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## Victimization on Main Street: Occupy Wall Street and the Mortgage Fraud Crisis

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## VICTIMIZATION ON MAIN STREET: OCCUPY WALL STREET AND THE MORTGAGE FRAUD CRISIS

*Sandra D. Jordan\**

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### INTRODUCTION

“We are the 99%! We are the 99%!” This quote has become the rallying cry of the Occupy Wall Street movement, which has spread across the globe.<sup>1</sup> The Occupy Wall Street movement has highlighted the wealth discrepancy in the United States and the factors that led to the Great Recession.<sup>2</sup> Simultaneously, the subject of white collar and

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1. Occupy Wall Street started as a grassroots movement on September 17, 2011 in New York. See OCCUPY WALL STREET, <http://occupywallst.org> (last visited Jan. 24, 2012). “Occupy Wall Street is a leaderless resistance movement with people of many colors, genders and political persuasions. The one thing we all have in common is that We Are The 99% that will no longer tolerate the greed and corruption of the 1%.” *Id.* The movement has since spread to almost 1000 cities and more than 80 countries worldwide. See Michele Kinama, *Occupy Wall Street Summary*, ACRONYM (Oct. 25, 2011, 9:00 AM), <https://acronym.imsa.edu/2011/10/occupy-wall-street-summary>.

2. The U.S. economy sank into the Great Recession in December 2007 and ended in June 2009, according to the National Bureau of Economic Research. Henry S. Farber, *Job Loss in the Great Recession: Historical Perspective from the Displaced*

corporate crime has escalated in recent years. Criminal justice policy and focus has turned the public's attention toward this field of law, raising numerous concerns about fairness within the criminal justice system. The way white collar offenders are investigated, charged, prosecuted, and sentenced demonstrates a dual system of justice that many view as unfair. As the rich get richer, the poor do indeed get prison.<sup>3</sup> The discrepancies in the treatment of various types of crimes raise fundamental concerns about our definitions of crimes and our reasons for punishment.

In Part I, I explain the historical underpinnings of white collar and corporate crimes and why this category of criminal activity was viewed and treated differently within our criminal justice system. Part II examines the economic disparities within the criminal justice system that flow from our perceptions of who the offenders are and what type of criminal activity is being committed.<sup>4</sup> Not only are the "Occupiers" on Wall Street angry at economic inequity, but many of them believe the government should be more aggressive in prosecuting the crimes perpetrated by the Wall Street elite. Part III demonstrates why language matters in our discourse on crimes. The way we define criminal conduct affects the public perception which, in turn, can affect the way that legislators enact statutes, the way that prosecutors exercise discretion, and the way judges sentence criminals.

Part IV looks at mortgage fraud and how this type of fraud is at the heart of the economic meltdown and current fiscal crisis. Part V compares the Savings and Loan crisis of the 1980s and points out that the government response was much more aggressive than what we are witnessing today with the financial meltdown. Part VI points out that the victims of mortgage fraud suffer many of the same harms as do victims of drug distribution networks. Instead of funneling resources into a War on Drugs, perhaps we should focus on a War on Greed. Finally, I propose that we should discard the language of white collar and corporate crime if it means that we will treat mortgage fraud more seriously. I posit that the mortgage fraud crisis should be viewed under the lens of the criminal law standards rather than civil remedies. By shifting our language, we can place mortgage fraud in

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*Workers Survey, 1984–2010* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 7040, 2011).

3. See JEFFREY REIMAN, *THE RICH GET RICHER, AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE* (9th ed. 2010) (describing some of the anger expressed about criminal justice discrepancies, some of the same concerns motivating the Occupy Wall Street movement).

4. See *infra* Part II.

the context of “real” crimes and deal with these widespread offenses in the serious manner that they deserve. This change can result in a shift in government resources, much as we did to fight the War on Drugs in the 1980s.<sup>5</sup>

### I. HISTORICAL PERSPECTIVE OF CORPORATE AND WHITE COLLAR CRIME

The treatment of criminal activity where the offender has no mind to think (no *mens rea*) and no body to act or imprison (no *actus reus*) in the corporate arena explains some of the historical roots of our approach to addressing crimes in the white collar field. Since the corporation does not “fit” into the common law definition of a criminal, courts and the legislature initially excluded corporations from the scope of criminal actors or activity. This view began to change in the early part of the last century, but we maintain these vestiges of disparate treatment today. By common definition, the field of white collar crime encompasses both corporate crimes and individual crimes perpetuated within and outside of corporate structures.<sup>6</sup>

In the 1909 case of *New York Central & Hudson River Rail Road Company v. United States (N.Y. Central)*,<sup>7</sup> the Supreme Court first tackled with the concept of holding a corporation criminally liable for the harm it caused. In *N.Y. Central*, a railroad company and its employees were convicted of violating the Elkins Act after regulating the rates common carriers could charge. In extending the tort doctrine of respondeat superior to a criminal case, the Supreme Court rejected two arguments advanced by the railroad company: that the conviction would harm or punish innocent shareholders and that the conviction was improper because there was no evidence that the board of directors authorized the actions.<sup>8</sup>

At the time of the decision, corporations were commonly viewed as incapable of committing crimes and were subjected to only civil fines for violations.<sup>9</sup> These violations were used to hold corporations accountable for harm caused by their actions and omissions or on the basis of strict liability. For the first time, the Supreme Court held that

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5. See *infra* notes 76–79 and accompanying text.

6. See J. KELLY STRADER & SANDRA D. JORDAN, *WHITE COLLAR CRIMES: CASES, MATERIALS, AND PROBLEMS* 4 (2nd ed. 2009).

7. 212 U.S. 481 (1909).

