

12-31-2007

Of Breaches of the Peace, Home Invasions, and Securities Fraud

A. Christine Hurt

BYU Law School, hurtc@law.byu.edu

Follow this and additional works at: https://digitalcommons.law.byu.edu/faculty_scholarship

 Part of the [Business Organizations Law Commons](#), [Criminal Law Commons](#), and the [Securities Law Commons](#)

Recommended Citation

A. Christine Hurt, ?? ??????? ?? ??? ?????, ??? ?????????, ??? ????????? ?????, 44 AM. CRIM. L. REV. 1365 (2007).

This Symposium is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

REGULATION THROUGH CRIMINALIZATION

OF BREACHES OF THE PEACE, HOME INVASIONS, AND SECURITIES FRAUD

Christine Hurt*

I. INTRODUCTION

As a response to the corporate scandals of the first part of this decade, the federal government created new legislation and amended current laws¹ to punish corporate misconduct more severely. New crimes were created, and penalties for existing crimes were increased.² In addition, resources were shifted toward prosecuting corporate misconduct, reflecting the new priority placed on cleaning up U.S. boardrooms and restoring investor confidence in the U.S. capital markets.³ Revelations of earnings manipulation and other financial frauds at large publicly-held companies such as Enron Corp., WorldCom, Inc., Rite Aid, and HealthSouth Corp. shocked an already-slumping stock market reeling from the bursting of the technology bubble and the attacks of September 11, 2001. Personal stories of retirement accounts with disappearing assets as well as tales of employees with lost livelihoods filled the media, creating even more ill will toward companies and their wealthy executives under investigation.⁴

The most compelling narrative from this era focused on the employees of Enron

* Associate Professor of Law, Richard W. and Marie L. Corman Scholar, University of Illinois College of Law. The author would like to thank the organizers and participants in the Corporate Criminality: Legal, Ethical, and Managerial Implications conference hosted by the Georgetown Business Ethics Institute at the Georgetown University Law Center in March 2007. In addition, the author would like to thank Rob Beard for his excellent research assistance. © 2007, Christine Hurt.

1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections at 11, 15, 18, 28 and 29 U.S.C.).

2. For example, sentences for convictions for conspiracies to commit a federal offense are now tied to penalties proscribed for the conspired offense, instead of the previous flat five-year sentence. *See* 18 U.S.C. § 1349 (2004).

3. In 2002, President George W. Bush established the President's Corporate Fraud Task Force to coordinate the response of various agencies, including the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). With this task force came a \$24.5 million increase in the DOJ's budget for corporate fraud investigations and a seventy-three percent budget increase for the SEC. Alice Fisher et al., *Encouraging Corporate Responsibility Through Criminal Enforcement*, in THE PRACTITIONERS GUIDE TO THE SARBANES-OXLEY ACT VII-I-1 (John J. Huber, et al. eds., American Bar Association 2006).

4. John C. Roper, *Citigroup Agrees to \$2 Billion Settlement*, HOUS. CHRON., June 11, 2005, at A1 (reporting one example of a long-term employee and his wife who, in their sixties, "were counting on a 401(k) retirement plan largely based on Enron stock").

Corp. These employees, the story tells, were enticed to work at this innovative, maverick company by promises of Enron stock. In addition to stock grants, all employees who participated in the Enron 401(k) pension plan had large amounts of Enron stock with their holdings.⁵ Employees could direct their contributions into a menu of balanced investments, including Enron stock, although the matching contribution was made wholly in Enron stock.⁶ This strategy of encouraging employees to hold employer stock, which was well-touted in the business literature⁷ and allowed under the Employee Retirement Income Security Act of 1974,⁸ worked well to invest employees, at least short-term, with the growth of Enron. Elevators in the Enron building on Smith Street in downtown Houston had television screens that featured market news, with a stock ticker showing Enron's stock market price at all times. However, the story turns dark when, as officers knew that Enron's projects were failing and that outlooks were negative, chief executive officer Ken Lay urged employees at firm meetings to keep buying Enron stock.⁹ In a final cruel joke, administrative changes were made to the firm's retirement plan, effectively freezing employees' accounts so that they were unable to sell even non-employer contributed Enron stock at the time that bad news began to pour out of the company in the fall of 2001.¹⁰

5. See John H. Langbein, *What's Wrong with Employer Stock Pension Plans*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 487, 487-88 (Nancy B. Rapoport & Bala G. Dharan eds., Foundation Press 2004) (noting that under the terms of the Enron 401(k) plan, Enron would match one-half of an employee's contributions, but Enron's contribution would be entirely in Enron stock). Employees could sell the Enron stock contributed by the employer only after the employee reached her fiftieth birthday. See *id.* at 488 ("With respect to these match shares, the plan made the employee-participants into involuntary Enron shareholders until age fifty.").

6. See *id.* at 487-88.

7. See John C. Coffee, Jr., *Understanding Enron: It's About the Gatekeepers, Stupid*, 57 BUS. LAW. 1403, 1413 (2002) ("[D]uring the 1990s, executive compensation shifted from being primarily cash based to being primarily equity based.").

8. See Langbein, *supra* note 4, at 489 ("The ERISA failure that allowed the Enron employees' loss to occur is that ERISA contains an exception to its diversification requirement. ERISA allows certain types of [defined contribution] plans, including 401(k) plans, to permit and/or require employees to hold these large concentrations of employer stock in their plan accounts.").

9. Superseding Indictment at 31-32, *United States v. Lay*, 456 F. Supp. 2d 869 (S.D. Tex. July 7, 2004) (Cr. No. H-04-25 (S-2)), available at <http://news.findlaw.com/cnn/docs/enron/usvlay70704ind.pdf> (alleging that Lay told employees at an online forum on September 26, 2001 that "[s]ome [officers], including myself, have [bought additional Enron stock] over the last couple of months and others will probably do so in the future. . . . [m]y personal belief is that Enron stock is an incredible bargain at current prices," when Lay knew that Enron's financials contained a \$1.2 billion accounting error and that he had sold more stock than he had purchased in the previous months) [hereinafter Lay Indictment]. In addition, on October 23, 2001, Lay attended an all-employee meeting where he also gave a false picture of the company's finances. *Id.* at 32.

