A QUESTION OF COSTS: CONSIDERING PRESSURE ON WHITE-COLLAR CRIMINAL DEFENDANTS

SARAH RIBSTEIN†

ABSTRACT

Because of the expense of defending white-collar criminal cases, individual corporate defendants can rarely fund their own defenses and often rely on their employers to pay their legal costs. Employers, however, often feel pressure to refuse to pay their employees' attorneys' fees. When employers decline to pay their employees' defense costs, defendants can be, in effect, coerced into pleading guilty because they do not have the financial resources to defend themselves at trial.

Commentators have discussed the problem of pressure on white-collar defendants but have not traced the cause of the pressure back to one of its most basic roots: criminalizing conduct that is prohibitively expensive for an individual to defend. Others have addressed the question of whether corporate behavior has been overcriminalized but have not focused on the high cost of defending these crimes as one of the key arguments against criminalizing the behavior in the first place. This Note intertwines the two strands of the debate over corporate crime: the strand evaluating the existence of and solutions to pressure on individual white-collar defendants and the strand questioning the overcriminalization of corporate law. This Note adds to both strands by focusing on one aspect, high defense costs, that contributes to the pressure, makes it unique to corporate crime as opposed to street crime, and puts it out of the reach of commonly

† Duke University School of Law, J.D. expected 2009; Duke University Graduate School Department of Biology, M.S. 2005; University of Virginia, B.A. 2002. I thank Professor James D. Cox for his advice and comments, Tom Kirkendall for his helpful insights, Professor Larry Ribstein for his constant guidance, advice and support, and the editors of the *Duke Law Journal* for all of their work on this Note.

suggested procedural fixes. The Note concludes that white-collar criminal prosecutions inherently place financial pressure on defendants, and legislatures should consider this pressure when deciding what behavior to criminalize.

INTRODUCTION

The often uncertain outcomes of criminal trials mean that even innocent defendants can face a terrifying choice: accept a minimal punishment by admitting that they have committed a crime they feel they did not commit or risk being found guilty at trial and being subject to a sentence many times as harsh. This was the choice facing Jamie Olis, a midlevel executive accused of wrongdoing in an energy transaction during his employment at Dynegy.[1] Unlike many criminal defendants, Olis was far from indigent (although not wealthy) and was able to afford an attorney, making him ineligible for a public defender.[2] His defense was also unlike most criminal defenses: the conduct in question involved a "complex series of [financial] transactions" that a layperson would struggle to understand.[3] Although Dynegy had promised its executives funding for defending job-related allegations, the firm breached its obligation under threat of indictment and left Olis to fend for himself.[4] Still, Olis was sure of his innocence, believed he was acting according to accepted business practices, and decided to go to trial with the defense that he could afford.[5]

Unfortunately, Olis's defense proved to be less than he hoped for[6] and very likely less than he would have gotten if Dynegy had

1. Susan Warren, *Refusing to Talk, Dynegy's Olis Goes to Prison*, WALL ST. J., May 20, 2004, at B1.

2. 18 U.S.C. § 3006A(b) (2006) ("[T]he United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him."). Whether the counsel Olis could afford was "adequate" under § 3006A(a), given the high costs of defending white-collar crime, is a difficult question. *See infra* Part III.B.1.b.

3. Rebecca Smith, *Fraud Charged Against Former Dynegy Employees*, WALL ST. J., June 13, 2003, at B2.

4. Paul Davies & David Reilly, *Executives on Trial: In KPMG Case, the Thorny Issue of Legal Fees—Dynegy's Mr. Olis, Now in Prison, Shows Stakes in Trial of Accounting Firm's Executives*, WALL ST. J., June 12, 2007, at C5.

5. *See* Warren, *supra* note 1 (reporting that "Mr. Olis . . . insisted on his innocence and . . . began to prepare for a trial" with a defense theory that he was following orders from other Dynegy employees).

6. *Id.*

honored its agreement to indemnify him. His lawyer did not contest the government's evidence of market loss, which became a key factor in lengthening Olis's sentence[7] and probably would have required hiring an expensive expert.[8] Olis was sentenced to twenty-four years and four months in jail,[9] and his lawyer later said that the lack of funds had "limited his ability to mount a strong defense."[10]

Jamie Olis's sentence was later reduced to six years on appeal,[11] but his ordeal has been cited as an example of the problems faced by white-collar defendants whose employers refuse to pay their legal fees.[12] During his trial, Olis "couldn't afford the $100,000 to print the [12 million pages of] documents" that the government had "used computer programs to sort through."[13] As opposed to the one lawyer that Olis could afford, who Olis could only pay by selling his house, "[t]he government had prosecutors, Federal Bureau of Investigation agents, postal inspectors and accounting experts work the case."[14] The Olis case shows the "astronomical," costs of defending corporate criminal allegations[15]—even the wealthiest white-collar defendants cannot afford to fund their defenses on their own.[16] Olis may be the most sympathetic of the high-profile defendants who have faced the pressures of the white-collar criminal justice system, as he is relatively young, less wealthy than many white-collar defendants, and was separated from his young daughter when he reported to prison.[17] But

7. United States v. Olis, 429 F.3d 540, 548 (5th Cir. 2005); Kevin P. McCormick, Comment, *Untangling the Capricious Effect of Market Loss in Securities Fraud Sentencing*, 82 TUL. L. REV. 1145, 1147 (2008).

8. *See* McCormick, *supra* note 7, at 1174 ("[One] problem with market loss is that the complexity of the calculations involved invariably places an onerous burden on both defendants and prosecutors to provide costly experts. . . . [T]hese costs can be a huge burden on individual defendants facing criminal charges.").

9. *Olis*, 429 F.3d at 541.

10. Davies & Reilly, *supra* note 4.

11. Posting of Peter Lattman to WSJ.com Law Blog, http://blogs.wsj.com/law/2007/06/12/white-collar-legal-fees-kpmg-jamie-olis (June 12, 2007, 8:50 EST). Olis's new lawyers did not disclose how they were paid. *Id.*

12. *See, e.g.*, Davies & Reilly, *supra* note 4 (using Olis's case as a "vivid illustration of what's at stake" when the government presses a defendant's former employer to stop paying his legal fees).

13. *Id.*

14. *Id.*

15. *See* Susan Beck, *Companies with Backdating Troubles Are Paying Astronomical Legal Fees*, AM. LAW., Oct. 2007, at 22, 22 (documenting legal fees in stock-option backdating cases).

16. *See infra* note 112 and accompanying text.

17. *See* Warren, *supra* note 1 (noting that Olis was thirty-eight, had an infant daughter, and "was no highflying executive").

his plight is far from unique among those individuals attempting to defend allegations of corporate misconduct.

Because of the expense of defending white-collar criminal cases, individual corporate defendants can rarely, if ever, fund their own defenses; instead, these defendants rely on their employers to pay their legal costs.[18] Their employers, however, often feel pressure to refuse to pay their employees' attorneys' fees.[19] When employers decline to pay their employees' defense costs, defendants end up with inadequate defense funds and find themselves in the position of Jamie Olis: they must either plead guilty or go to trial with a lawyer who cannot fully defend them against the complicated allegations corporate crime cases usually involve. Defendants are, in effect, coerced into pleading guilty because they simply do not have the financial resources to defend themselves at trial, where they often risk harsh sentences many times greater than the ones they could receive under a plea bargain.[20]

There have been several attempts to alleviate the pressures faced by defendants who cannot afford their own defense costs. Both Judge Louis Kaplan in the Southern District of New York and a panel of the Second Circuit have found that the Sixth Amendment prevents the government from pressuring firms to refuse to advance attorneys' fees to employees who are under criminal investigation.[21] Judge

---

18. *See, e.g.*, Laurence A. Urgenson & Audrey Harris, *Is the White-Collar Defense Attorney Headed for Extinction?*, LJN BUS. CRIMES BULL., May 2006, at 1, 2, *available at* http://www.kirkland.com/sitecontent.cfm?contentID=223&itemId=2294 ("Even if an individual defendant is able to scrape together enough money to keep his counsel, few can afford the experts, accountants, investigators and support staff that it takes to sort through (much less, make sense of) the warehouses of material that their 'cooperating' employer gave the government.").

19. *See infra* Part II.B.

20. One of the clearest illustrations of this phenomenon was in the prosecution of former Enron executives. *See* John R. Emshwiller, *Skilling Gets 24 Years in Prison—Enron Ex-CEO Faced Longer Term for Fraud, Conspiracy Conviction; Victims Fund to Get $45 Million*, WALL ST. J., Oct. 24, 2006, at C1 ("Yesterday's sentence also underscored the dangers of going to trial versus the benefits of pleading guilty and cooperating with federal investigators. Andrew Fastow, Enron's former chief financial officer, received a six-year sentence after he pleaded guilty to criminal charges and helped the government in its case against Messrs. Skilling [who was sentenced to twenty-four years and four months in prison] and Lay."); *see also* Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. CRIM. L. & CRIMINOLOGY 731, 751 & n.123 (2007) ("Deciding whether to take the risk [to go to trial] may also be a function of money, as the cost of legal counsel can influence the ability to spend the sums necessary for a trial . . . .").