8. *Id.* at 496.

9. A general freight traffic manager and an assistant manager were found to have acted to benefit the corporation in violating the Elkins Act. *Id.* at 492–93.

an agent of a corporation could be held criminally liable under the respondeat superior theory of liability for performing acts within the scope of employment.<sup>10</sup> As the Supreme Court stated, “many offenses might go unpunished and acts [can] be committed in violation of the law” without the respondeat superior theory of liability.<sup>11</sup> The *N.Y. Central* decision is seen as the seminal statement allowing for direct criminal sanctions for corporate wrongdoing. The case resulted in a changed focus among prosecutors who began to look to corporate wrongdoing with new eyes.<sup>12</sup> In the years since the *N.Y. Central* case, the courts have extended corporate criminal liability to include the Model Penal Code’s “high managerial agent,”<sup>13</sup> a more restrictive view of corporate criminal liability. Under this view of criminal liability, the prosecution must identify at least one person within the corporation with some level of managerial responsibility who condoned or participated in the criminal activity.<sup>14</sup>

A much broader theory of criminal liability for corporations emerged in the mid-1980s known as the “collective knowledge” doctrine.<sup>15</sup> This version of criminal liability holds that the corporation can be held accountable based on the collective knowledge of the sum of its individual corporate agents. This theory is the broadest version of corporate liability because it does not require high level employees to sanction the wrongdoing.<sup>16</sup> It emerged in 1987 in *United States v. Bank of New England*,<sup>17</sup> after the Bank of New England (Bank) failed to file the Currency Transaction Reports (CTRs) triggered by thirty-one separate cash withdrawals made by a customer over the

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10. *Id.* at 499.

11. *Id.* at 495.

12. See generally Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007) (tracing the development of the broad rule of vicarious corporate liability and outlining features of prosecutorial guidelines).

13. MODEL PENAL CODE § 2.07 (1981). The Model Penal Code limits criminal liability to only those who serve as a “high managerial agent” when committing the offense on behalf of the corporation. *Id.* This more restricted view requires proof that someone with managerial responsibilities condone the actions for the corporation to be held liable. *Id.*

14. See MODEL PENAL CODE § 2.07 (1)(c) (1981).

15. *Id.* Under the collective knowledge doctrine, a corporation could be held accountable based on the “sum of the knowledge of all of the employees.” *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987).

16. Cf. Sarah Kelly Kilgore & Emily M. Smith, *Corporate Criminal Liability*, 48 AM. CRIM. L. REV. 421, 431 (2011) (“[A] corporation may be liable even if there is no single employee at fault.”)

17. 821 F.2d 844 (1987).

course of a year's time.<sup>18</sup> *Bank of New England* increased the exposure of financial institutions to include criminal actions for failure to file the required CTRs. In adopting the collective knowledge theory of mens rea, the court acknowledged that no specific individual within the Bank knowingly violated the law.<sup>19</sup> The court found that the collective knowledge of all of the employees was sufficient to hold the Bank accountable for the failure to file the reports.<sup>20</sup>

Most courts have rejected this theory of criminal liability, finding it overly broad and inconsistent with principles of criminal accountability.<sup>21</sup> Collective knowledge, however, is quite similar to the concept of "willful blindness," which is used with regularity in drug prosecutions.<sup>22</sup> When an actor is willfully blind about a fact, and refuses to

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18. The government charged the Bank with violations of 31 U.S.C. § 5322 for "willfully" failing to file the required forms for cash deposits. *Id.* at 846-47. This collective knowledge doctrine is beneficial in situations where it is difficult to establish willfulness to an artificial entity such as a corporation. Because each of the Bank's employees possessed at least one component of the required knowledge, the court accumulated this individual knowledge and held that it equated to collective knowledge of the Bank. The court stated,

Regarding the Bank's specific intent to violate the reporting obligation, [the teller] testified that head teller knew that [the customer's] transactions were reportable, but, on one occasion deliberately chose not to file a CTR on him because he was a "good customer." In addition, the jury heard testimony that bank employees regarded [the customer's] transactions as unusual, speculated that he was a bookie, and suspected that he was structuring his transactions to avoid the Act's reporting requirements. An internal Bank memo, written after an investigation of the [customer's] transactions, concluded that a "person managing the branch would have to have known that something strange was going on." Given the suspicions aroused...and the abundance of information indicating that his transactions were reportable, the jury could have concluded that the failure by Bank personnel to, at least, inquire about the reportability . . . constituted flagrant indifference to the obligations imposed by the Act.

*Id.* at 857.

19. *Id.* at 856.

20. The Bank processed cash transactions over a twelve-month period of time exceeding \$100,000. *Id.* at 852. The case increased attention and exposure to banks which were circumventing the cash reporting requirements in place at that time. The CTRs law was part of a series of statutes enacted in 1980 as part of the Bank Secrecy Act, 31 U.S.C. §§ 5313 (2011), designed to allow the government to track the flow of large sums of cash in the economy and to criminalize the flow of illegally-generated funds. Eventually, the reporting requirements lead to the enactment of the money laundering statutes which targeted the illegally derived funds directly rather than just a bank reporting requirement. In 1986 Congress enacted the principal money laundering statutes. 18 U.S.C. §§ 1956, 1957 (2011).