10. See *Retirement Insecurity: 401(k) Crisis at Enron before the Sen. Governmental Affairs Comm.*, 107th Cong. (2002) (statement of Sen. Joe Lieberman, Member, Sen. Governmental Affairs Comm.) available at <http://hsgac.senate.gov/020502lieberman.htm> ("In late October and early November of last year, because Enron was changing the outside administrator of its 401(k) plan, employees were locked into their 401(k) accounts for at least two weeks during a volatile period in the company's stock price, making them powerless to sell their Enron stock as it was dropping.").

The response to the Enron debacle was the formation of the Enron Task Force,¹¹ comprising assistant U.S. attorneys from other locations, joined together to bring down the fiercest threat to the U.S. investor. Beginning with middle management, the Task Force was able to construct, through testimony given in exchange for leniency, a criminal case against the two figureheads of Enron: Ken Lay, former CEO and Chairman of the Board, and Jeff Skilling, former President and CEO.¹² Lay and Skilling symbolized to the nation all that was wrong with corporate greed; two millionaires who fiddled while their empire burned, taking its investors and employees down with it. Lay was charged with multiple counts of conspiracy to commit securities and wire fraud, securities fraud, and wire fraud.¹³ He was also charged with four counts of bank fraud, and those counts were tried in a separate bench trial.¹⁴ Skilling was charged with conspiracy to commit securities and wire fraud, and multiple counts of securities fraud, false statements to auditors, and insider trading.¹⁵ Lay was found guilty on all counts and faced a maximum prison term of 165 years; Skilling was found guilty on nineteen counts in his indictment and faced a maximum prison term of 185 years.¹⁶ After Lay's death in July 2006, his conviction was vacated on all counts.¹⁷ Skilling was sentenced to slightly longer than the minimum allowed under the Federal Sentencing Guidelines, twenty-four years.¹⁸ Skilling's sentence is being appealed.¹⁹

11. See U.S. DEP'T OF JUSTICE, CRIMINAL DIV., FRAUD SECTION, ACTIVITIES REPORT: FISCAL YEARS 2002 & 2003 5 (2003), available at <http://www.usdoj.gov/criminal/fraud/docs/reports/2002-03/actrp0203.pdf>. ("In January 2002, in a recusal matter in the Southern District of Texas, the Enron Task Force was established to investigate all matters related to the collapse of the Enron Corporation, the largest bankruptcy in U.S. history. The Fraud Section Chief is Acting United States Attorney for the Task Force, which is directed by the Assistant United States Attorney Leslie Caldwell of the Northern District of California."). The Enron Task Force was disbanded in October 2006, with responsibilities for ongoing cases delegated back to the Fraud Section.

12. Alexei Barrionuevo & Kurt Eichenwald, *The Enron Case That Almost Wasn't*, N.Y. TIMES, June 4, 2006, at C1 (chronicling the life cycle of the Enron Task Force's investigation and noting that the prosecution team had no evidence against Ken Lay until dominoes of lower-level employees agreed to testify against him in exchange for leniency).

13. See Lay Indictment, *supra* note 9, at 36-61. The original defendants in the indictment were Lay, Skilling, and Richard Causey. Shortly before trial, Causey pled guilty and agreed to testify against Lay and Skilling in return for a reduced sentence. However, for strategic reasons, Causey never testified in the Lay/Skilling trial. See Kristen Hays, *Enron's Top Accountant Gets Five Years*, HOUS. CHRON., Nov. 16, 2006, at A1 [hereinafter *Enron's Accountant*].

14. U.S. v. Causey, No. Crim H-04-025, 2004 WL 2414438 (S.D. Tex. Oct. 19, 2004), at *7 (severing four bank fraud-related charges against Lay from the main trial against Lay, Skilling, and Causey).

15. See Lay Indictment, *supra* note 8, at 36-61.

16. See Mary Flood, et al., *Ken Lay: Convicted on all Ten Counts; Jeff Skilling: Convicted on 19 of 28 Counts; Guilty! Guilty!; Verdict Will Mean Prison for ex-Enron Chiefs*, HOUS. CHRON., May 25, 2006, at A1.

17. United States v. Lay, 456 F. Supp. 2d 869, 875 (S.D. Tex. 2006) (holding that under the abatement rule in the Fifth Circuit Court of Appeals, any conviction must be vacated when the defendant dies prior to entry of judgment or pending appeal).

18. See Carrie Johnson, *Skilling Gets 24 Years for Fraud at Enron; Former Workers Tell of Hard Times Over Lost Jobs, Retirement Savings*, WASH. POST, Oct. 24, 2006, at A1.

19. See Brief of Defendant-Appellant Jeffrey K. Skilling, U.S. v. Skilling, No. 06-20885, 2007 WL 2804318 (5th Cir. Sept. 14, 2007).

In the wake of Skilling's sentence, many debated whether the punishment fit the crime. Under Texas state law, no single crime carries with it the minimum sentence of twenty-four years;²⁰ even the minimum sentence for first-degree murder is five years.²¹ Therefore, Skilling's minimum sentence can be compared to the sentence for someone who murdered five people, without passion and without any mitigating circumstances.²² The ultimate question then that has been bandied about in newspapers, magazines, television shows, and the blogosphere then becomes: Is Skilling as bad as a serial killer? Can Skilling's actions, and their effects, be likened to multiple murders?

Skilling's sentence is not an aberration in federal criminal law, or even in white collar criminal law. In recent years, due to changes in federal laws and the Federal Sentencing Guidelines, other corporate actors have received similarly long sentences for similar acts of financial fraud.²³ Because of the availability of these lengthy sentences, prosecutors are able to threaten other corporate officers and employees, also with unblemished criminal records, to plead guilty in exchange for shorter but still substantial sentences.²⁴

The remainder of this brief essay will address the question of what the severity of Skilling's sentence, and the increased penalties available for corporate fraud generally, reflects about the values held by American society. This essay seeks to answer the question of whether these penalties are skewed and disproportionate, such as a hypothetical punishment of the death penalty for littering, or whether these penalties do, for better or worse, reflect the fact that corporate actors strike at the heart of what our society holds most dear. This essay concludes that ironically, and perhaps unfortunately, increased penalties for financial frauds represent an attempt to protect our most treasured possessions: not our bodies or our homes, but our retirement funds. These new penalties reflect our society's fears for our retirement castles and peaceful capital marketplaces.