21. United States v. Stein (*Stein V*), 541 F.3d 130, 136 (2d Cir. 2008); United States v. Stein (*Stein IV*), 495 F. Supp. 2d 390, 415 (S.D.N.Y. 2007); United States v. Stein (*Stein I*), 435 F. Supp. 2d. 330, 367–73 (S.D.N.Y. 2006).

Kaplan found that the Fifth Amendment's Due Process Clause provides similar protection.[22] Senator Arlen Specter introduced legislation that would prevent the government from considering whether a corporation is paying its employees' legal fees when deciding whether to indict.[23] Deputy Attorneys General Paul McNulty and Mark Filip created revised Department of Justice (DOJ) policies that first lessened,[24] and then eliminated,[25] prosecutors' ability to consider whether an employer is paying its employees' legal fees.

Many scholars, lawyers, and policymakers have discussed the problem[26] (or lack thereof[27]) of pressure on individual white-collar defendants. Some have argued that the Constitution should protect white-collar defendants from prosecutorial pressure.[28] Some have suggested nonconstitutional methods of constraining prosecutorial power.[29] Some have contended that broad corporate criminal liability

---

22. *Stein I*, 435 F. Supp. 2d at 364–65.

23. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong. § 3(b)(2)(B).

24. Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 11 n.3 (Dec. 12, 2006) [hereinafter McNulty Memorandum], *available at* http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

25. Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 13 (Aug. 28, 2008) [hereinafter Filip Memorandum], *available at* http://www.usdoj.gov/dag/readingroom/dag-memo-08282008.pdf.

26. *See, e.g.*, Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 56 (2007) ("[C]ourts, commentators, and practitioners should more seriously consider the connection between the overbroad corporate criminal liability rule and the risk of overreaching by prosecutors who use their legally-conferred blank check to ferret out corporate crime."); Noah D. Stein, Note, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of its Employees' Attorneys' Fees?*, 75 FORDHAM L. REV. 3245, 3276 (2007) ("[Commentators] argue that a policy that emphasizes cooperation significantly augments the government's power."); Larry E. Ribstein, *Perils of Criminalizing Agency Costs* 10 (Ill. Law & Econ. Working Papers Series, Working Paper No. LE06-021, 2006), *available at* http://ssrn.com/abstract=920140 ("The government retains significant power to coerce cooperation from defendants.").

27. *See* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1617 (2007) ("[S]eeing these differences in context reduces worry about the state's current practices and leads to a response to the calls for reform that, at most, would modestly restrain the state in some respects."); Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 2 (2006), http://blj.ucdavis.edu/article.asp?id=641 (referring favorably to the government's consideration, when deciding whether to indict, of a corporation's advancement of defense costs to its employees).

28. *E.g.*, Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 353 (2007) ("[T]he Fifth Amendment should afford employees some protection against the adverse consequences of coerced disclosures . . . .").

29. Stein, *supra* note 26, at 3292–93 (suggesting that clarifying the McNulty Memorandum could curb prosecutorial pressure).

standards necessarily give prosecutors too much power.[30] Commentators have not, however, traced the cause of the pressure back to one of its most basic roots: criminalizing certain conduct that is prohibitively expensive for an individual to defend. Those who have addressed the question of what behavior Congress should criminalize in the first place have not recognized that legislatures must consider the pressures high legal fees place on individuals.[31]

This Note intertwines two strands of the debate over corporate crime: the strand evaluating the existence of and solutions to undue pressure on individual white-collar defendants and the strand questioning the overcriminalization of corporate law. It adds to both strands by focusing on one aspect of the pressure on white-collar defendants: high defense costs. These abnormally high costs increase the pressure, make it unique to corporate crime, put it out of the reach of commonly suggested procedural fixes, and make it an important consideration in criminalizing corporate behavior. The Note concludes that the pressure from high defense costs on white-collar defendants is something that policymakers and society should consider when deciding what behavior to criminalize.

Part I of this Note discusses the legal background necessary to appreciate the expenses that individual white-collar defendants face when defending allegations of corporate misconduct, exploring the aspects of white-collar crime cases that make these defense costs so high. Part II argues that the high costs of defending corporate criminal charges create dilemmas for white-collar defendants that are significantly different than the dilemmas facing defendants in traditional crime (or "street-crime") cases, making white-collar defendants uniquely vulnerable to coercion during prosecutions. Part III examines several options available to corporations, courts, and regulators when dealing with the coercion white-collar defendants

30. *See, e.g.*, Bharara, *supra* note 26, at 105 ("[T]he criticism of prosecutorial discretion is a systemic one, which cannot be overcome either by pointing to discretion well-exercised in the past or by addressing prosecutors' conduct only."); Ribstein, *supra* note 26, at 10 ("The wrongdoing in [corporate criminal] cases is subtle, blame difficult to apportion, and facts hard to find.").

31. *See, e.g.*, Richard A. Booth, *What Is a Business Crime?*, 3 J. BUS. & TECH. L. 127 *passim* (2008) (discussing the problems with criminalizing corporate misconduct, but not including legal fees among the problems discussed); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23 *passim* (Summer 1997) (same); Dick Thornburgh, *The Dangers of Over-Criminalization and the Need for Real Reform: The Dilemma of Artificial Entities and Artificial Crimes*, 44 AM. CRIM. L. REV. 1279 *passim* (2007) (same); Ribstein, *supra* note 26 *passim* (same).

face: corporate employment indemnification provisions, constitutional protection through the Fifth and Sixth Amendments, and stricter standards for prosecutorial misconduct. This Part demonstrates that all are inadequate solutions to the problem, concluding that the problem is inherent in prosecuting individuals for these crimes. The Note concludes by recommending that pressures on individual defendants created by high defense costs must begin to be a consideration in the debate over how to criminalize corporate crime.

I. EXPLAINING THE HIGH COSTS OF DEFENDING CORPORATE CRIME

The high defense costs in corporate criminal cases stem from the legal, factual, and mens rea questions that must be addressed in white-collar criminal investigations.[32] As many commentators argue, prosecutors should have every tool available to them because the types of inquiries involved in white-collar crime make these cases very difficult to prosecute.[33] The difficulty of investigating corporate activity means that prosecutors may only be able obtain answers through wide prosecutorial discretion and some cooperation from employees and corporations.[34] These difficulties for the prosecution, however, translate to three equally knotty problems for defendants, who also have limited resources to cover the costs involved in answering the complex questions involved and who have much more to lose by choosing to go to trial.

First, the substantive legal questions are inherently difficult to answer because of the wide variety of behavior that could be considered criminal misconduct under federal law. Standards for criminality are vague, unsettled, and still developing,[35] leaving unclear

32. *See* John Hasnas, *Foreword to Corporate Criminality: Legal, Ethical and Managerial Implications*, 44 AM. CRIM. L. REV. 1269, 1269–70 (2007) (discussing the costs these questions create for prosecutors in white-collar cases). Professor Hasnas points out that difficult legal, factual, and mens rea questions make it hard to determine when to criminalize corporate misconduct. This Note uses these three peculiar aspects of white-collar crime to explain the high costs of defending it and to distinguish its inherent procedural problems from those in the street-crime context.

33. *See, e.g.*, Michael Elston, *Cooperation with the Government Is Good for Companies, Investors, and the Economy*, 44 AM. CRIM. L. REV. 1435, 1437–38 (2007) (describing the difficulties of investigating corporate crime when a company does not cooperate).

34. *See* Griffin, *supra* note 28, at 340–41 ("Unraveling the threads of an intricate corporate fraud scheme without extensive cooperation is also a daunting challenge . . . .").

35. Lynch, *supra* note 31, at 37.

the legality of the corporation's activity even assuming the activity occurred. For one thing, a great deal of what is criminal differs only subtly from standard business practices, as the widespread practice of backdating illustrates.[36] Sometimes the conduct in question has been made illegal only recently, such as the tax shelters at issue in KPMG's case, so that the exact contours of the illegality remain unclear.[37] As a result, defendants can find it very difficult to predict the charges or the outcome of the investigation because of the broad definitions of corporate crime and the lack of precedent with which to predict outcomes. This problem requires lawyers specializing in corporate crime, who are often very expensive to retain. The flexibility of broad corporate criminal laws means that prosecutors can effectively determine whether criminal liability attaches to the conduct in question.[38] Congress has exacerbated this problem by criminalizing a wide variety of corporate activity, "heighten[ing] the vulnerability of individual employees,"[39] and increasing penalties without always providing clear standards for liability.[40]

Second, the factual questions involved in corporate crime require a costly process of sorting through all of the records created by a huge business. Investigators and lawyers examining the inner workings of corporations need to sift through extensive paper trails and interview

36. *See* David I. Walker, *Unpacking Backdating: Economic Analysis and Observations on the Stock Option Scandal*, 87 B.U. L. REV. 561, 566 (2007) ("Backdating has accounting consequences when discovered, but few instances of backdating were motivated by accounting concerns, and backdating does not represent an accounting scandal along the lines of those perpetrated at Enron, WorldCom, or Tyco.").