21. See, e.g., Kilgore & Smith, *supra* note 16, at 432.

22. Willful blindness has also been called the ostrich approach because it allows criminal prosecution of drug couriers who take possession of a package from a well-

gain the requisite knowledge, the law will treat this as actual knowledge.<sup>23</sup> Where a drug courier accepts a package under suspicious circumstances, such as huge payment, directive not to open, or direction to deliver to only certain individuals at a particular time, this would raise suspicions in a reasonable person that criminal activity is afoot. Willful blindness is also used in cases involving receipt and sale of stolen property—if it sounds too good to be true, and costs a fraction of the retail value, it is in all likelihood stolen property.<sup>24</sup> There is little reason not to utilize this theory of investigation and prosecution for mortgage and related frauds committed within and on behalf of financial institutions. If a banker or executive can direct employees and agents to act in suspicious ways, tells them to just “do it” and not ask questions, or instructs them to destroy documents, then the supervisor is causing them to act in a willfully blind manner which is conduct suggestive of criminal knowledge. Imputing the knowledge as collective knowledge, just as is done in the drug cases, is a viable theory of prosecution. In fact, this is precisely how the court convicted Bank of New England—the sum of all of the employees was imputed to the Bank.<sup>25</sup> A comparable approach would assist in closing the schism between the two worlds of crime—street crime and white collar crime.

## II. ECONOMIC DISPARITIES ARE REFLECTED IN CRIMINAL JUSTICE POLICIES

Economic disparity in the United States has a direct impact on the nature of crime and the identity of individuals who are prosecuted

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known drug source without actual knowledge of the package contents. *See, e.g.,* United States v. Griffin, 524 F.3d 71, 77 n.4 (1st Cir. 2008); United States v. Alston-Graves, 435 F.3d 331, 338 (D.C. Cir. 2006). In these situations, the possessor does not have actual knowledge of the contents, but declines to inquire further. Instead, the courier receives a huge fee for transporting the package. Just as the ostrich buries its head in the sand to avoid observations, willful blindness in criminal prosecutions is consistent with the Model Penal Code’s description of criminal knowledge: “Requirement of Knowledge Satisfied by Knowledge of High Probability. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.” MODEL PENAL CODE § 2.02(7) (1962).

23. *See* Kilgore & Smith, *supra* note 16, at 431 (“Under this doctrine, proof of either actual knowledge or conscious avoidance satisfies the knowledge requirement.”).

24. *See, e.g.,* United States v. Coviello, 225 F.3d 54, 59 (1st Cir. 2000) (prosecuting defendants for selling stolen Microsoft Windows as CD-ROMS for \$15 each even though wholesale value was \$165).

25. *See* United States v. Bank of New England, 821 F.2d 844, 855 (1987).

and convicted for criminal conduct. One author described the situation succinctly in a comprehensive book titled, “The Rich Get Richer and the Poor Get Prison.”<sup>26</sup> As I write this Article, we are witnessing the growth of Occupy Wall Street, a grassroots movement that started on Wall Street and spread across the globe. The Occupiers consist of masses of individuals who are expressing their anger and frustration with the policies of the fiscally elite, the richest 1% of the population.<sup>27</sup> The movement began on September 17, 2011, and partially reflects a criticism of the Wall Street banking bailout that contributed to the collapsing economy and the current Great Recession.<sup>28</sup> The Occupiers describe the movement as a “leaderless resistance movement with people of many colors, genders and political persuasions.”<sup>29</sup> According to the members of the movement, the one issue they all have in common is that they represent the 99% that will no longer tolerate the negative consequences caused by the greed and corruption of the 1%.<sup>30</sup>

Contrasting the wealth of the 1% with the wealth of the 99%, working class people are protesting, in part, because their employment prospects are dwindling,<sup>31</sup> while policies in place are leading to the accumulation of more and more wealth for the super rich. A study recently released by the Congressional Budget Office (CBO) reveals that the rich do indeed get even richer.<sup>32</sup> This CBO study revealed that the perceptions of the Occupiers are true. CBO finds that, between 1979 and 2007, income grew by 275% for the top 1% of households, 65% for the next 19%, under 40% for the next 60%, and

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26. REIMAN, *supra* note 3; *see also* DYLAN RATIGAN, GREEDY BASTARDS: HOW WE CAN STOP CORPORATE COMMUNISTS, BANKSTERS, AND OTHER VAMPIRES FROM SUCKING AMERICA DRY (2012) (describing how the author, an economic analyst for Bloomberg and CNBC, was outraged at the government’s handling of the 2008 financial crisis. The author reviews the intersection between government and business revealing the adverse impact on things financial, including banking policies, health care, student loans, and energy policies).

27. *See* OCCUPY WALL STREET, *supra* note 1.

28. *See generally* Farber, *supra* note 2 (discussing the Great Recession).

29. OCCUPY WALL STREET, *supra* note 1.

30. *See id.*

31. As of January 6, 2012, there are 13.1 million unemployed people in the United States. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, THE EMPLOYMENT SITUATION—JANUARY 2012 2 (2012), <http://www.bls.gov/news.release/pdf/empisit.pdf>.

32. CONGRESSIONAL BUDGET OFFICE, U.S. CONGRESS, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 ix (2011), <http://www.cbo.gov/ftpdocs/124xx/doc12485/10-25-HouseholdIncome.pdf>.



18% for the bottom 20%.<sup>33</sup> These huge variations in accumulated wealth, partly as a result of the greed on Wall Street, have moved many to call for the investigation and prosecution of those connected with the bank bailouts<sup>34</sup> and the mortgage crisis.<sup>35</sup>

Investigation and prosecution of both individuals and corporations bring on different and difficult challenges.<sup>36</sup> Both individual and organized/corporate criminals are committing white collar offenses for personal financial gain. Often, they are part of larger, organized groups, suggesting organizational criminal activity.<sup>37</sup> This category of crimes includes offenses not commonly viewed as white collar offenses, such as the illegal distribution of drugs, which is also committed for financial gain. With illegal drug distribution comes money laundering and tax evasion, both characterized as white collar offenses. The harms, however, that come from fraud and its related offenses are vaster and more insidious than some of the traditional street offenses, both in victim impact and losses. The criminal justice system's slow treatment of the mortgage fraud which triggered the current economic recession is a perfect example of disparate treatment of criminals and victims. To date, few prosecutions of defendants have begun. Some may say that the delayed response is because the conduct is not criminal.