20. This essay does not purport to compare white collar crime sentences with other federal sentences, such as drug possession and distribution offenses.

21. TEX. PENAL CODE ANN. § 12.32(a) (Vernon 2003) ("An individual adjudged guilty of a felony of the first degree shall be punished by imprisonment in the institutional division for life or for any term of not more than 99 years or less than 5 years.").

22. Under Texas law, murder under the immediate influence of sudden passion arising from an adequate cause is a felony in the second degree. The minimum punishment for second-degree felonies is two years imprisonment. *Id.* § 12.33(a).

23. Bernard Ebbers, former CEO of MCI WorldCom Inc., was sentenced to twenty-five years in prison on nine counts of securities fraud and conspiracy, a sentence actually below the minimum level recommended by the Guidelines. See *United States v. Ebbers*, 458 F.3d 110, 129 (2d Cir. 2006) (expressing regret at the harshness of the Guidelines, noting that "[t]wenty-five years is a long sentence for a white collar crime, longer than the sentences routinely imposed by many states for violent crimes, including murder, or other serious crimes such as serial child molestation").

24. Richard Causey, Enron's Chief Accounting Officer, pleaded guilty in exchange for a five and a half year sentence. *Enron's Accountant*, *supra* note 12. Andrew Fastow, Enron's Chief Financial Officer, pleaded guilty in exchange for a ten-year sentence, which was reduced to six years because of the importance of his cooperation in convicting Lay and Skilling. See Kristen Hays, *Ex-Enron CFO Fastow Sentenced to Six Years in Prison*, HOUS. CHRON., Sept. 26, 2006, available at <http://www.chron.com/disp/story.mpl/front/4215426.html>.

II. THEORIES OF PUNISHMENT

Many legal philosophers have explored the large topic of punishment, including the reasons why a society chooses to punish certain activities and refrain from punishing others. This essay will not attempt to either fully present that literature or add to it. Instead, this analysis begins with the premise that prohibition and punishment of an action should reflect a given society's placement of value on the liberty interest that is being violated by a certain action.

This liberty interest that is being violated may be either directly or indirectly violated. When Person A hits Person B, Person A is violating Person B's interest in bodily safety. One might also argue that Person A is also violating other Persons' interests in being free from fear of bodily safety by creating a violent environment. When Person A engages in prostitution with Prostitute C, one might argue that Person A is violating an interest of Prostitute C's in not being exploited that she (or he) may not waive or that Person A is violating the interests of third-parties who may be negatively impacted by the spread of disease or other collateral effects of prostitution. The punishment of assault and prostitution reflects values that at least some portion of the citizens hold: the value of being free from bodily injury and the fear of such injury, the value of being free from disease or at least living in a society that is not riddled with disease, or even possibly the value of living in a society where the laws reflect the morality of the voting majority.

Not all citizens may agree on these values, either to their extent or to their validity. Therefore, laws in a given society will change over time as groups of citizens persuade lawmakers that previous laws are obsolete or misguided or that new laws are necessary.²⁵ Whereas in one era the interest in not being cuckolded was exceptionally strong, not only for moral reasons but for reasons of certainty in property distribution, this interest may not seem as strong in a different era.²⁶ Therefore a state with a long-standing criminal law against adultery may decide to abolish this law²⁷ or at least not prosecute it.²⁸ On the other hand, a state may determine that citizens have an interest in being free of unwarranted emotional

25. And of course, the judiciary may over time declare that some laws that purport to protect indirect interests of the citizenry in fact violate direct interests of individuals to participate in certain activities. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding that a Texas statute criminalizing consensual sodomy between adults violated the Due Process Clause both because of the infringement of the defendants' rights to autonomy and because of the harmful expressive effects of such a law).

26. *See* Gabrielle Viator, *The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837, 840-41 (2006) (discussing the rationale behind common law adultery prohibitions).

27. For example, the District of Columbia abolished the criminal offense of adultery in 2004. *See id.* at 842.

28. Non-prosecution has problems of its own. Rarely prosecuted laws on the books may send a message to constituents that the activity is not truly prohibited, therefore not deterring the conduct but allowing law enforcement to retain the right to prosecute. This situation results in opportunities for selective prosecution. *See, e.g.*, Kay A. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privilege and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 694 (2006) (outlining how "prosecutorial discretion works to control the reach of controversial criminal laws").

distress and so may recognize new civil actions against those who intentionally,²⁹ and in some states negligently,³⁰ inflict severe emotional distress on others or create criminal prohibitions against certain types of activities that inflict such distress, such as stalking.³¹

A corollary to the premise that prohibitions and punishments of certain acts should reflect the values that a society holds is that the severity of such punishments should also reflect a society's relative values on certain interests. For example, a citizenry's interest in having clean streets may not be as strong as its interest in being free from bodily injury, so littering would be punished in a much less harsh way than assault or murder would be.

Unfortunately, as a society evolves and new crimes are continually added and few repealed, the end result may not seem consistent over time. Some laws currently in force may seem silly to modern citizens and may in reality not be prosecuted, or unfortunately, selectively prosecuted. In addition, the resulting array of punishments may not seem cohesive when certain crimes are compared to others. In the federal system, some estimate that there are currently over 4000 statutory crimes and as many regulatory criminal provisions promulgated by agencies.³² Therefore, one would not be surprised if the punishments to 8000 violations or so did not precisely adhere to the relative values inherent in those prohibitions. This essay seeks to question whether the federal punishments for corporate crime relate proportionally to the punishments for long-standing, state law crimes. To better understand the punishments levied against Jeff Skilling and other corporate actors, critics first need to identify the values that the criminal charges against them reflect and then determine what the relative weight of those values is compared with other crimes.

III. SECURITIES FRAUD AS LARCENY

A. *What is Securities Fraud?*

In determining what values underlie the crimes at the heart of corporate misconduct cases, first these crimes must be analyzed somewhat so as to compare them to other crimes and punishments. Skilling's conviction, for example,

29. See RICHARD A. EPSTEIN, TORTS § 1.8, at 17-18 (Aspen Publishers 1999) (describing briefly the rise of the tort of intentional infliction of emotional distress over the past one hundred years).