37. *See, e.g.*, Brief for Appellees Jeffrey Stein et al. at 88 n.34, United States v. Stein (*Stein V*), 541 F.3d 130 (2d Cir. 2008) (No. 07-3042) ("[T]he tax shelters in this case have never been brought before a judge, so their legality and legitimacy has never been settled as a point of law. . . . That gives this KPMG trial an Alice-in-Wonderland quality; the accused are on trial for promoting a fraudulent tax shelter that has never been proved to be fraudulent in the first place." (quotation error in original) (quoting Editorial, *KPMG in Wonderland*, WALL ST. J., Oct. 6, 2005, at A14)).

38. *See* Lynch, *supra* note 31, at 37 ("Prosecutors and courts, moreover, have utilized the broad discretion created by the criminalization of regulatory misconduct or by the vague terms of some criminal statutes, to change the terms in which certain forms of misbehavior are seen, and the consequences that attach to violations.").

39. Griffin, *supra* note 28, at 331 (referring to the Sarbanes-Oxley Act).

40. Lynch, *supra* note 31, at 37 ("Congress, and the sentencing commission it created to systematize criminal punishment, have significantly increased the *de jure* and *de facto* levels of punishment for violations in many areas, including the provision of severe sanctions for some of these innovative and sometimes poorly defined crimes.").

many witnesses to have any hope of figuring out what conduct actually occurred.[41] For example, in KPMG's case, the court observed,

> The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. The briefs on pretrial motions passed the 1,000-page mark some time ago. The government expects its case in chief to last three months, while defendants expect theirs to be lengthy as well. To prepare for and try a case of such length requires substantial resources.[42]

Costs in white-collar crime cases can become extremely high very early in the criminal process, such that without an advancement of their defense costs, white-collar defendants may have to give up on their defense before really beginning.[43]

Third, determining culpability in white-collar crime requires a difficult examination of the knowledge and subjective intentions of numerous employees of the corporation with various levels of responsibility. These questions are not about whether conduct was criminal, but about whether an individual defendant's consciousness of the potential impropriety of his conduct reaches the necessary level of scienter for criminality.[44] There can be a subtle difference between culpable and nonculpable mens rea of individuals, especially because each individual is a small part of the organization and it is difficult to tell how much the players knew about how their conduct fit into the larger scheme of the firm's operations. For instance, employees of General Re charged with being involved in a fraudulent reinsurance transaction have argued that Warren Buffett and other supervisors authorized the employees' actions and that they therefore could not

---

41. *See, e.g.*, Urgenson & Harris, *supra* note 18, at 2 (referring to the "warehouses of material" that can be produced in corporate-crime cases).

42. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (footnotes omitted).

43. *Id.* at 355 (stating that fee advancement "protects the 'ability [of the employee] to mount . . . a defense . . . by safeguarding his ability to meet his expenses at the time they arise, and to secure counsel on the basis of such an assurance'" (alterations in original) (quoting United States v. Weissman, No. S2 94 Cr. 760 (CSH), 1997 WL 334966, at *16 (S.D.N.Y. June 16, 1997) (mem.))).

44. *See* Buell, *supra* note 27, at 1628 ("Mens rea both dominates the law of white collar crime and is distinctive there in relation to other precincts of criminal law. Inquiry into mental state in white collar cases often progresses past relatively thin cognitive states like the Model Penal Code's 'knowledge' or 'purpose' to concepts such as 'willfulness,' 'bad purpose,' and 'consciousness of wrongdoing.'").

have acted wrongfully.[45] Such a "deep inquiry into mental state"[46] is hard to perform in the context of organizations that "tend to diffuse decision-making responsibility."[47] Further obscuring the inquiry into precisely who knew what and when, employees who know or fear that they were involved in misconduct have an incentive to further impede the search for truth.[48]

The inherent intricacy of white-collar crime on three different levels means that defendants' lawyers cannot investigate these crimes without spending a great deal of time, which translates into a great deal of money, sorting out the legal, factual, and intent issues. As Part II explains, the complexity of these issues not only raises the price of defending corporate crime, it significantly differentiates white-collar criminal defendants from typical street-crime defendants.

II. DIFFERENCES BETWEEN CORPORATE AND STREET CRIME

Some commentators have pointed to the similarities and differences between the prosecution of corporate and street crime to argue that the coercion is no worse, and reform is no more necessary, in the former than in the latter.[49] Street-crime defendants do face a great deal of pressure and relative lack of bargaining power when submitting to plea agreements to maintain their freedom, and Fifth

45. *See, e.g.*, Karen Richardson, *"Lies" or "Doubt": GenRe-AIG Trial Begins as Both Sides Lay Groundwork—Former Executives Accused of Fraud in Reinsurance*, WALL ST. J., Jan. 8, 2008, at C2 ("Reid Weingarten, lawyer for former General Re executive Elizabeth Monrad, said Joseph Brandon, the current CEO of General Re, who isn't charged, was 'all over this transaction.' Mr. Weingarten also said Warren Buffett knew about the transaction and that, as such, Ms. Monrad 'never in a million years would have thought the transaction would be shady.'").

46. Buell, *supra* note 27, at 1628.

47. Hasnas, *supra* note 32, at 1270.

48. In some corporate-crime cases, obstruction of justice and perjury charges are the only ones that end up sticking. Griffin, *supra* note 28, at 333 & n.116 ("Consider the case of Bruce G. Hill, the general counsel of a small Boston-based software company, Inso Corp., who was convicted on only one of two perjury charges for a false exculpatory statement but was found not guilty of the securities and wire fraud charges that had prompted the investigation in the first place. Similarly, in a case in which four Merrill Lynch employees had been charged with aiding Enron's fraudulent accounting, the Fifth Circuit tossed out all of the conspiracy and wire fraud counts and left standing only the perjury and obstruction counts against a single Merrill Lynch defendant." (citation omitted)).

49. *See* Sara Sun Beale, *Is Corporate Criminal Liability Unique?*, 44 AM. CRIM. L. REV. 1503, 1503 (2007) ("[T]he problems highlighted by the critics of corporate and white collar liability are often most severe in other contexts . . . ."); Buell, *supra* note 27, at 1617 (arguing that examining the differences between ordinary and corporate crime "reduces worry" about the government's treatment of white-collar defendants).

Amendment jurisprudence does not protect these defendants from all such coercion.[50] The pressures on street-crime defendants are significant and problematic, and policymakers should not necessarily ignore those problems in favor of reforming the white-collar criminal procedure.[51] Two principal differences between corporate and street crime distinguish the type and the level of coercion individual white-collar defendants face, however, presenting them with a different dilemma—that is, the choice between pleading guilty and being unable to afford to defend themselves at all.

A. Differences in Legal, Factual, and Intent Inquiries

The difficult legal, factual, and intent inquiries in white-collar crime cases that raise the costs of these defenses[52] are significantly different from the inquiries usually involved in traditional criminal cases. Because white-collar cases are so much more complex, it is less clear whether defendants have committed crimes. Prosecutors thus enjoy greater discretion to determine whether and how to charge white-collar cases. Prosecutors' increased discretion can give the government even greater bargaining power over alleged white-collar criminals than over alleged street criminals. This power leads to a much higher risk of pressure on defendants to plead guilty to white collar–crime allegations than the typical street-crime defendant faces.

First, the complex legal standards involved in prosecuting corporate crime[53] create a very different "legal landscape"[54] from the one on which street-crime cases are prosecuted. In traditional criminal cases the standards for criminality are usually much better defined; for instance, everyone can agree that possessing cocaine is illegal, whereas complicated accounting decisions involve questions of criminality that courts may have never even addressed before and

50. Brady v. United States, 397 U.S. 742, 758 (1970) ("Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful.").

51. *See* Beale, *supra* note 49, at 1535 ("While these problems exist in the context of corporate and white collar prosecutions, it would be a mistake to overlook the need for review and reform of the greater criminal system.").

52. *See supra* Part I.

53. *See supra* Part I.

54. Buell, *supra* note 27, at 1617.

that can be nearly inscrutable to those lacking accounting expertise.[55] Prosecutors have little difficulty deciding whether a homicide was a crime. In contrast, "in complex organizational settings, the wrongdoing can be deeply nested within legitimate and valuable economic activity."[56] Prosecutors in street-crime cases have a great deal of discretion as to whether or not to indict, but they do not usually have the discretion to prosecute behavior that is arguably not a crime at all.[57] This greater discretion in white-collar cases leads to a greater risk of prosecuting noncriminal activity and therefore of pressuring noncriminals to plead guilty.