The major accounting firm Arthur Andersen was prosecuted for obstruction of justice for its role in destroying documents related to its accounting work for Enron Corporation in June 2002. The indict-

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33. *Id.*

34. Bank bailouts were handled under the Troubled Asset Recovery Program (TARP). Officials estimate the cost to taxpayers for the bank bailout at \$25 billion. CONGRESSIONAL OVERSIGHT PANEL, MARCH OVERSIGHT REPORT 9 (2011), <http://cybercemetery.unt.edu/archive/cop/20110401232213/http://cop.senate.gov/documents/cop-031611-report.pdf>.

35. The details are more complex regarding the extent to which TARP has been successful. See Steve Adamske, *TARP: By the Numbers*, TREASURY NOTES BLOG (Mar. 11, 2011), <http://www.treasury.gov/connect/blog/Pages/TARP-by-the-numbers.aspx>.

36. For example, all crimes must have evidence of the criminal mind. See, e.g., *Staples v. United States*, 511 U.S. 600 (1994). Locating the criminal mind, or *mens rea*, within a corporation, presents investigative challenges unlike those present with street crimes. Nonetheless, these types of corporate offenses are successfully prosecuted.

37. Organized crimes, such as conspiracy and money laundering, have a much wider and more devastating impact on victims. Money laundering is certainly at the heart of many drug distribution networks, but such motivation is also at the heart of many types of mortgage fraud. In fact, using the banking and financial institutions to assist in the perpetration of the frauds makes this type of "insider" criminal activity more easily accomplished.

ment charged that the employer knowingly, intentionally, and corruptly encouraged its employees to shred documents related to Enron, then under investigation.<sup>38</sup> As the case progressed through civil enforcement with the Securities and Exchange Commission (SEC), and criminal sentencing and fines, approximately 28,000 people lost their jobs, many more lost their retirement and Andersen went out of business. In the end, a unanimous Supreme Court reversed the conviction based on an erroneous jury instruction on criminal intent within a corporation.<sup>39</sup>

Since the *Andersen* case, the U. S. Department of Justice (DOJ) began to back away from its aggressive pursuit of criminal sanctions for wide-ranging corporate wrongdoing.<sup>40</sup> Instead, prosecutors reverted back to the civil justice system in an attempt to secure monetary fines for what many called criminal conduct.<sup>41</sup> The reduced burden of proof and the ability of the government to extract huge concessions from a corporation made the civil route much easier for the government.<sup>42</sup> Individuals who operate within corporations and

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38. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702 (2005).

39. *Id.* at 698.

40. See generally Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107 (2006). In 2008, new Department of Justice guidelines allowed the government to take a softer approach to investigating and prosecuting corporate crimes. Deferred prosecution agreements allow corporations to avoid prosecution if they agree to investigate and report their own wrongdoing. This approach essentially outsources what should be a governmental investigation to the very corporation under scrutiny. See generally Memorandum from Craig S. Morford, Acting Deputy Attorney Gen. on *Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations to Heads of Dep't, U.S. Attorneys* (Mar. 7, 2008), <http://www.justice.gov/dag/morford-useofmonitorsmemo-03072008.pdf>.

41. Gerald E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 23, 31 (1997) (arguing that “[c]orporate misconduct appears to be a particularly suitable area for the application of punitive civil sanctions for three reasons: monetary sanctions are appropriate, corporate plaintiffs are relatively abundant, and specialized agencies exist to facilitate public enforcement where that is necessary.”).

42. See Kurt Eichenwald, *Analysis: Reversal of Andersen Conviction*, N.Y. TIMES (June 1, 2005), <http://www.nytimes.com/2005/06/01/business/01assess.html>. Many observers have applauded the reversal of the Andersen conviction stemming from the Enron case because of the huge collateral costs of the conviction. The accounting firm Arthur Andersen imploded in the midst of the investigation and prosecution. Thousands of employees lost their jobs and retirements. Mary Flood, *Supreme Court Overturns Arthur Andersen's Enron Conviction*, HOUSTON CHRONICLE (June 1, 2005, 5:30 AM), <http://www.chron.com/business/enron/article/Supreme-Court-overturns-Arthur-Andersen-s-Enron-1952976.php>. The legal standard of criminal culpability, mens rea, and the question of whether a crime was even committed was at the forefront of the Supreme Court's reversal. *Arthur Andersen*, 544 U.S. at 704–08.

other organized entities should be aggressively prosecuted for massive frauds. Others may say that the actions should be addressed through civil remedies.<sup>43</sup> Regardless, the response has been slow.<sup>44</sup> Our definitions of crime tend to exclude a wide variety of conduct that is just as injurious and destructive, if not more so, than traditional offenses. The next Part explores this topic.

### III. LANGUAGE DOES MATTER

Depictions of the Occupy Wall Street movement on the front pages and in the electronic and social media show the moral and emotional outrage suffered by victims of the recent financial collapse. The 99% of main street protesting are indeed victims in a variety of ways; many have lost employment, housing, retirement, equity, and/or invest-

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White-collar cases are not akin to—and are, in fact, often the opposite of—trials involving murder or bank robbery, where everyone usually acknowledges that a crime took place and merely debate the culpability of a particular defendant. Instead, in white-collar cases, defense lawyers often admit their client’s involvement in particular acts, while arguing that no crime ever occurred.”