30. See *id.* § 10.16, at 279 (discussing cases in which plaintiffs with no physical injuries have been able to recover for the mental distress caused by the negligence of the defendants).

31. See, e.g., TEX. PENAL. CODE ANN. § 42. (Vernon 2003) (establishing the crime of stalking in which a defendant knows or reasonably believes that a course of conduct would, and reasonably does, put another in fear of bodily injury or death to herself or a household member or damage to property).

32. Dick Thornburgh, Former U.S. Att'y Gen., Keynote Luncheon Address at the Georgetown University Law Center Conference on Corporate Criminality: Legal, Ethical, and Managerial Implications: The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes (Mar. 15, 2007), in 44 AM. CRIM. L. REV. 1279, 1281 (2007).

centered on the theory that he committed securities fraud. He was alleged to have

[E]ngaged in a wide-ranging scheme to deceive the investing public, including Enron's shareholders, the SEC and others (the "Victims"), about the true performance of Enron's businesses by: (a) manipulating Enron's publicly reported financial results; and (b) making public statements and representations about Enron's financial performance and results that were false and misleading in that they did not fairly and accurately reflect Enron's actual financial condition and performance, and they omitted to disclose facts necessary to make those statements and representations fair and accurate.³³

The allegations listed in the indictment depict violations of various provisions of the Securities and Exchange Act of 1934, including Section 10(b), which briefly outlines the heart of securities fraud: "To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance."³⁴ This provision is fleshed out in SEC regulations, particularly Rule 10b-5. This rule specifies that in connection with the purchase or sale of any security, it is unlawful to "employ any device, scheme, or artifice to defraud," to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading," or to "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."³⁵

At the core of these provisions is the prohibition against obtaining money (inflated purchase price of a security) or property (the security without sufficient payment) by use of a fraudulent statement or a deception. In essence, Skilling was charged with larceny. The wording of the provision likens security fraud to theft, specifically the historical crime of theft by false pretenses in which a person tells lies to gain both possession of and title to another's property.³⁶ In theory, when a corporation creates a false impression that the company is doing well and worth more per share than the company really is, the market reacts by buying shares of the company and increasing the market price of the company's shares to the level of the impression created.³⁷ This false picture induces investors³⁸ to purchase

33. Lay Indictment, *supra* note 9, at 3. This allegation corresponds to violations of 15 U.S.C. §§ 78j(b), 78m(a), 78m(b)(2), 78ff (2006), and 17 C.F.R. § 240.10b-5 (2007).

34. 15 U.S.C. § 78j(b) (2006).

35. 17 C.F.R. § 240.10b-5 (2007).

36. See WAYNE R. LAFAYE, CRIMINAL LAW § 19.1(b) (Thomson West 4th ed. 2003) (explaining that because common law larceny, specifically larceny by trick, only applied to situations in which a person attained possession, but not title, to another's property through trickery, the British Parliament created the statutory crime of false pretenses).

37. See *Basic Inc. v. Levinson*, 485 U.S. 224, 246-47 (1988) (supporting the fraud on the market theory by acknowledging that in an efficient market, stock prices for publicly held corporations will reflect all publicly known information, whether true or false, so that false public statements can distort prices).

38. *Basic* does not require that each shareholder prove that she relied on the false statement to purchase the shares; instead, in an efficient market, reliance on the market price is sufficient. *Id.* at 247.

shares in the company that otherwise they may not have or at least to purchase shares in the company at a price that they would not have.³⁹ This fraudulent inducement is similar to a theft of that purchase price or at least of that portion of the price that is inflated. If and when the false picture is corrected, either by internal revelations or external criticisms, the stock price will then decline and shareholders will recognize the loss created by that inflated purchase price. So, for example, if an investor bought shares of a \$10 per share company that were trading at \$15 per share because of false statements (or the refraining from making true statements), once the price is corrected, the investor has spent \$15 for a good worth \$10, at a \$5 loss.⁴⁰ One can argue that the corporate officers have stolen that \$5 per share.

In analogizing securities fraud to larceny, one is often tempted to ask whether the corporate officers benefited from the transaction. In all situations other than initial public offerings, the victims buy stock from or sell stock to another shareholder who is oblivious to the fraud. In cases where officers sell into the market and may personally benefit from an inflated purchase price (or buy, benefiting from a deflated purchase price), these officers may be charged separately with insider trading. However, prosecutors need not show a personal benefit; the benefit to corporate officers of inflating the corporation's profile in the market is assumed. This benefit may be realized in the form of bonuses, raises, continuation of employment, or increased reputation in the market for corporate officers.

Although Skilling was prosecuted for using the wires to commit a violation of the Securities Exchange Act of 1934, corporate actors may now be prosecuted directly for securities fraud under a new federal criminal provision in Title 18 of the United States Code, where most federal criminal statutes are codified. The Sarbanes-Oxley Act of 2002 added a new securities fraud defense at 18 U.S.C. § 1348, which makes it a crime to:

39. There is also an argument that the inflated picture may induce existing shareholders to hold onto shares and not to sell, but for simplicity of argument this explication will focus on buyers, not holders.

40. In the civil system, analyzing what the investor has lost can get quite complicated. Under private securities litigation rules, a shareholder may only recover damages if the shareholder can prove loss causation or that the false statement (or omission) caused the price to be inflated and that the revelation caused the price to decline, without extraneous market forces. *See Dura Pharm. Inc. v. Broudo*, 544 U.S. 336 (2005) (holding that proof of an inflated purchase price due to a false statement, without proof of a revelation of truth and subsequent price decline below the purchase price, was not sufficient to plead loss causation). If a good economic environment has caused the stock to increase to such a level that the subsequent truth-induced decline does not make the stock price fall below the purchase price, then the shareholder may have suffered no cognizable loss under the civil securities laws. *See id.* at 343 (declining to address this scenario). However, in the criminal system, prosecutors are not subject to civil pleading requirements and must only prove the elements of the securities law violation. For example, the new securities fraud provision, 18 U.S.C. § 1348 would require prosecutors to prove that a defendant knowingly executed or attempted to execute a scheme or artifice to defraud another person in connection with any security of a designated issuer. 18 U.S.C. § 1348 (2006). If in a particular case, a good economic environment caused shareholders to enjoy a net gain, the defendant may still be found guilty of violating the statute.