Second, factual questions are much more difficult to answer in the midst of the complicated internal workings of a corporation than on the street.[58] The factual questions surrounding traditional criminal activity do not involve untangling complex organizations or corporations' extensive paper trails. Unlike in traditional crime, the allegedly illegal activity in corporate crime is often committed by many layers of employees, and the questions of what activity occurred, whose activity was illegal, and to whom the activity can be attributed are not necessarily clearly answered even after sorting through reams of evidence.[59] The difficulty in answering these questions might create greater opportunities for mistakes in corporate-crime prosecutions than in street-crime prosecutions; for instance, prosecutors (possibly with the help of dissembling employees covering their tracks and shifting blame) might attribute the conduct in question to the wrong one of many possible players in the multilayer organization. Factual mistakes and evidentiary uncertainty may be more likely to favor the prosecution in white-collar cases than in street-crime cases because white-collar defendants

---

55. *See id.* at 1627 (noting that it is much easier to determine whether a crime has occurred when the allegation is murder than when it is fraud).

56. *Id.*

57. *See id.* at 1628 ("The state makes decisions case by case . . . about what to treat as a crime and what to leave for civil regulation.").

58. The difference between street and corporate crime could be considered the difference between a puzzle, which "grows simpler with the addition of each new piece of information," and a mystery, which requires sorting through and making sense of "too much information" to answer a question that may not have a "simple, factual answer." Malcolm Gladwell, *Open Secrets: Enron, Intelligence, and the Perils of Too Much Information,* NEW YORKER, Jan. 8, 2007, at 44, 49.

59. *See* Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526 (2004) ("Corporate wrongdoing is less visible and harder to detect than most street crime.").

have a greater resource disadvantage, pressuring them to plead guilty when they cannot afford to defend against the allegations.

Finally, answering questions of intent is easier in the street-criminal context than in corporate crime. Whereas mens rea is usually a relatively straightforward question of "knowledge" or "purpose" in traditional criminal cases, white-collar crime cases raise more difficult intent issues; mens rea can include additional layers such as "willfulness," "bad purpose," "consciousness of wrongdoing," and an increased focus on mistake of law.[60] In addition, accused white-collar criminals can often contend that they did not know that their conduct was anything but business as usual, especially if a more senior employee authorized it[61] or they arguably believed it was a commonly accepted business practice, such as backdating.[62] This "searching inquiry into mental state"[63] creates yet another way in which prosecutors have greater flexibility to determine culpability in white-collar cases than they do in street-crime cases.

B. Government Pressure on Employers

White-collar defendants face additional pressure from their employers, who control a source of funds for their defense. Traditional criminal defendants who cannot afford to defend themselves are provided with counsel according to the Sixth Amendment[64] and the Criminal Justice Act (CJA).[65] It would seem that well-off white-collar defendants backed by multibillion dollar corporations could only be in a better position than indigent street-crime defendants, but in one way at least, they are caught in a difficult

60. Buell, *supra* note 27, at 1628.

61. *See supra* note 45 and accompanying text.

62. Edward Iwata, *Pay Analyst Testifies Grants "Seemed Odd" in Brocade Backdating Case*, USA TODAY, June 19, 2007, at 7B ("Defense attorney Richard Marmaro told jurors that backdating was 'a common business practice in America' . . . . In recent years, he said, Brocade issued backdated grants to more than 1,000 employees to recruit top talent."); *see also* United States v. Brown, 459 F.3d 509, 524–26 (5th Cir. 2006) (describing the many documents the government attempted to use to prove the defendant's knowledge and specific intent to defraud and concluding that these documents did not prove the sufficient level of intent).

63. Buell, *supra* note 27, at 1628.

64. U.S. CONST. amend. VI; *see also* Gideon v. Wainwright, 372 U.S. 335, 341–45 (1963) (extending the Sixth Amendment's guarantee of counsel to the states).

65. 18 U.S.C. § 3006A(a) (2006) ("Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.").

situation in which the criminal justice system protections are not available to them. Despite white-collar defendants' relative wealth, often the only ones willing and able to pay their attorneys are their employers, because very few individual defendants can actually afford to fully defend a white-collar criminal case.[66] The government, however, has a unique ability to prevent white-collar defendants from being able to fully fund their defenses by pressuring their employers not to pay these fees.

When prosecuting corporate crime cases, the DOJ has historically considered a corporation's payment of its employees' attorneys' fees when deciding whether or not to indict the firm,[67] and firms under threat of indictment have often given in to pressure to cut off indemnification of their employees.[68] At the time of the events precipitating the *United States v. Stein* decisions,[69] the Thompson Memorandum[70] provided guidelines for the DOJ in its decisions to indict corporations.[71] It explicitly suggested that prosecutors use a corporation's payment of its employees' defense costs as one of several indications of the corporation's cooperation in the

66. Urgenson & Harris, *supra* note 18, at 2; *see also* United States v. Stein (*Stein IV*), 495 F. Supp. 2d 390, 425 (S.D.N.Y. 2007) ("This is not to say that the Constitution guarantees anyone charged with a crime representation by a 'Dream Team' or a multimillion dollar defense. But, as *Stein I* held, it does guarantee those who can afford it the right to spend their money for the best (or, what is not always the same thing, the most expensive) defense that money can buy, free of unjustified interference by the government. It also, as a general matter, prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one. The vice of the government's actions here was that the government improperly interfered with the payment of defense costs that KPMG otherwise would have paid . . . ."); Podgor, *supra* note 20, at 751 n.123 ("News reports suggested that Enron's former chief accounting officer Richard Causey's plea was motivated by the cost of attorney fees . . . .").

67. The government tends to focus on the corporation's cooperation when making its charging decisions. Until the change from the Thompson to the McNulty Memorandum, prosecutors treated a refusal to pay employees' attorneys' fees as one element of cooperation. Elston, *supra* note 33, at 1436.

68. *See, e.g.*, Davies & Reilly, *supra* note 4 (discussing the fee cutoff in both the Olis and Stein trials).

69. The *Stein* litigation has prompted a number of decisions. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330 (S.D.N.Y. 2006); United States v. Stein (*Stein II*), 440 F. Supp. 2d. 315 (S.D.N.Y. 2006); United States v. Stein (*Stein III*), 452 F. Supp. 2d 230 (S.D.N.Y. 2006); *Stein IV*, 495 F. Supp. 2d at 390; United States v. Stein (*Stein V*), 541 F.3d 130 (2d Cir. 2008).

70. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys pt. VI.B (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

71. *Id.*

investigation.[72] Eventually, the Thompson Memorandum was replaced by the McNulty Memorandum, which changed the guidelines slightly: it prohibited the DOJ from considering payment of defense costs as a measure of cooperation except in "rare cases."[73] That change, however, was widely agreed to have little or no effect on the amount of pressure on corporations: the DOJ did not have to disclose its reasons for deciding whether to indict, and corporations would still want to signal the utmost cooperation by cutting off their employees' legal fees.[74]

Ultimately, the Filip Memorandum replaced the McNulty Memorandum. This new version of the guidelines may appear to have resolved the issue by flatly prohibiting the DOJ from considering attorneys' fees in its charging decisions.[75] But for the same reasons that the McNulty Memorandum's changes to DOJ policy were probably ineffectual in reducing pressure on corporations, the Filip Memorandum will also probably not solve the problem—the government is still not required to disclose what it considered when deciding how to charge, and incentives that create a likelihood of perceived pressure remain. The same broad prosecutorial discretion that pressures individual defendants to plead guilty can create even greater pressure on corporations because indictment sometimes threatens a firm's very existence,[76] giving employers strong incentives to surrender to any perceived government pressure to cut off advancement of employees' defense costs. As the U.S. Attorney said

---

72. *Id.*

73. McNulty Memorandum, *supra* note 24, at 11 n.3.

74. *See, e.g.*, Bharara, *supra* note 26, at 78–79 (observing that, "in most important respects," the provisions of the Thompson and McNulty memoranda that concern how the government assesses the culpability of corporations and considers its own source of authority and leverage, "the new [McNulty] guidelines are identical to the [Thompson] guidelines [they] replaced"); John Power, Note, *Show Me the Money: The Thompson Memo,* Stein*, and an Employee's Right to the Advancement of Legal Fees Under the McNulty Memo*, 64 WASH. & LEE L. REV. 1205, 1235 (2007) ("[W]hile the McNulty memo aims to limit the circumstances under which advancement [of an employee's legal fees] may be considered by prosecutors, consideration about advancement may remain, albeit pushed to an unspoken, underground level.").