Eichenwald, *supra*.

43. Recently, the DOJ announced that it had reached a \$25 billion settlement agreement with the five largest mortgage loan and servicing agencies. Under the terms of the agreement, homeowners adversely affected by the mortgage crisis who are underwater on their loans might be able to seek loan modification to more accurately reflect the home’s true value. Successful loan modification will allow homeowners to remain in their homes and continue to pay their mortgage and property taxes, thus continuing to the stabilization of the community. Press Release, U.S. Dep’t of Justice, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>

44. On September 15, 2011, the DOJ issued an indictment against former United Commercial Bank (UCB) senior officers Ebrahim Shabudin and Thomas Yu in the Northern District of California. Both individuals have been engaged in a \$10 billion fraud at UCB in San Francisco, which specialized in lending to Chinese-Americans. The indictment was unsealed on October 11, 2011. See U.S. Attorney’s Office, *Former United Commercial Bank Officials Charged with Securities Fraud*, FBI (Oct. 11, 2011), <http://www.fbi.gov/sanfrancisco/press-releases/2011/former-united-commercial-bank-officials-charged-with-securities-fraud>. A criminal information was also filed against former UCB senior officer Lauren Tran on May 24, 2011 and unsealed on October 13, 2011. Tran pled guilty on June 15, 2011. See *The UCB Indictment*, WHITE COLLAR CRIME PROF BLOG (Oct. 22, 2011), [http://lawprofessors.typepad.com/white-collarcrime\\_blog/2011/10/the-ucb-indictments.html](http://lawprofessors.typepad.com/white-collarcrime_blog/2011/10/the-ucb-indictments.html). While it is true that some investigations of the banking crisis are ongoing and others are underway, the approach contrasts sharply with the investigative approach taken during the Savings and Loan crisis of the mid-1980s. See *infra* notes 72–75 and accompanying text.

ments. Many are “upside down” or underwater in their mortgage.<sup>45</sup> Language and terminology does make a difference. When some people discuss white collar and corporate crime, they tend to disconnect this category of criminal activity from main street crime.<sup>46</sup> “Traditional” or “conventional” crimes usually have some level of interpersonal or sexual violence. People rightly fear the very real harm that such crime inflicts on its victims. Victims of traditional crimes have some level of proximity between criminal and victim so there is no doubt that a crime has been committed. Individual losses in traditional crimes range from financial loss to bodily harm, with rape and homicide being some of the most serious offenses on the books.

By contrast, corporate and white collar crimes are often shrouded in some level of moral ambiguity. Who are the victims? Do they know they are victimized? Who can be held accountable? Are there sufficient resources to address the harm? Is it really even “fraud”? Will the government do anything to assist in recovering the loss? These are just some of the questions that arise in white collar and corporate crime, but rarely surface with traditional crimes.<sup>47</sup>

The discourse in addressing crimes should stay focused on the committed acts, not the status of the actors.<sup>48</sup> When we stay attentive to the definition of crime, we can maintain perspective on why some white collar criminals should be viewed as real criminals. Indirect harms committed within and sanctioned by a corporation are no less criminal because of the status of the actors. By focusing on the *actions*, rather than the *actors*, we can maintain a consistent and fairer

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45. An “underwater mortgage” is a one that is higher than the value of the property. This negative equity imbalance often leads to financial ruin for the homeowner and foreclosure on the property. The actual number of homes that are underwater is a moving target, as more and more homeowners lose their jobs, or suffer as their communities turn over with more vacancies. Estimates suggest that one-fourth of all homeowners are underwater, owing more on their homes than their value. See Rex Nutting, *11.3 Million Homeowners Under Water on Mortgage*, MARKETWATCH (Feb. 23, 2010, 6:21 PM), <http://www.marketwatch.com/story/113-million-homeowners-underwater-on-mortgage-2010-02-23>. One local group in Boston, after occupying on Wall Street for thirteen days, organized a group of outraged homeowners, now in foreclosure, to sit-in and “occupy” Bank of America. See TAKE BACK BOSTON, <http://takebackboston.org> (last visited Feb. 2, 2012).

46. See, e.g., Frank S. Perri, *White-Collar Criminals: The ‘Kinder, Gentler’ Offender?*, 8 J. INVESTIGATIVE PSYCHOL. OFFENDER PROFILING 217, 217–41 (2011), <http://www.all-about-forensic-psychology.com/support-files/white-collar-criminals.pdf>.

47. See generally Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 501 (2004).

48. See REIMAN, *supra* note 3 and accompanying text.

approach to criminality.<sup>49</sup> Organizations that inflict serious harms with the requisite mental state are criminal actors, not merely corporate actors committing “violations.”<sup>50</sup>

Because the criminals often come from the privileged class, the system of justice views appropriate punishment through the same elite language filter.<sup>51</sup> White collar defendants are more likely to avoid prison through the payment of fines, restitution, community service, civil actions, and house arrest.<sup>52</sup> There is a tendency not to categorize these criminals as real criminals because they are more than likely members of the business and professional community. This skewed view of their status as criminals often stems from the close alignment between white collar criminals and those who investigate, prosecute, and punish them. After all, many white collar and corporate criminals are often members of the same elite class as are legislators, judges, and prosecutors.<sup>53</sup> Edwin H. Sutherland first defined white collar crime as a “crime committed by a person of respectability and high social status in the course of his occupation.”<sup>54</sup> He later elaborated:

First, the methods used in the enforcement of any law are an adaptation to the characteristics of the prospective violators of the law, as appraised by the legislators and the judicial and administrative personnel. The appraisals regarding business men, who are the prospective violators of the [law] include a combination of fear and admiration. Those who are responsible for the system of criminal justice are afraid to antagonize business men; among other conse-

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49. A fundamental element of a crime is the actus reus, which is defined as “[t]he guilty act. A wrongful deed which renders the actor criminally liable if combined with mens rea. The actus reus is the physical aspect of a crime, whereas the mens rea (guilty mind) involves the intent factor.” BLACK’S LAW DICTIONARY 36 (Centennial ed. 1991). The criminal is “one who has committed a criminal offense; one who has been legally convicted of a crime; one adjudged guilty of crime.” *Id.* at 372.