[K]nowingly execute or attempt to execute a scheme or artifice to (1) defraud another person in connection with any security of a designated issuer; or (2) to obtain money or property through false or fraudulent pretenses, representations or promises in connection with the purchase or sale of any security of a designated issuer.⁴¹

Because section 1348 generally combines 15 U.S.C. § 78j and the mail fraud statute, 18 U.S.C. § 1341,⁴² this section will explicate the new provision as the basis for analysis for simplicity. The wording captures the same larcenous conduct: fraudulently obtaining money or property of another in connection with the purchase or sale of a security. As this provision was recently added to the federal canon of criminal provisions, it would arguably be a more perfect proxy for the current priorities and preferences of the U.S. society.

B. A Brief History of Theft

The next question is what interest is at stake that causes a society to criminalize theft of the property of another. The obvious answer is the interest in the property itself; theft laws reflect a society's valuation of ownership interests in property. However, that answer is incomplete. Historically, theft consisted of three separate crimes: common law larceny, embezzlement and false pretenses.⁴³ Most U.S. jurisdictions⁴⁴ and the Model Penal Code⁴⁵ have collapsed these distinctions into one general theft statute. Larceny was defined at common law as the wrongful taking of property from the victim's possession.⁴⁶ Larceny by trick expanded larceny to include situations in which the thief tricked the possessor into granting the thief possession, and then the thief effectively took title to the property.⁴⁷ Embezzlement applied to more complicated situations in which the thief was voluntarily given possession without any trick or evil intent, but then the thief

41. 18 U.S.C. § 1348 (2006).

42. See KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME* 211 (Aspen Publishers 4th ed. 2006) (explaining that the Sarbanes-Oxley Act adds a new securities fraud offense which is modeled on the mail fraud statute).

43. See LAFAVE, *supra* note 36, § 19.1 (chronicling the development of larceny in England and subsequent creation of the crimes of embezzlement and false pretences for types of theft that fell outside the parameters of larceny).

44. See e.g., John Wesley Bartram, *Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement and False Pretenses* and §§ 19.2-284, 56 WASH. & LEE L. REV. 249, 250 (1999) (describing Virginia's maintenance of the three distinct categories in VA. CODE ANN. §§ 18.2-95-96 (larceny); § 18.2-111 (embezzlement); and § 18.2-178 (false pretenses)).

45. MODEL PENAL CODE § 223.1(1) (2001).

46. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* 622 (1972) (defining common-law larceny as the trespassory taking and carrying away of the personal property of another with intent to steal it).

47. LAFAVE, *supra* note 36, § 19.1(b).

wrongfully took title.⁴⁸ The crime of false pretenses covered situations where the thief was voluntarily given both possession and title to another's property, but under false pretenses.⁴⁹

The common law crime of larceny seems to protect a private ownership interest, but originally it was developed to protect an interest in the public peace over and above the private interest, which had been left to the civil courts.⁵⁰ This peace is endangered when the wresting of possession occurs because of the threat of force or violence.⁵¹ The society as a whole has an interest in having its public places free of both the violence of thievery and the violence of self-help remedies for thievery. As the crimes of embezzlement and false pretenses developed, however, courts took an interest in losses of property interests that were effectively peaceful but still created a need for deterrence and retribution.⁵² Nevertheless, this analysis of the punishment of securities fraud is informed by the historical rationale for punishing theft to preserve the peace.

In addition, over time different types of theft crimes have emerged that are distinguishable based on other interests that they are designed to protect. For example, robbery occurs when possession is taken from the actual person of another, and robbery carries a higher penalty than some types of theft.⁵³ This additional penalty reflects not the mere value of the owner's interest in the property, but the value of the owner's interest in her bodily integrity.⁵⁴ If the thief is so bold as to use physical force or the threat of physical force to gain possession of the property, then the owner or possessor (for the holder may not be the owner) may be put in reasonable fear for her person. This interest in bodily integrity is an interest that society has historically held very dear, which explains why this society has held its harshest punishments in reserve for actions that result in death or bodily injury.

More to the point, although simple larceny statutes distinguish penalties based on the value of the stolen property, robbery statutes do not because the additional

48. See *The King v. Bazeley*, 168 Eng. Rep. 517 (Ex. Ch. 1799) (convicting for embezzlement where a bank clerk stole money honestly deposited by bank customers).

49. LAFAVE, *supra* note 36, § 19.1(b).

50. See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 472-73 (1976) (noting that this traditional approach reflected a deep commitment to working out the realm of public harms, subject to criminal prosecution, and the realm of private harms, subject only to redress by means of private actions).

51. See *id.* at 502-03 (describing the transfer of the crime of larceny from one that protected society from the public threat of overt thieves to one that protected society's interests in property).

52. See *id.* at 471 ("The draftsmen of the Model Penal Code maintain that there is no essential difference between misappropriating an entrusted asset and failing to perform a promise to pay over a sum equivalent to an amount received for that purpose.").

53. See *e.g.*, TEX. PENAL CODE ANN. § 29.02(a)(2) (Vernon 2003 & Supp. 2006) ("A person commits an offense if, in the course of committing theft . . . and with intent to obtain or maintain control of the property, he . . . intentionally or knowingly threatens or places another in fear of imminent bodily injury or death."). The crime of robbery under the Texas statute is a first-degree felony. *Id.* § 29.02(b).

54. See LAFAVE, *supra* note 36, § 20.3 (describing robbery as an offense against a person and a substantial departure from societal norms).

penalty is unrelated to the value of property. Theoretically, if someone wrestles a Timex watch or a Rolex watch away from a victim, that victim's terror would be the same, although her later regret over the loss of the property may differ. However, robbery statutes do distinguish between the intensity of the fear that the victim may reasonably experience. Should the thief use a weapon or give the impression that the thief has a weapon to use, then the act is armed or aggravated robbery, which receives an even higher penalty.⁵⁵ Again, the increased penalty is not due to the increased value of the property but the increased value that society places on being free from fear of imminent severe physical harm or even death.

