 2012), https://reut.rs/38PJFrU (quoting Jimmy Gurulé, Professor of Law at Notre Dame Law School).

is for U.S. Attorneys to become less reliant on DPAs in the enforcement of white-collar guidelines. Another, more extreme, solution is to eliminate DPAs entirely. Proponents of this solution argue that "[i]f a case is too flimsy to file charges, [prosecutors should] drop it."[174] The recommendation below, however, lies somewhere between these two proposals and involves the role of the judge in the DPA process.

First, it is critical to recognize a key distinction between a DPA and a regular plea agreement: the approval of the court. DPAs and plea agreements are similar in many regards. They provide prosecutors with an alternative to pursuing trial and are both types of alternative dispute resolution (ADR). However, while courts can review plea agreements to evaluate the sufficiency of their substantive terms, that review is absent in the DPA process.[175] The current role of courts in the DPA approval process is clear: "[A] district judge is not permitted to reject the deal due to disagreement with its substantive terms."[176] One federal district court when discussing its lack of meaningful judicial review during a DPA approval hearing stated, "I have absolutely no choice in this matter, no discretion whatsoever . . . . I'm obliged to swallow the pill, whether I like it or not."[177] Thus, judges have been forced to approve DPAs even in instances where it would "provide insufficient deterrence to companies which otherwise would permit fraud, or fail to prevent fraud, by its senior officials in the future."[178] This jurisprudence stems from two federal appellate court rulings: *United States v. Fokker Services B.V.* and *United States v. HSBC Bank USA*.[179] Revisiting this rule and homogenizing DPA and plea agreements in this manner would strengthen the effectiveness of DPA agreements. "Congress—or the Judicial Conference, which drafts changes to the rules of criminal procedure—can give judges specific powers to ensure that the deals adequately serve the public interest."[180]

In plea agreements, judges can, and do, get involved in the substantiality of the terms of the agreements. In *United States v. Orthofix, Inc.*, the district court judge rejected two plea agreements for failing to adequately protect public interest.[181] There, Judge William Young wrote that district courts

174 *The Case of the Missing White-Collar Criminal*, *supra* note 99.

175 Reilly, *supra* note 168, at 1117.

176 *Id.* at 1122.

177 *Id.* at 1117 (quoting Arraignment at 10, United States v. U.S. Bancorp, No. 18-cr-150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9).

178 *Id.* at 1122–23 (quoting Order at 2, United States v. Transp. Logistics Int'l Inc., No. 18-CR-00011 (D. Md. Apr. 2, 2018), ECF No. 10).

179 *Id.* at 1128; *see also* United States v. HSBC Bank USA, N.A., 863 F.3d 125 (2d Cir. 2017); United States v. Fokker Servs. B.V., 818 F.3d 733 (D.C. Cir. 2016).

180 *The Case of the Missing White-Collar Criminal*, *supra* note 99.

181 956 F. Supp. 2d 316, 320 (D. Mass. 2013); *see also* Reid J. Schar, Robert R. Stauffer, Tiffany M. Cartwright & Eddie A. Jauregui, *Court Rejects Corporate Plea Agreements for Failing to Sufficiently Protect the Public Interest*, JENNER & BLOCK (Aug. 21, 2013), https://jenner.com/system/assets/publications/12186/original/Court_Rejects_Corporate_Plea_Agreements_For_Failing_To_Sufficiently_Protect_The_Public_Interest–ATTORNEY_ADVERTISING.pdf?1377158483.

should take on "a more robust role in protecting the public interest when deciding whether to accept a corporation's guilty plea."[182] The order emphasized that "[s]entencing offenders is one of the . . . core responsibilities assumed by a federal district judge," and as such, they must "zealously" protect the public interest by ensuring that the agreement is not negotiated in the "shadow of the law."[183] Therefore, when presented with such an agreement, "the judge is dutybound to consider whether the recommended sentence would serve the public interest *before* deciding whether to accept [it]."[184] Judge Young concluded by stating that this responsibility is especially important when the defendant in question is a corporation.[185] This was because "(1) it is difficult to assess the sincerity and capacity for rehabilitation of a corporation whose officers will change over time; and (2) large corporations have the capacity to 'wreak far more damage' than individual persons."[186]

Judges acting as representatives of the public interest is no foreign concept in our judicial system. For example, by involving the court as a representative of the public, the judiciary would serve in a capacity similar to the one in civil protective orders of documents exchanged by the parties in discovery. There, the judge may not "rubber stamp" an agreement, even if it is stipulated by both parties, because the judge serves as "the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request" for good cause.[187] The same principle should be applied to white-collar DPAs. Since the agreements, as currently designed and executed, are not achieving their purpose of adequately punishing corporate white-collar criminal conduct, a judge taking on the role as the protector of public interest would significantly enhance their effectiveness.

## Conclusion

White-collar crime imposes tremendous and severe costs on our society. The government's current approach to the criminal enforcement of financial institutions is ineffective and fails to adequately address the severity of such conduct. By entering into Deferred Prosecution Agreements the government is forgoing more effective penalties in exchange for admissions of guilt and massive fines that makes headlines, thereby failing to accomplish the fundamental objectives of punishment. When corporations agree to pay such fines, it is not the persons responsible for committing the illegal conduct who shoulder the burden, but, instead, the burden is dispersed among hundreds of thousands of innocent public shareholders. These fines do not deter the criminal conduct of either individual actors or the financial institu-

182 Schar et al., *supra* note 181.

183 *Orthofix*, 956 F. Supp. 2d at 320, 323 (footnote omitted).

184 *Id.* at 332.

185 *Id.* at 328–32.

186 Schar et al., *supra* note 181 (quoting *Orthofix*, 956 F. Supp. 2d at 331).

187 Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co, 178 F.3d 943, 945 (7th Cir. 1999).

tions the fines are levied against. These fines do not incapacitate or rehabilitate offenders. These fines also do not address the retributive aims of dispensing punishment based on the offender's moral desert.

As such, the government should amend its enforcement policies in two ways. First, FinCEN should place less emphasis on SARs, which have the ability to allow banks to file thousands of reports a year without having to address actual illicit conduct on the part of their clients. Instead, FinCEN should require financial institutions to have a holistic internal control system that is more adequately suited to address client misconduct. To enforce such a requirement, FinCEN should also use stricter enforcement penalties such as the revocation of bank clearing licenses until such internal controls are effectively designed and implemented. In addition, the judiciary should take on a more significant role as a representative of public interest in the DPA process. If judges had the ability to substantively review DPAs in this manner, prosecutors and corporations would be forced to find a sentence that acts in the best interest of the public. Implementing these solutions would incentivize financial institutions to more effectively combat white-collar crime and to deter not only the misconduct on the part of the banks, but also the crimes that these transactions fund around the world.