50. A violation is a classification used by the Model Penal Code for public welfare offenses, and is not defined as a crime. MODEL PENAL CODE § 1.04(5) (1981). Violations are, historically, committed by corporations and organizations and punishment is usually just a monetary fine. See Ezra Ross, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL’Y REV. 453, 455 (2011) (“[I]n the corporate context, [] financial penalties are often the primary means of redressing both civil and criminal offenses . . .”).

51. See Edwin A. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1, 8 (1940).

52. *Cf. id.*

53. See Edwin H. Sutherland, *Is “White Collar Crime” Crime?*, 10 AM. SOC. REV. 132, 137 (1945) [hereinafter Sutherland, “*White Collar Crime*”] (describing “the cultural homogeneity of legislators, judges, and administrators with business men.”).

54. Edwin H. Sutherland, President, American Sociological Society Presidential Address: *White-Collar Criminality* (Dec. 1939).

quences, such antagonism may result in a reduction in contributions to the campaign funds needed to win the next election. Probably much more important is the cultural homogeneity of legislators, judges, and administrators with business men. Legislators admire and respect business men and cannot conceive of them as criminals, that is, business men do not conform to the popular stereotypes of “the criminal.” The legislators are confident that these business men will conform as a result of very mild pressures.<sup>55</sup>

Although Sutherland first defined “white collar crime” in a 1939 speech, the vestiges of these misperceptions still hold true today. As of this writing, the criminals responsible for the Great Recession have enjoyed relative immunity.<sup>56</sup>

Two comparisons can be made: the governmental response to the Savings and Loan (S&L) crisis, and the governmental response to drug investigations and prosecutions. By comparison, the financial losses of victims of corporate and white collar crimes far exceed the losses of traditional street crimes.<sup>57</sup> A bank robber might succeed in

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55. Sutherland, “*White Collar Crime*,” *supra* note 53.

56. Harvey Silvergate, *Justice ‘Deferred’*, FORBES (July 14, 2011), <http://www.forbes.com/sites/harveysilvergate/2011/07/14/justice-deferred/> (discussing the proliferation of deferred prosecution in large-scale financial cases).

57. It is difficult to get an exact measure on the actual losses occasioned by white collar and corporate crime. Partly, the difficulty lies with the vast types of white collar crimes by definition. According to FBI reports, white collar crime includes frauds such as financial, corporate, securities, health, mortgage, insurance, marketing, and money laundering, among others. *See 2009 Financial Crimes Report*, FBI (2009) <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2009>. The FBI reports statistics in areas of white collar and corporate crimes. Part of the challenge in obtaining accurate victim impact statements is the way in which the numbers are reported. The FBI breaks down the stats to include restitution, recoveries, fines and seizures as well as matters under investigation. *See Financial Crimes Report to the Public Fiscal Year 2006*, FBI (2006), [http://www.fbi.gov/stats-services/publications/fcs\\_report2006/financial-crimes-report-to-the-public-fiscal-year-2006](http://www.fbi.gov/stats-services/publications/fcs_report2006/financial-crimes-report-to-the-public-fiscal-year-2006). The most recent report details the following in each category.

*Corporate Crimes:*

During FY 2006, the FBI investigated 490 Corporate Fraud cases resulting in 171 indictments and 124 convictions of corporate criminals. Numerous cases are pending plea agreements and trials. The following notable statistical accomplishments are reflective in FY 2006 for Corporate Fraud: \$1.2 billion in Restitutions, \$41.5 million in Recoveries, \$14.2 million in Fines, and \$62.6 million in Seizures.

*Id.* at 6.

*Securities Fraud:*

During FY 2006, the FBI investigated 1165 cases of Securities and Commodities fraud and recorded 302 indictments and 164 convictions. Many of these Securities Fraud cases are pending plea agreements or trials. The following notable statistical accomplishments are reflective in FY 2006 for Se-

obtaining a few thousand dollars with the threat of violence on a de-

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curities and Commodities Fraud: \$1.9 billion in Restitutions, \$20.6 million in Recoveries, \$80.7 million in Fines, and \$62.7 million in Seizures.

*Id.* at 12.

*Health Care Fraud:*

Through FY 2006, 2,423 cases investigated by the FBI resulted in 588 indictments and 534 convictions of Health Care Fraud criminals. Numerous cases are pending plea agreements and trials. The following notable statistical accomplishments are reflective in FY 2006 for Health Care Fraud: \$373 million in Restitutions, \$1.6 billion in Recoveries, \$172.9 million in Fines, and \$24.3 million in Seizures.”

*Id.* at 17.

*Mortgage Fraud:*

Through FY 2006, 818 cases investigated by the FBI resulted in 263 indictments and 204 convictions of Mortgage Fraud criminals. The following notable statistical accomplishments are reflective in FY 2006 for Mortgage Fraud: \$388.9 million in Restitutions, \$1.4 million in Recoveries, and \$231 million in Fines.

*Id.* at 26.