Burglary, furthermore, is another type of theft that carries a penalty above simple larceny. Burglary is the taking of property from a residence.⁵⁶ The interest at stake that is valued here also goes beyond the ownership interest in the property taken and so carries a penalty beyond the penalty for stealing the value of the property.⁵⁷ This crime reflects society's interest in both the sanctity of home and the safety of one's self and family in one's home.⁵⁸ The cultural importance of home and hearth is well-established and embodied in the oft-repeated phrase "a man's home is his castle."⁵⁹ At common law, the elements of burglary also required that the taking occur after nightfall,⁶⁰ perhaps focusing on the concern

55. See *e.g.*, TEX. PENAL CODE § 29.03(a) (Vernon 2003 & Supp. 2006) (elevating robbery under § 29.02 to aggravated robbery if the actor (1) causes serious bodily injury to another; (2) uses or exhibits a deadly weapon; or (3) causes bodily injury to another person or threatens or places another person in fear of immediate bodily injury or death, if the other person is (A) sixty-five years old or older or (B) a disabled person). Under the Texas statute, aggravated robbery is a felony in the first degree. *Id.* § 29.03(b); see also MODEL PENAL CODE § 221.1(2) (2001) (categorizing robbery as a second-degree felony, and elevating it to a first degree felony if the actor attempts to kill anyone or purposely inflicts or attempts to inflict serious bodily injury).

56. Some states define burglary as the taking of property from a building; however, if the building is a residence, then the penalty will be greater than if the building is a non-residence. See, *e.g.*, TEX. PENAL CODE § 30.02(a)(1) (Vernon 2003 & Supp. 2006) (categorizing as a burglary the uninvited entering of a habitation or building not then open to the public with an intent to commit a felony, theft or assault). Under the Texas statute, the burglary of a habitation is a second-degree felony, but the burglary of a non-residential building is a state jail felony. *Id.* § 30.02(c).

57. For example, although burglary that involves theft of any type of property is automatically a second-degree felony in Texas, simple thefts of small amounts may be misdemeanors. Only thefts in excess of \$100,000 would be punishable as second-degree felonies. See TEX. PENAL CODE § 31.03 (Vernon 2003 & Supp. 2006) (categorizing thefts of property by value of the property stolen, with some exceptions).

58. See WILLIAM BLACKSTONE, 4 COMMENTARIES *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity.").

59. The origin of this phrase has been traced to Sir Edward Coke, an English jurist. See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 162 (Lawbook Exchange 4th ed. 2002) (1671) ("[F]or a man's house is his castle, et domus sua cuique tutissimum refugium."). This concept is also found in the writings of William Blackstone. WILLIAM BLACKSTONE, 3 COMMENTARIES *288 (1768) ("Every man's house is looked upon by the law to be his castle . . ."). The Fourth Amendment of the United States Constitution also acknowledges the placement of value on one's residence. See U.S. CONST. amend. IV ("The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures shall not be violated.").

60. See BLACKSTONE, *supra* note 58, at*224.

that residents are more likely to be at home, and possibly asleep and vulnerable, after nightfall.⁶¹ However, the residence need not be occupied at the time of the intrusion for burglary to occur. This element is preserved in the Model Penal Code.⁶²

C. *Securities Fraud in the Larceny Spectrum*

To determine where the punishment of securities fraud should fall in the spectrum of punishments from simple larceny to burglary to robbery to aggravated robbery, first the nature of the particular interest involved in securities fraud must be determined. Arguably, the harsh punishment of securities fraud may relate solely to the fact that simple larceny has occurred multiple times. For example, if Jeff Skilling persuaded investors to buy Enron stock in September 2000 at its all-time high of \$90, but the true price of the stock was the ending market price in December 2001 of less than \$1, then he committed larceny of \$89 multiplied by the number of shares outstanding. Of course, few investors bought at \$90 and sold at less than \$1, so the aggregate amount of the theft would be much smaller, as Enron's stock price continually fell during that fifteen-month period. However, Skilling was alleged to have caused a full \$60 billion of investor losses, so under this theory Skilling stole \$60 billion from investors by false pretenses.

However, other societal interests may be at play besides the ownership interest in the capital used to purchase the inflated stock. By examining the new laws that were promulgated in the wake of the Enron scandal, a pattern emerges that sheds some light on the modern values that underlie the harsh penalties now available for corporate actors.

IV. THE NEW PUBLIC PEACE AND THE NEW CASTLE

As asserted before, prohibitions and their relative punishments tend to reflect the values of a society. The criminal prohibitions on larceny reflected not only a desire to protect ownership interests, but more directly a desire to protect society's interest in a peaceful community. Citizens should be able to walk with their purses of money from their homes to the market without fear that any other citizen might grab their purses or their newly purchased wares with impunity. If citizens did not have the comfort of laws against larceny, then citizens would avoid public places, such as the market, which would have negative effects on the economy and the community as a whole. Maintaining the public peace is key to orderly communities.

61. One of the crimes of the twentieth century that seemed most chilling in the United States was the burglary-turned-multiple homicide in Holcomb, Kansas in 1959 in which two would-be burglars broke into the Clutter farmhouse before dawn. The burglary was interrupted, and the two burglars killed all four members of the Clutter household before leaving with \$40 and a pair of binoculars. Two adult Clutter daughters who lived elsewhere survived. This crime was forever etched in U.S. memory by the true crime novel, *In Cold Blood*. See TRUMAN CAPOTE, *IN COLD BLOOD* (Vintage Books 1994) (1965).

62. MODEL PENAL CODE § 221.1(2) (2001).

Robbery and aggravated robbery were crimes that codified not only this interest in public peace but also an additional interest of being free from fear of bodily injury. Thefts, which also created a danger of physical harm, were treated more harshly than other types of theft. In addition, thefts involving uninvited entry into someone's home were also punished more harshly than simple theft. Introducing actors with thieving intent into a residence created the danger of physical harm and threatened the sanctity of home and hearth. If a person's home is her castle, then citizens have an additional interest in keeping bad actors out and recognize that additional harm may occur if homeowners defend their castles.

To continue the analysis, either these values of bodily integrity, public peace and sanctity of the home must be found in the motivations of punishing securities fraud or new values must be identified to justify harsh punishments. This essay presents the argument that the crime of securities fraud involves both breaching the public peace and threatening the sanctity of home.