75. Filip Memorandum, *supra* note 25, at 13.

76. *See, e.g.*, Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1483 (2007) ("[W]hat matters is that upon the mere announcement of an indictment, a corporation is effectively punished as if a guilty verdict had been returned."). The pressure on corporations described here tends to apply largely to certain types of firms whose reputation or ability to secure clients will be most affected by an indictment. Lawrence D. Finder & Ryan D. McConnell, Annual Corporate Pre-Trial Agreement Update – 2007, at 4–5 (Mar. 2008) (unpublished manuscript, on file with the *Duke Law Journal*).

about KPMG's cooperation with the investigation during negotiations over a deferred prosecution agreement, "Let me put it this way, I've seen a lot better from big companies."[77] Whether or not prosecutors faithfully put all knowledge of the corporation's fee payment policy out of their minds when making charging decisions, corporations know that their every action might affect the decision.

Therefore, despite language to the contrary in the Filip Memorandum, corporations may deem it necessary to refuse to advance their employees' defense costs to avoid indictment, especially if other corporations under investigation are willing to cut off advancement of fees, potentially creating a feedback loop in which no corporation will risk paying its employees' fees. Further enhancing prosecutorial discretion, courts have continually broadened the scope of criminal corporate liability such that almost any conduct by any employee can lead to a finding of liability of the firm under the respondeat superior and "collective knowledge" doctrines.[78] Thus, corporations are in a tenuous position with extremely little bargaining power and will scramble to cooperate with the government to secure deferred (or non-) prosecution agreements.[79] Further, although corporations use indemnification and advancement agreements to attract employees, they have the financial incentive to place some limits on these agreements.[80] Whether or not the government does anything to induce a corporation to cut off its employees' fees, the corporation could decide on its own not to fund an employee's defense past a certain point. Whatever the reason, the employee is left effectively defenseless and pressured to plead guilty.

Traditional street-crime defendants face well-documented pressure to plead guilty, and the Fifth Amendment does not fully protect them from this pressure.[81] They face broad prosecutorial discretion, a lack of bargaining power, significantly greater sentences

77. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 348 (S.D.N.Y. 2006) (quoting David N. Kelley, United States Attorney, Southern District of New York).

78. *See* George J. Terwilliger III, *Under-Breaded Shrimp and Other High Crimes: Addressing the Over-Criminalization of Commercial Regulation*, 44 AM. CRIM. L. REV. 1417, 1421–28 (2007) (describing the Supreme Court's expansion of corporate criminal liability).

79. *See* Griffin, *supra* note 28, at 327 ("Because virtually no company will risk indictment, prosecutors have come to expect compliance with every government demand.").

80. *See, e.g.*, Tafeen v. Homestore, Inc., No. CIVA. 023-N, 2004 WL 556733, at *10 (Del. Ch. 2004) (acknowledging the financial risk placed on companies by unlimited advancements but rejecting that risk as a basis for nonenforcement of a contract), *aff'd*, 888 A.2d 204 (Del. 2005).

81. Brady v. United States, 397 U.S. 742, 758 (1970).

if they lose at trial than if they agree to a plea bargain, and often the damning testimony of codefendants who have cut a deal with the government. White-collar defendants, however, face similar pressures with the additional wrinkle of their extremely high defense costs: they may find the option of going to trial almost completely infeasible due to their lack of resources if their employers do not pay their defense costs. The contention that white-collar criminals face a different kind of pressure does not suggest that the traditional criminal justice system is not also in serious need of reform. Rather, it illustrates that white-collar defendants are subject to a different dilemma that is, in some ways, more problematic than the one street-crime defendants face.

III. APPROACHES TO ALLEVIATING THE PRESSURE

Pressure on white-collar criminal defendants is a problem, then, but what is the solution? One possibility would be to prevent the pressure before it begins by ensuring that white-collar defendants are adequately indemnified for their legal fees; if their employers could not withdraw financial support from their employees, defendants would have the resources to fully defend themselves at trial and would not feel coerced into pleading guilty. A second type of solution is constitutional protection, which Judge Kaplan and the Second Circuit have found covers at least some instances of prosecutorial influence on corporate employers; under this approach, defendants' broadly defined procedural rights would limit prosecutors' power. Third, prosecutorial guidelines, ethical rules, or legislation could regulate prosecutorial conduct directly. This Part examines each approach and concludes that inherent procedural aspects of white-collar prosecutions make each solution infeasible or ineffective.

A. Indemnification Agreements

Although firms commonly agree to indemnify their employees for their legal fees, corporate employees cannot necessarily rely on their employers to protect them from the difficult choice between pleading guilty and mounting a defense they are unable to afford. The DOJ policy, as outlined in the Filip Memorandum, ostensibly prevents the government's consideration of preexisting indemnification provisions when assessing a firm's cooperation,[82] but

82. Filip Memorandum, *supra* note 25, at 13.

employers could still feel intense pressure to cut off fee advancement for the reasons Part II.B discussed. Violations of the DOJ policy are difficult to detect[83] and to enforce.[84] Further, employers face their own financial pressure to cut off indemnification and advancement at some point; they may not want to risk providing limitless defense funds to an employee who could later be convicted or found to have acted in bad faith.[85] Thus, some pressure to cut off indemnification likely remains, despite the changed guidelines.

Given that firms likely still face pressure to stop paying their employees' legal costs, will they do so despite having contracted to advance their employees' fees? Employers often agree to indemnify their employees and advance fees beyond the legal minimum.[86] They have an incentive to offer generous indemnification and advancement provisions to attract talent and encourage some risk taking from employees who fear bankruptcy or being unable to pay for their defense if their behavior is later alleged to be criminal.[87] Most states have indemnification statutes that allow various levels of contractual indemnification and often require some level of indemnification, but these statutes usually only require reimbursement of fees after a successful defense.[88] Because defendants usually cannot afford to pay

---

83. *See infra* note 147 and accompanying text.

84. Filip Memorandum, *supra* note 25, at 21.

85. *See, e.g.*, Levy v. Hayes Lemmerz Int'l, Inc., Civ. A. No. 1395-N, 2006 WL 985361, at *10 (Del. Ch. 2006) (rejecting a corporation's argument that the court should stay an indemnification action until an SEC investigation concluded whether the former directors acted in bad faith).

86. The court found that California statutes applicable to some of the KPMG defendants required that they be advanced costs if the costs were related to the defendants' employment and that they be indemnified unless their actions were "unlawful and 'believed to be unlawful' at the time." United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 356 n.119 (S.D.N.Y. 2006) (citing CAL. LAB. CODE § 2802(a) (West 2006); CAL. CIV. CODE § 2778 (West 2006)). The applicable Delaware law allows partnerships to indemnify their partners as set forth in the partnership agreements. *Id.* at 355 n.117 (citing DEL. CODE ANN. tit. 6, § 15-110 (2006)).

87. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 211 (Del. 2005) ("Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service. . . . Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service.").

88. *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(c) (2006) ("To the extent that a person or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action . . . such person shall be indemnified against expenses (including attorney's fees) actually and reasonably incurred by such person in connection therewith."); *see also Stein I*, 435 F. Supp. 2d at 354–55 (observing that "[t]oday, all states have statutes addressing the indemnification of corporate directors, officers, employees, and other agents" and describing those statutes).

for their defenses out of pocket during the investigation and trial, most states also allow firms to advance fees during litigation.[89]

Firms often have flexibility in determining the terms of their fee advancements to employees, so they have the option of drafting agreements that cut off the payment of fees at some point.[90] A finite advancement agreement can leave an employee in the same position as if the government had pressured the corporation to cut off defense fees: the individual defendant is still left unable to adequately defend against the likely complex charges. And even with the most generous possible advancement agreement, employers have strong incentives to cut off fees and risk their employees suing them for breach of contract.[91] Suing an employer when criminal charges are pending might be too inconvenient for the employees, so the risk of suit might not be that significant. In any case, though, lawsuits take time, and after waiting for the uncertain outcome of a lawsuit, it may be too late for an employee to pay for a proper defense without being sure of reimbursement. Therefore defendants may not see suing their employers for their attorneys' fees as a viable option and may feel forced to forego a full defense because they lack the resources. Even if defendants do choose to go to trial (likely with inferior counsel) and later sue for reimbursement, the threat to the firm of such a suit may in many cases pale in comparison to the threat of being charged with criminal misconduct, because the latter could destroy the corporation.[92] If in practice firms are willing to breach an indemnification agreement in response to perceived government pressure, they will likely continue to do so to save the corporation. Even if employers are later found responsible for their employees' attorneys' fees, it may be too late for the employees to fully defend

89. *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(e) ("Expenses (including attorney's fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action . . . ."); *see also Stein I*, 435 F. Supp. 2d at 355 ("[M]any states authorize business entities to advance defense costs to their personnel . . . .").

90. *See, e.g.*, Adobe Systems Inc., Current Report (Form 8-K), ex. 3.1, art. XI, § 43(c) (Sept. 23, 2005) (Amended & Restated Bylaws), *available at* http://www.sec.gov/Archives/edgar/data/796343/000110465905045524/a05-16703_1ex3d1.htm (limiting fee advancement when the board of directors determines that the officer or director acted in bad faith or against the corporation's interests).