*Identity Theft:*

Through FY 2006, 1255 cases investigated by the FBI resulted in 457 indictments and 405 convictions of Identity Theft criminals. The following notable statistical accomplishments are reflective in FY 2006 for Identity Theft Fraud across all FBI Programs: \$156.5 million in Restitutions, \$4.3 million in Recoveries, and \$1.2 million in Fines.

*Id.* at 32.

*Insurance Fraud:*

During FY 2006, 233 cases investigated by the FBI resulted in 53 indictments and 54 convictions of Insurance Fraud criminals. The number of cases and subsequent arrest and conviction statistics will likely rise in the near future as more fraud is uncovered in the wake of Hurricane Katrina. The following notable statistical accomplishments are reflective in FY 2006 for Insurance Fraud: \$30 million in Restitutions and \$3 million in Seizures.

*Id.* at 37.

*Mass Marketing Fraud:*

Through FY 2006, 147 cases investigated by the FBI resulted in 13 indictments and 44 convictions of Mass Marketing Fraud criminals. The FBI's involvement in multi-agency initiatives like Global Con has helped make significant strides in combating this fraud, as reflected in the FBI's notable statistical accomplishments as follows: \$268.8 million in Restitutions, \$86.9 million in Fines and \$12.4 million in Seizures.

*Id.* at 41.

*Asset Forfeiture and Money Laundering:*

Through FY 2006, 473 cases investigated by the FBI resulted in 161 indictments and 95 convictions of Money Laundering Fraud criminals. For FY 2006, the following Money Laundering most notable accomplishments were achieved for the White Collar Crime Program: \$17 million in Restitutions and \$3.3 million in Recoveries. FBI Financial Crimes Report to the Public Fiscal Year 2006, October 31, 2005–September 30, 2001.

*Id.* at 45.

mand note handed to a bank teller. The bank embezzler, on the other hand, will often get away with millions of dollars with the click of a button at her office computer.<sup>58</sup> The criminal act in the embezzlement scenario might not be uncovered for some time after the criminal act.

We need to adjust our discourse and call the criminal activity on Wall Street what it is: real crime that impacts Main Street. Instead of muting the moral outcry with nebulous terms such as “violations,” “workplace accidents,” and “defrauding,” we should be more precise in describing the “environmental accident” as criminal negligence or even negligent homicide, and those who are defrauded as victims of “robbery” whose assets were “stolen.” As with all crimes, we should focus on the acts, not the description of the actor.<sup>59</sup> Crimes are defined by the *actus reus* and the *mens rea*, not the income level or status of the offender.<sup>60</sup> When we liberate white collar crime from these terminology shackles, we uncover the reality: real crime by real criminals causing real harm. If the 1% really lived on Main Street, they would comprehend the perspective of the 99% who are occupying Wall Street. One thing that the Occupy Wall Street movement has done is to bring to the forefront the personal moral outcry of the 99%, including the disparate treatment of criminals.

If we examine criminality viewed through the lens of victims, it is much easier to reconcile similarities between street crimes, such as drug dealing, and white collar crimes, such as mortgage frauds. The next Part highlights some of the similarities between mortgage fraud and drug dealing.

#### IV. MORTGAGE FRAUD

The term “mortgage fraud” can mean a variety of things. The FBI has defined it as either fraud for profit or fraud for housing.<sup>61</sup> Mort-

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58. The robber, convicted under 18 U.S.C. § 2113 is likely to be sentenced to twenty to twenty-five years. See United States Sentencing Commission, *Guidelines Manual*, § 2B3.1 (Nov. 2011). The bank employee who embezzles from within the same bank, and is convicted under 18 U.S.C. § 656 might get five years or so of prison time. *Id.* § 2B1.1.

59. “Actus reus” means the guilty act. It is a “wrongful deed which renders the actor criminally liable if combined with mens rea.” BLACK’S LAW DICTIONARY, *supra* note 49, at 36.

60. Crime is defined as “a positive or negative *act* in violation of penal law.” *Id.* at 370 (emphasis added).

61. Assistant Secretary of the criminal division of the FBI testified before the Senate Judiciary Committee and offered the FBI’s definition of mortgage fraud:



gage fraud is a real crime, and I submit it has more similarities to street crime than our compartmentalized notion of white collar crime permits. As long as we view mortgage fraud and its related types of financial fraud as white collar and corporate crime, we minimize our approach to dealing with the real harm to people. This is one of the rallying cries of the Occupy Wall Street movement: big banks and financial institutions operate in their own self-interest with impunity, and the masses be damned. The fear is that as the rich continue to grow richer and the income disparity in this country widens, inaction or preferential approaches by law enforcement and the federal government to mortgage fraudsters will only exacerbate the inequities.

The current mortgage crisis, connected with the banking bailout and economic collapse of financial institutions during the summer of 2008 and continuing to this day, has had a devastating effect on communities as well as individuals. After the bailout,<sup>62</sup> Congress thought that the banks would act to turn around the economy by reinvigorating mortgage loans to help to stabilize the housing industry.<sup>63</sup> In fact, although the banks received billions of federal dollars for their

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The FBI delineates mortgage fraud in two distinct areas: 1) Fraud for Profit; and 2) Fraud for Housing. Fraud for Profit uses a scheme to remove equity, falsely inflate the value of the property or issue loans relating to fictitious property(ies). Many of the Fraud for Profit schemes rely on "industry insiders", who override lender controls. The FBI defines industry insiders as appraisers, accountants, attorneys, real estate brokers, mortgage underwriters and processors, settlement/title company employees, mortgage brokers, loan originators, and other mortgage professionals engaged in the mortgage industry.