A. *Securities Fraud as a Breach of the Peace*

In the wake of the accounting scandals, industry participants called for a restoration of investor confidence in the U.S. capital markets. In congressional hearings and public speeches, this key phrase was repeated continually to urge legislators and regulators to act swiftly to restore this confidence. In this rhetoric, lawmakers were not expressing concern that citizens felt sufficiently safe to travel to and from the market with coins to buy food and other necessities; lawmakers were scrambling to protect an environment where investors felt sufficiently safe to invest their savings in stocks of U.S. companies either directly or through the purchase of mutual funds. If this confidence was not restored, then U.S. capital might shift to foreign investment or to low-risk domestic investments that might not stimulate growth in U.S. companies. In addition, foreign capital might also find other investments. The U.S. economy very obviously depends on efficient and orderly capital markets.

Therefore, this essay asserts that in the modern age, protecting the stability and integrity of the capital markets has become as important as maintaining order in the public square. This theory finds some support in the text of new punishments under the Federal Sentencing Guidelines.⁶³ In addition to enhancing existing criminal fraud penalties and fashioning new criminal offenses by passing the Sarbanes-Oxley Act, Congress directed the United States Sentencing Commission

63. In 1984, Congress passed the Sentencing Reform Act of 1984, which authorized a newly-created U.S. Sentencing commission to promulgate guidelines for federal judges in the sentencing of criminal defendants. *See* Brickey, *supra* note 42, at 666 (noting that the "Sentencing Guidelines take a tough stance against white collar criminals"). The Guidelines are not simple to understand, however. To calculate a sentence, one must ascertain a "base offense level" for the crime charged and then adjust that numerical upward or downward according to various factors to arrive at a prescribed sentencing range for the resulting "offense level." *See id.* (giving as an illustration a calculation of a sentencing range using seven steps to arrive at the appropriate offense level).

to increase available penalties for corporate fraud.⁶⁴ The Commission responded first, by emergency amendment, effective January 25, 2003,⁶⁵ and second, by permanent amendment, submitted to Congress on April 30, 2003.⁶⁶ These amendments reflect a particular interest in punishing those who threaten the order of the capital markets.

For example, Congress further directed the Commission to consider the promulgation of new sentencing guidelines or amendments to existing sentencing guidelines to provide an enhancement for officers or directors of publicly traded corporations who commit fraud and related offenses.⁶⁷ Fraud generally corresponds to a base offense level of six, which then corresponds to a sentence of up to six months in prison. Although the vast majority of corporations in the U.S. are not publicly traded,⁶⁸ fraud in publicly held corporations has much more potential to substantially affect the capital markets.⁶⁹ The Commission met this directive by providing a new four-level enhancement to the base offense level of a particular crime (an approximate fifty percent increase in the sentence length)⁷⁰ that applies if the defendant was an officer or director of a publicly traded company and violated securities law.⁷¹ The Commission also increased the penalty by another route: expanding the victims table to increase penalties for harming 250 or more individuals.⁷² The Guidelines now provide for a six-level increase if the offense involved 250 or more victims.⁷³ This expansion would apply to most violations thought to harm investors of a publicly-held corporation, automatically creating a base offense level for one count of securities fraud of sixteen instead of six.

64. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 805, 905, 1104, 116 Stat. 745, 802, 805, 808 (codified in 28 U.S.C. § 994)

65. Pursuant to §§ 805, 905 & 1104, Congress requested that the Commission "promulgate the guidelines or amendments provided . . . as soon as practicable, and in any event not later than 180 days after [enactment]." §§ 805(1)(b), 905(1)(c) & 1104(1)(c)(2006).

66. U.S. SENTENCING GUIDELINES MANUAL §2B1.1 (supp. 2003).

67. Sarbanes-Oxley Act of 2002 § 1104(a)(2), 28 U.S.C. § 994 (2006).

68. See ROBERT A. RAGAZZO & DOUGLAS K. MOLL, CLOSELY HELD ORGANIZATIONS 1 (Thomson West 2006) ("[T]he number of closely held businesses in this country vastly exceeds the number of publicly held businesses."); DAVID G. EPSTEIN ET AL., BUSINESS STRUCTURES 137 (West Group 2002) (noting that in 1996, of the 4,631,370 corporations in the U.S., more than 75% had less than \$250,000 in assets).

69. Note that some very large corporations, such as Koch Industries, Inc. and Cargill, are privately held. If the Fortune 500 ranked privately held corporations, both of these companies would be ranked in the top 20 companies on that list. Fraud in these companies would greatly disrupt employees' lives and their communities, but possibly not the equity markets. Compare FORTUNE, Fortune 500 (Apr. 30, 2007), available at http://money.cnn.com/magazines/fortune/fortune500/full_list/ (listing the gross revenues for the largest 500 U.S. companies by revenue), with Cargill, <http://www.cargill.com/about/financial/financialhighlights.htm#TopOfPage> (last visited Nov. 1, 2007) (listing Cargill's 2006 revenues that would place the company #21 on the 2007 Fortune 500); HOOVERS, <http://premium.hoovers.com/subscribe/co/factsheet.xhtml?ID=cftjkkfjjsccyye> (last visited Nov. 1, 2007) (listing Koch's 2006 revenues that would place the company at #18 on the 2007 Fortune 500).

70. U.S. SENTENCING GUIDELINES MANUAL § 2B.1.1(2)(b)(13) (supp 2003). For example, this enhancement to a fraud case with a base offense level of six increases the offense level to ten.

71. *Id.*

72. *Id.* § 2B1.1(2)(C).

73. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2)(c) (2007).

B. Securities Fraud as Home Invasions

In addition, securities fraud is seen as an attack on U.S. wealth and savings, particularly U.S. retirement funds. In this age of Social Security uncertainty⁷⁴ and increasing rarity of (well-funded) employer pensions,⁷⁵ the prevalence of retirement accounts, often with very large balances, has rapidly increased over time. Since the introduction of individual retirement accounts (IRAs) in 1974, retirement account options have greatly increased from standard employer-managed defined contribution funds, or 401k funds, to Roth IRAs. In 2003, U.S. investors held \$3 trillion in IRA accounts alone, and the entire retirement market was \$11.6 trillion.⁷⁶ The stories of long-time Enron employees (some employees of other companies acquired by Enron) suddenly finding out near retirement age that their retirement accounts were worthless rattled many Americans as much as the horrifying tale of the Clutter farmhouse murders described in Truman Capote's *In Cold Blood*.⁷⁷ Now, mid-life citizens found their sleep disturbed not by the terrifying fear that shiftless vagrants would break into their homes in the middle of the night but by the even more salient fear that tomorrow the television morning show would announce that their employers had been cooking the books, destroying their retirement plans and throwing them into an insecure future.