91. *See supra* notes 80, 85 and accompanying text; *infra* note 109 and accompanying text.

92. *See supra* Part II.B.

themselves by the time they are reimbursed.[93] Therefore, indemnification and advancement provisions cannot reliably lift the financial pressure on individual defendants.

B. Constitutional Protections

When legal procedures are unfair, it might seem logical to look to the Constitution to prevent injustice. In fact, two courts have invoked constitutional safeguards to protect white-collar defendants from the pressure their high defense costs create.[94] But others have argued that courts cannot stretch these constitutional doctrines to apply to the type of coercion that arises from the cost of defending corporate crime.[95] And even if the Constitution can, in theory, protect white-collar defendants from the pressure this Note describes, applying its protections might, in practice, be impossible. This Section outlines the doctrinal and practical problems associated with using the Fifth and Sixth Amendments to protect individual white-collar defendants from financial pressure to plead guilty and concludes that neither amendment can fully protect them.

1. *The Sixth Amendment.* In *Stein*, the district and appellate courts both held that the Sixth Amendment protected the defendants from the conduct of the DOJ in its prosecution of KPMG.[96] Sixth Amendment doctrine fits poorly, however, with the type of pressure that white-collar defendants face because of their high defense costs, and even if it applied doctrinally, it could be prohibitively impractical to implement its protections.

a. Doctrinal Issues. Despite the holdings in *Stein* that the Sixth Amendment protected against the DOJ's conduct when it prosecuted

---

93. *See* Posting of Peter Lattman, *supra* note 11 ("[A] Texas jury ruled that Dynegy improperly cut [Olis] off in a bid to avoid a criminal indictment of the energy company [four years ago]. The jury ordered Dynegy to pay Olis's attorney Terry Yates, who brought the case, $2.5 million in damages. The company plans to appeal. For Olis, 41 years old, the decision was a hollow victory.").

94. United States v. Stein (*Stein V*), 541 F.3d 130, 136 (2d Cir. 2008); United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 366 (S.D.N.Y. 2006).

95. *See* Margulies, *supra* note 27 (arguing that *Stein III*'s application of the Fifth and Sixth Amendments "make[s] it a dangerous precedent that will increase agency costs and moral hazard for owners of business organizations, and reduce the government's ability to combat stonewalling of investigations that is disfavored under both the legal ethics rules and substantive law").

96. *Stein V*, 541 F.3d at 136; *Stein I*, 435 F. Supp. 2d at 367–69.

KPMG,[97] those courts arguably misapplied the doctrine to cover the facts of that case,[98] and future cases will be even harder to fit into a Sixth Amendment rubric.

First, a corporation's usual practice of advancing attorneys' fees to its employees does not necessarily make those advancements the defendants' own resources, which the Sixth Amendment requires, such that government interference with fee advancements amounts to interference with defendants' choice of counsel.[99] The cases relied on in *United States v. Stein (Stein I)*[100] for the holding that the government improperly interfered with defendants' choice of counsel could also stand for the proposition that defendants do not have an absolute right to their choice of counsel. In *Wheat v. United States*,[101] the Supreme Court held that a trial court could reject the defendant's counsel of choice due to a "serious potential for conflict[s of interest],"[102] and in *Caplin & Drysdale, Chartered v. United States*[103] the Court affirmed the trial court's decision to prevent the defendant from using funds he allegedly earned through illegal drug trafficking.[104] Unlike the right to the effective assistance of counsel, "which is an irreducible minimum under the Sixth Amendment," defendants' rights to choose their own counsel is not "absolute"[105] and courts arguably should limit it when it may severely hamper a criminal prosecution or when defendants attempt to use allegedly ill-gotten funds (here, from their alleged corporate misdeeds) for their defense. In addition, future cases will likely present a different situation—one in which the corporation has explicitly contracted to

97. *See Stein I*, 435 F. Supp. 2d at 366 ("It protects, among other things, an individual's right to choose the lawyer or lawyers he or she desires and to use one's own funds to mount the defense that one wishes to present." (citing Wheat v. United States, 486 U.S. 153, 164 (1988); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989))).

98. *See* Margulies, *supra* note 27 ("[T]he court's legal holdings are difficult to support. While the court asserted that the defendants have a Sixth Amendment right to advancement of legal fees, precedent holds only that the defendant has a right to 'spend his *own* money' to secure counsel." (emphasis added) (quoting *Caplin & Drysdale*, 491 U.S. at 626)).

99. *Caplin & Drysdale*, 491 U.S. at 619.

100. United States v. Stein (*Stein I*), 435 F. Supp. 2d. 330 (S.D.N.Y. 2006).

101. Wheat v. United States, 486 U.S. 153 (1988).

102. *Id.* at 164.

103. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989).

104. *Id.* at 632.

105. Brief for the United States of America at 56, United States v. Stein (*Stein V*), 541 F.3d 130 (2d Cir. 2008) (No. 07-3042) (citing United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006)).

advance an employee's attorneys' fees,[106] making it less likely that a court will find that the resources do not belong to the employee.

Second, violations of the Sixth Amendment must be perpetrated by the government or by action attributable to the government.[107] But the government likely is not demonstrably responsible when it is ultimately the corporation that has directly impeded the defendants' ability to retain adequate counsel. Under the Filip Memorandum, which prohibits the outright consideration of attorneys' fees, it will be even harder than it was in *Stein* to demonstrate that government action caused interference with defense counsel because the decision to cut off fees will be even less attributable to the government and more to the corporation. Given that "scholars who seek to constrain the private exercise of authority through the extension of constitutional limits to nonstate actors face an uphill battle,"[108] a finding of state action will be hard to justify doctrinally when the government will presumably avoid the appearance that it is considering attorneys' fees at all. In fact, the corporation could be acting solely on its own to cut off its employees' fees, possibly based on its own determination that its employees have committed wrongdoing or based on internal financial pressure,[109] in which case the individual defendant is left without a constitutional remedy.

b. Practical Problems. Even if courts follow the *Stein* courts' reasoning and continue to find state action despite the change in DOJ guidelines, they may have trouble delineating the extent of these Sixth Amendment protections. Applying the Sixth Amendment to indirect pressure on white-collar defendants creates a variety of

106. *See* Homestore, Inc. v. Tafeen, 888 A.2d 204, 218 (Del. 2005) ("[M]ost Delaware corporations do adopt advancement provisions as an inducement . . . [to] attract[] the most capable people into corporate service.").

107. Thompson v. Mississippi, 914 F.2d 736, 738 (5th Cir. 1990) (finding that although the sheriff's department permitted an accidental run-in between a witness and defendant, there was no state action because the run-in "was not authorized, arranged, or requested by" the government).

108. Griffin, *supra* note 28, at 365 (referring to the state's practice of obtaining incriminating statements through private actors).

109. *See, e.g.*, DeLucca v. KKAT Mgmt., L.L.C., Civ.A. No. 1384-N, 2006 WL 224058, at *2 (Del. Ch. 2006) (rejecting a company's attempt to interpret its indemnification and advancement provisions narrowly when the company sued a former employee for breaches of fiduciary and contractual obligations); Tafeen v. Homestore, Inc., No. CIVA. 023-N, 2004 WL 556733, at *10 (Del. Ch. 2004) (rejecting the corporation's argument that the provision in its bylaws for advancing fees to a former officer should not be enforced because of the financial strain it would place on the corporation), *aff'd*, 888 A.2d 204 (Del. 2005).

practical problems: given these defendants' inevitable high defense costs, the questions of who will pay the costs and how they will be paid will be difficult to answer.

In traditional criminal cases, the government can and does pay to provide indigent defendants with adequate representation,[110] easily solving Sixth Amendment problems that arise from a lack of defense funds. In corporate criminal cases, on the other hand, many defendants have enough money that they are likely not eligible for public defenders unless they first spend all of their resources on their defense.[111] Even very wealthy white-collar defendants often cannot afford the level of representation necessary to fully defend the types of charges they face.[112] In any case, the government simply could not afford to cover the defendants' costs to the extent necessary to provide them the defense they would otherwise choose; a government defender would not have nearly the same expertise or resources as the expensive defense counsel that an employer would fund.[113] The remedy for a Sixth Amendment violation is to restore defendants to the position they occupied before the government interfered with their choice of counsel, which in some cases could arguably be achieved by appointing counsel under the CJA.[114] This is likely impossible in corporate criminal prosecutions, however, because defendants would have to spend all of their money to become eligible for a CJA lawyer, and they still would not get their counsel of

110. *See* 18 U.S.C. § 3006A(a) (2006) ("Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.").

111. *See, e.g.*, United States v. Stein (*Stein IV*), 495 F. Supp. 2d 390, 420 (S.D.N.Y. 2007) (noting that under the CJA plan for the Southern District of New York, "the retention of assets in excess of those essential to provide 'the necessities of life' would be disqualifying").