In this era of relative peace in the U.S., when life expectancy grows longer each year and many Americans are confident that violence cannot penetrate their gated communities and jumbo-sized sport utility vehicles, the greatest fear might be personal financial crisis, not bodily harm. Indeed, the prospect of outliving one's financial resources and being a burden on family or social services at best or dependent on thinly stretched social services at worst may seem more probable than the prospect of being the victim of random violence. As lifetimes increase and U.S. workers live longer after retirement than ever before, individual futures are dependent on the strength and security of these retirement accounts. Whereas in earlier times, four walls and a roof sheltered a family's bodies and most prized possessions, now a 401k account may truly shelter that family's most prized possession—its financial future, including access to future health care necessary

74. See Colleen E. Medell, *Enron and the Pension System*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 475 n.16 (Nancy B. Rapoport & Bala G. Dharan, eds., Foundation Press 2004) ("According to estimates by the Board of Trustees for the Social Security program, Social Security benefit expenditures are expected to exceed payroll tax revenues starting in 2018. It is at this point that Social Security will be in direct competition with other federal programs for annual funding in the federal budget.")

75. See Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in Private Industries 2007* (2007), <http://fto.bls.gov/pub/news.release/ebs2.txt> (reporting that twenty percent of employees participate in a defined benefit retirement plan and 43% of employees participate in a defined contribution (401(k) or similar) plan); Medell, *supra* note 74, at 471 ("The most significant trend for the future of the pension system is the growing number of workers, primarily employed in smaller firms, whose only pension plan is a 401(k) plan.")

76. Sarah Holden et al., *The Individual Retirement Account at Age 30: A Retrospective*, 11 PERSPECTIVE 1, 1 (2005), available at <http://www.ici.org/pdf/per11-01.pdf>.

77. See discussion, *supra* note 61.

for the prolonged end-of-life period. In these modern times, a person's retirement account may be her castle.

Amendments to the Federal Sentencing Guidelines also reflect a desire to punish more harshly thefts that threaten the security of these new castles, retirement accounts. The Commission responded to Congress' request to increase penalties for any offense that endangers the solvency or financial security of a substantial number of victims.⁷⁸ The new amended Guidelines provide two new prongs that would trigger enhancement, both providing a four level increase.⁷⁹ The first new prong applies to offenses that substantially endanger the solvency or financial security of an organization that, at any time during the offense, was a publicly traded company or had 1000 or more employees.⁸⁰ The second prong applies to offenses that substantially endanger the solvency or financial security of 100 or more individual victims.⁸¹

Retirement accounts are inherently risky; workers invest their savings into stocks, bonds or other securities (hopefully a diversified mixture), but then lose control over the outcome. Investments are subject to company risk, industry risk, and general economic risk. Although investors can buy security systems for their homes and choose safe neighborhoods, few investment choices are perfectly safe. Shareholders can monitor investments and move out of poorly producing investments, but such monitoring can be costly and possibly beyond the competence of some of the forty-three percent of the workforce investing in retirement plans. After the fall of Enron, workers perceived their funds as being even more vulnerable. The post-Enron changes in federal criminal law reflect the importance of retirement accounts to the U.S. public.⁸²

V. CONCLUSION

For better or worse, the increased penalties for corporate actors may not be arbitrary or inconsistent with punishments for other crimes. The harsh sentences of

78. Sarbanes-Oxley Act of 2002 § 805(a)(4), 28 U.S.C. § 994 (2006).

79. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(13)(B) (2007).

80. *Id.* § 2B1.1(b)(13)(B)(ii)(I)-(II). An application note for this section sets forth a non-exhaustive list of factors that the court shall consider in determining whether the offense endangered the solvency or financial security of such an entity: The list of factors that the court shall consider when applying the new enhancement includes, among others, consideration of insolvency, filing for bankruptcy, substantially reducing the value of the company's stock, and substantially reducing the company's workforce. Other factors not enumerated in the application note also could be considered by the court as appropriate. *Id.* § 2B1.1(b)(13)(B) app. 12(B)(ii).

81. *Id.* § 2B.1(b)(13)(B)(iii).

82. Following the presentation of this paper at the Overcriminalization conference, an audience member suggested to me that the U.S. government has its own interest in not watching tax-deferred retirement savings account decline in value because of fraud: The federal government has a contingent financial interest in the amounts accumulating in taxpayers' 401(k) and pension plans. These deferred tax revenues will not be realized if values decline before liquidation; therefore, the U.S. Treasury theoretically bears a percentage of fraud-related losses as well.

Although this hypothesis is somewhat cynical, note that in 2002, this foregone tax revenue was \$87.9 billion, the single largest tax expenditure in the entire federal budget. Medell, *supra* note 74, at 474.

Jeff Skilling and other officers merely reflect society's concern, whether misplaced or exaggerated, with maintaining the peace of our capital marketplace and the sanctity of our retirement castles. Whether these new crimes and new penalties are an effective way to meet these objectives is unexamined in this essay.⁸³ However, the federal criminal law in the corporate arena satisfies the premise stated previously regarding prohibitions and punishments of certain actions. The newly harsh punishments for corporate misconduct do seem to adequately mirror the relative value that society places on different interests. Ironically, the interest in having safe and protected investment accounts seems to have become paramount, rivaling earlier interests in being free from bodily injury and ensuring homes were free from intruders with evil intents. Perhaps corporate greed extends beyond the boardrooms to its shareholders.

83. *But see* Christine Hurt, *The Undercivilization of Corporate Law*, U. of Ill. Law & Econ. Res. Paper No. LE07-005 (2007), <http://ssrn.com/abstract=965871> (discussing why civil remedies may be more appropriate than criminal prosecutions for corporate misconduct).