112. *See id.* at 423 (discussing the financial states of the defendants and concluding that "[n]one of them can afford to defend this case at any meaningful level"). In *Stein IV*, the government conceded that an estimate of $3.3 million in defense fees for one defendant was "very conservative," and other lawyers estimated that the cost could be between $7 and $24 million. *Id.* at 424.

113. *Id.* at 419.

114. *See id.* at 419–21 (finding that, in that case, a CJA appointment could not restore defendants to their original positions because they would have had to "spend down" their resources to qualify and the CJA attorney would have been limited by a maximum fee that was much less than what KPMG would have paid); *see also* 18 U.S.C. § 3006A(a) ("Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section.").

choice.[115] Therefore, for instance, in *United States v. Stein (Stein IV)*[116] the government conceded that dismissal was the only possible remedy for most of the defendants given the finding that the government had violated their Sixth Amendment rights.[117] Dismissing all prosecutions in which employers do not pay defendants' legal fees could significantly frustrate prosecuting white-collar crime.

Even if courts decide that the government must provide some portion of a white-collar defendant's costs, or provide some type of representation, it would be difficult to determine how much the government must pay or how skilled a public defender must be to be constitutionally adequate. For white-collar defendants who are eligible for public defenders, requiring the government to pay significantly more for white-collar defenses than the $7,000 the CJA allots[118] would raise serious issues of unfairness and inequality, and $7,000 would make an insignificant dent in the typical cost of defending the types of allegations involved.[119]

2. *The Fifth Amendment*

a. Doctrinal Problems. The *Stein I* court also held that the government's actions toward KPMG violated the individual defendants' Fifth Amendment substantive due process rights to "obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[120] The court found this right to be a fundamental substantive due process right, subject to strict scrutiny, and further found that the Thompson Memorandum and the actions of the U.S. Attorney's Office were not narrowly tailored to a compelling governmental interest.[121] In *Stein IV*, the court found that the government's conduct, "us[ing] KPMG to strip any of its employees who were indicted of means of defending themselves," "shocked the

115. *Stein IV*, 495 F. Supp. 2d at 421–22.

116. United States v. Stein (*Stein IV*), 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

117. *Id.* at 425.

118. 18 U.S.C. § 3006A(d)(2).

119. *See Stein IV*, 495 F. Supp. 2d at 424 (presenting estimates of one defendant's total fees ranging between $3.3 and $24 million).

120. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 361–62 (S.D.N.Y. 2006). The Second Circuit did not reach the Fifth Amendment question on appeal. United States v. Stein (*Stein V*), 541 F.3d 130, 136 (2d Cir. 2008).

121. *Stein I*, 435 F. Supp. 2d at 364–65.

conscience" and thereby violated the defendants' substantive due process rights.[122]

Judge Kaplan's constitutional analysis includes some possible doctrine infirmities. First, although the court in *Stein I* referenced many cases in which courts upheld the rights to various aspects of fair procedure, it did not cite any cases finding that defendants have the right to use someone else's funds to pay for their defenses.[123] In addition, the court acknowledged that the Supreme Court had not previously found even the broader "right to fairness in the criminal process" to be a fundamental right.[124] Thus the court declared an arguably new fundamental right of a criminal defendant "to obtain and use in order to prepare a defense resources lawfully available to him or her."[125] Bolstering the argument that this right was not previously considered to be fundamental, the Supreme Court in *Caplin & Drysdale* had addressed a question of using available funds to pay for a defense without declaring that the question involved a fundamental right or applying strict scrutiny.[126] If the right to use available resources in one's defense is not a fundamental right, it is not subject to strict scrutiny and would likely pass the less stringent rational basis test because of the government's interest in preventing corporations from protecting culpable employees.[127]

Second, the court's finding that the prosecution's behavior met the "shocks the conscience" standard is questionable. The standard is not easy to delineate, but it is arguably not met when a prosecutor pressures a corporation to withhold its employees' legal fees.[128] In the past, courts have often required a much higher level of coercion to find a violation of substantive due process rights, including

122. *Stein IV*, 495 F. Supp. 2d at 415.

123. *Stein I*, 435 F. Supp. 2d at 357–59.

124. *Id.* at 360.

125. *Id.* at 360–62.

126. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 619 (1989) ("We are called on to determine whether the federal drug forfeiture statute includes an exemption for assets that a defendant wishes to use to pay an attorney who conducted his defense in the criminal case where forfeiture was sought. Because we determine that no such exemption exists, we must decide whether that statute, so interpreted, is consistent with the Fifth and Sixth Amendments.").

127. Washington v. Glucksberg, 521 U.S. 702, 728 (1997) (holding that the assisted suicide ban was not a fundamental interest and "unquestionably" met the rational basis requirement for validity).

128. *See* Margulies, *supra* note 27 (arguing that more is usually required for a finding of a substantive due process violation of the right to fairness in a criminal proceeding).

involuntary stomach pumping,[129] using a defendant's own lawyer against him,[130] and hiding a criminal investigation to collect evidence and avoid constitutional protections.[131] In KPMG's case, the government's actions were nearly imperceptible; the government made only subtle references to attorneys' fees during negotiations[132] and followed a policy (in the Thompson Memorandum) that included payment of attorneys' fees as one factor among many to consider in indictment decisions.[133] In the future, under the Filip Memorandum, the DOJ is unlikely to exhibit any outward signs of pressure at all because the policy explicitly forbids it to consider attorneys' fees.[134] The government may even have nothing to do with an employer's decision to cut off fees; in such cases, the individual defendants would still be left without defense funds and would still feel pressure to plead guilty, but the lack of state action would leave them without recourse to the Fifth Amendment.

b. Practical Problems. Even if courts agree with the *Stein* court that the Fifth Amendment Due Process Clause protects against government pressure on employers to cut off advancement of fees,[135] the question remains how this protection would apply in practice. Because corporate crime is so difficult to investigate, prosecutors often need a defendant corporation's help to sort through its complicated inner workings.[136] The corporation could, in some cases, be interfering with the government's prosecution by advancing its employees' attorneys' fees to help protect culpable employees by "circling the wagons."[137] Applying the Fifth Amendment could also create spillover problems in other instances of potential coercion. The Fifth Amendment could, for example, prevent the government from using other methods of obtaining corporations' cooperation, such as

129. Rochin v. California, 342 U.S. 165, 209–10 (1952).

130. United States v. Marshank, 777 F. Supp. 1507, 1523 (N.D. Cal. 1991).

131. United States v. Stringer, 408 F. Supp. 2d 1083, 1088–89 (D. Or. 2006).

132. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 344 (S.D.N.Y. 2006).

133. Thompson Memorandum, *supra* note 72, pt. V1.B.

134. Filip Memorandum, *supra* note 25, at 13.

135. Extending the Fifth Amendment to cover government pressure on employers to cut off advancement of legal fees to employees is unlikely if most courts follow the Supreme Court's lead and generally protect the government's prosecutorial power. *See* Bharara, *supra* note 26, at 104–05 ("*Stein* is in spirit at odds with a century of utilitarian Supreme Court decisions mostly deferential to law enforcement.").

136. *See supra* Part I; *see also supra* note 33 and accompanying text.

137. Margulies, *supra* note 27.

encouraging employee testimony, that are arguably necessary for prosecuting white-collar crimes.[138]

It will also be extremely difficult to prove when the government is acting coercively. In KPMG's case, the payment of attorneys' fees was expressly a consideration in the Thompson Memorandum and the prosecutors did make references, albeit oblique ones, to attorneys' fees in negotiations with KPMG.[139] The Filip Memorandum, however, will prevent the DOJ from outright considering payment of fees, meaning that it will be much harder to show when the government's actions caused employers to cut off their employees' fees. In fact, the government does not have to act at all for employers to feel pressure to cut off fees: firms often have the incentive to do so whether or not the government has actively pressured them, either to avoid indictment or for reasons having nothing to do with government action.[140]

C. Prosecutorial Regulation

If constitutional prohibitions cannot prevent prosecutorial pressure on corporations, changing the rules that prosecutors follow in making their indictment decisions may rein in some of the coercive conduct.[141] This change would involve strengthening the standards by which prosecutorial conduct is judged and making sure these standards have enough authority that prosecutors will actually follow them.[142] The necessarily broad discretion that prosecutors enjoy makes it difficult, however, to control the process by which they make their charging decisions.

The Filip Memorandum already provides guidelines that technically prohibit prosecutors from considering advancement of defense costs.[143] But this seemingly straightforward answer to the problem may not relieve the pressure on individuals. One reason is that this change in the guidelines from the Thompson Memorandum likely has merely driven consideration of fee payment under the table

---

138. *See* Buell, *supra* note 27, at 1643 (discussing the problems with extending Fifth Amendment protections to employer-coerced statements).

139. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 344 (S.D.N.Y. 2006).

140. *See* Stone, *supra* note 80, at 6–12 (detailing the reasons a corporation may want to cut off its employees' defense costs).

141. Stein, *supra* note 26, at 3292–93 (suggesting that clarifying the DOJ's prosecution guidelines could curb prosecutorial pressure).

142. *Id.*

143. Filip Memorandum, *supra* note 25, at 13.

and has had little or no effect on the actual pressure on corporations.[144] Making the standards for charging considerations more explicit does not make the government's considerations any more visible, and in any case these guidelines do not provide defendants with a remedy in court and are not otherwise enforceable.

Any attempts to directly constrain prosecutorial pressure on corporations to stop paying their employees' defense costs face significant enforcement problems. The Filip Memorandum guidelines and U.S. Attorneys' Manual are not enforceable in court.[145] Defendants likely would struggle to prove violations of even enforceable standards (for example, legislation[146] or bar association ethical rules) because they cannot see what the prosecution actually considered when deciding whether to indict. As Judge Kaplan pointed out in *Stein I*, "whatever the government may do in the privacy of U.S. Attorneys' offices and in the DOJ's Criminal Division is not what defense lawyers see,"[147] so defense lawyers likely will advise corporations to cut off advancement of attorneys' fees if they have any reason to believe that it will help the corporation avoid indictment. As a result, any constraint on prosecutorial discretion would have to make prosecutors' considerations transparent enough that defense lawyers actually believe that prosecutors are adhering to it. Although imposing stricter standards could make prosecutors' considerations more visible and reduce their ability to apply pressure, prosecutors could continue to consider attorneys' fee advancement if they had incentives to make it difficult for corporations to protect their employees.

Prosecutors do have incentives to make it difficult for individual defendants to defend themselves by placing pressure on their corporate employers. The high-profile nature of corporate-crime cases and the public's desire to see alleged corporate criminals harshly punished often encourage prosecutors to obtain guilty pleas

144. *See, e.g.*, Bohrer & Trencher, *supra* note 76, at 1488 ("While the McNulty Memo may contain some limitations not found in the Thompson Memo, corporations under investigation must still offer and give complete and genuine cooperation in order to escape an indictment. What this means in practice is still somewhat of an open question." (footnote omitted)).

145. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 1-1.100 (2008), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam; Filip Memorandum, *supra* note 25, at 21.

146. For example, Senator Arlen Specter proposed a bill that would have legislated something like the guidelines that were incorporated into the McNulty Memorandum. Attorney-Client Privilege Protection Act of 2006, S. 30, 109th Cong.

147. United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 364 (S.D.N.Y. 2006).

or verdicts; public perception may already be that the defendants must be guilty based on the estimated widespread harm of their actions.[148] The public approval of successful prosecutions of corporate crime means that prosecutors often go through the "revolving door" into lucrative private-practice careers.[149] Prosecutors have, and the public encourages them to use, increased powers to fight the "war" on corporate crime.[150] Prosecutors also have the incentive to enter deferred prosecution agreements rather than indict firms and risk destroying the companies, harming the economy, and drawing public disapproval. Instead they prefer focusing on the guilt of individuals in the company, which avoids these consequences while still successfully punishing the misconduct.[151] As long as the government considers criminal prosecution to be an important tool for regulating corporate misconduct, and as long as societal pressure to search out and punish corporate wrongdoers exists, individual prosecutors will continue to have motivations to wield their power over corporations to get as much cooperation from them as possible, including the refusal to pay employees' defense costs.

Given these incentives, prosecutors may still continue considering the payment of attorneys' fees when making charging decisions despite rules designed to prevent them. More importantly, even if prosecutors do not actually consider a firm's advancement of defense costs in charging decisions, corporations, seeing these incentives, likely will still feel pressure to cut off their attorneys' fees just in case doing so will save them from indictment. Many white-

148. *See* Griffin, *supra* note 28, at 315 ("[T]he perceived scope of contemporary corporate crime has inspired particularly zealous tactics.").

149. *See Revolving Door*, WASH. POST, Nov. 4 2007, at F3 (reporting the hiring of "David Esseks, former federal prosecutor who led the government's fraud case against Refco, as litigation partner of law firm Allen & Overy in London"); Posting of Peter Lattman to WSJ.com Law Blog, http://blogs.wsj.com/law/2006/10/13/chicago-law-firms-bid-for-berkowitz (Oct. 13, 2006, 11:07 EST) ("Sean Berkowitz, the head of the Enron Task Force, plans to join a Chicago law firm sometime later this year. . . . If Berkowitz heads to the other side, he will continue the trend of Enron Task Force members leaving their government wages behind for high-paying law firms."); *see also* Ribstein, *supra* note 26, at 4 ("For many of these lawyers, Enron is not a disaster, but a launching pad into lucrative big firm practice or a political career." (citing Carrie Johnson, *After Enron, Fighting off the Job Offers,* WASH. POST, June 5, 2006, at D2)).

150. Griffin, *supra* note 28, at 315–16 (comparing the war on corporate crime to the wars on terrorism and drugs and the expansion of power in the USA PATRIOT Act and increased drug criminalization to "new cooperation requirements [that] allow prosecutors to compel individual employee statements, to constrain defense resources, and in some cases of derivative obstruction, effectively to create the crime" (footnote omitted)).

151. Bohrer & Trencher, *supra* note 76, at 1483.

collar defendants will inevitably face some level of coercion to plead guilty as a result of the high costs of defending corporate crime and their lack of funding to defend themselves.

CONCLUSION

The pressures this Note describes are inherent in corporate-crime prosecutions. They are not necessarily simply due to bad prosecutorial practices, and when they are, these practices will be difficult to curb because of the strong motivations behind them and the necessary lack of transparency in the prosecutorial process. The pressures on white-collar defendants arise from a confluence of factors, all of which are unavoidable aspects of corporate-crime prosecutions: the difficulty of getting evidence, the unclear criminal standards, and the intricate mens rea inquiries. No constitutional protections, indemnification agreements, or attempts to change prosecutorial behavior will be able to eliminate the intense pressures on the parties to white-collar criminal prosecutions or the difficulty inherent in defending them.

Scholars debating the criminalization of corporate behavior address several fundamental reasons for narrowing the coverage of criminal law in the corporate context. In weighing the costs and benefits of when to use criminal rather than civil remedies, commentators have considered the breadth of prosecutorial discretion,[152] the moral basis for punishment,[153] the difficulty of judging guilt,[154] and the effectiveness of noncriminal remedies to deter the behavior.[155] Although this Note's analysis indirectly touches many of these factors, it focuses on one that commentators have not previously weighed: the financial cost of defending these crimes. Like some of the other considerations scholars have addressed, the high price of defense separates corporate crime from other types of crime and contributes to the unique pressure on corporate defendants. Unlike some of the other considerations, even procedural or most legislative adjustments cannot directly fix it; any investigation into the complicated workings of a corporation is necessarily expensive to the point of being beyond the means of almost any individual.[156]

---

152. Lynch, *supra* note 31, at 58–60.

153. *Id.* at 48–52.

154. Ribstein, *supra* note 26, at 5–6.

155. Booth, *supra* note 31, at 128–33.

156. *See supra* Part I.

Because the problems are inherent in the criminalization of corporate behavior, legislators must consider them when passing criminal laws. Others have suggested legislative reform that would clarify and limit the criminalization of corporate conduct with an eye to limiting prosecutorial discretion.[157] Commentators have suggested instituting an affirmative good faith defense;[158] avoiding the imposition of criminal penalties on regulatory infractions;[159] and a threefold approach involving limiting the respondeat superior standard, imposing a presumption of due diligence in corporate behavior, and establishing a presumption against indictment of a firm unless the government shows that civil and regulatory options are inadequate.[160]

This Note does not attempt to propose a specific legislative solution, but rather identifies a previously undeveloped approach to the debate. This Note suggests a way to evaluate legislative options; if a suggested reform would not lower the financial burden on defendants or the pressure on them to plead guilty, then the reform would not resolve the coercion problems this Note has outlined. When deciding whether to criminalize certain corporate behavior, the legislature should consider the implications of its decision for individual defendants; when criminalizing corporate conduct would create the type of unfair pressure this Note has described, the legislature should instead turn to other methods of dealing with the wrongdoing, such as civil remedies or regulatory oversight. When legislating, Congress must look beyond punishment and deterrence and consider whether, in practice, criminal laws would subject defendants to impossible dilemmas. If, as this Note argues, the pressures on white-collar defendants are inherent in the process of prosecuting white-collar crime, then policymakers must consider these pressures when balancing the costs and benefits of criminalizing the behavior in the first place.

---

157. Bharara, *supra* note 26, at 107.

158. Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1543 (2007).

159. Thornburgh, *supra* note 31, at 1285–86.

160. Pamela H. Bucy, *Why Punish? Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1303 (2007).