Fraud for Housing represents illegal actions perpetrated by a borrower, typically with the assistance of real estate professionals. The simple motive behind this fraud is to acquire and maintain ownership of a house under false pretenses. This type of fraud is typified by a borrower who makes misrepresentations regarding the borrower's income or employment history to qualify for a loan.

*The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 102, 102 (2009) (statement of John S. Pistole, Deputy Director, FBI) [hereinafter Statement of John S. Pistole].

62. The bailout of financial institutions began in the summer of 2008 and continued through 2009. The figures reveal the following amounts of the bailout: Bear Sterns (\$30 billion 2008); Fannie Mae and Freddie Mac (\$200 billion 2008); American International Group (\$180 billion 2008); Auto Industry (\$25 billion); Troubled Asset Relief Program (\$700 billion 2008); Citigroup (\$280 billion); Bank of America (\$142.2 billion 2009). *History of U.S. Government Bailouts*, PROPUBLICA (Apr. 15, 2009, 12:02 PM), <http://www.propublica.org/special/government-bailouts>.

63. Sharyl Attkisson, *Where Did The Bailout Billions Really Go?*, CBS NEWS (May 26, 2009, 5:54 PM), <http://www.cbsnews.com/stories/2009/01/12/eveningnews/main4717298.shtml>.

bailout,<sup>64</sup> not much benefit has inured to the individual homeowners.<sup>65</sup> As a result, individuals have lost their homes during this economic downturn, triggering a foreclosure crisis not seen since the great depression. Industry observers, such as Housing Predictor, forecasted the coming crisis five years ago and project that we have only seen the tip of the iceberg.<sup>66</sup> “An estimated 7.6 million residential properties have been foreclosed since the crisis started, with another 7.4 million foreclosures forecast through 2016.”<sup>67</sup> Vacancies were initially concentrated in particular neighborhoods and states,<sup>68</sup> triggering increased criminal activity in those areas. Moreover, these vacancies further depress housing costs across the board, resulting in decreasing tax bases. These tax losses have a ripple effect on schools and businesses in the affected communities.

In the midst of this crisis, many banks and other financial institutions have benefitted from the collapse of the market, mainly through the receipt of taxpayer bailout money.<sup>69</sup> Many have maintained that this is not an issue of criminality at all, and suggest that the crisis should be handled as a civil matter; they call for the foreclosure crises to “run its course”<sup>70</sup> and play out with further vacancies, allowing investors to sweep in and buy cheap housing to bolster the investor’s profits. Others blame the Occupiers for their own predicament and say they should just get a job.<sup>71</sup> People who hold this view fail to

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64. *History of U.S. Government Bailouts*, *supra* note 62.

65. See Attkisson, *supra* note 63.

66. See HOUSINGPREDICTOR, [www.housingpredictor.com](http://www.housingpredictor.com) (last visited Mar. 30, 2012).

67. Kevin Chu, *Foreclosures Forecast to Hit 15 Million Homeowners*, HOUSINGPREDICTOR (Oct. 6, 2011), <http://www.housingpredictor.com/2011/foreclosures-crisis-forecast.html>.

68. *Id.*

69. Banks earned approximately \$13 billion in income by taking advantage of below-market rates. Bob Ivry, Bradley Keoun & Phil Kuntz, *Secret Fed Loans Gave Banks \$13 Billion Undisclosed to Congress*, BLOOMBERG (Nov. 27, 2011, 7:10 PM), <http://www.bloomberg.com/news/2011-11-28/secret-fed-loans-undisclosed-to-congress-gave-banks-13-billion-in-income.html>.

70. Presidential candidate Mitt Romney, when speaking to the *Las Vegas Review-Journal's* editorial board in October 2011, stated that after allowing the foreclosure process to “hit bottom,” the government should “allow investors to buy up homes, put renters in them, fix the homes up, and let it turn around and come back up.” Jim Rutenberg, *DNC Ad Goes After Romney in Arizona*, CAUCUS BLOG—N.Y. TIMES (Oct. 24, 2011, 5:59 PM), <http://thecaucus.blogs.nytimes.com/2011/10/24/dnc-ad-goes-after-romney-in-arizona/?scp=1&sq=romney%20foreclosures%20run&st=cse>.

71. Presidential candidate Herman Cain said that the protesters who do not have jobs have no one to blame but themselves:

acknowledge the human toll of this type of massive fraudulent activity. Of course, the government has at its disposal the full panoply of civil remedies available to address the wrongdoing, including fines, restitution, and debarment. This Article maintains that the conduct of the banks and financial institutions can legitimately be categorized as criminal and aggressively pursued as serious crimes.

## V. COMPARISON TO THE SAVINGS AND LOAN CRISIS

The approach taken today contrasts sharply with the government's reaction to the S&L crisis in the 1980s. When the S&L crisis was percolating in the 1980s, federal law enforcement quickly addressed the widespread fraud.<sup>72</sup> The government formed a federal task force in Dallas, Texas, and the government committed massive resources to investigate and prosecute the actors and institutions involved in the fraud.<sup>73</sup> The fraud at that time permeated the entire savings and loan industry and had ramifications beyond the immediate impact on individual institutions insured by the Federal Savings and Loan Insurance Corporation.<sup>74</sup> In the wake of the S&L crisis, strike forces were established in twenty-seven cities, 1000 FBI investigators and agents were dispatched across the nation, accompanied by forensic accountants and many federal prosecutors. This concerted effort resulted in

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I don't have facts to back this up, but I happen to believe that these demonstrations are planned and orchestrated to distract from the failed policies of the Obama administration. Don't blame Wall Street, don't blame the big banks, if you don't have a job and you're not rich, blame yourself! . . . It is not a person's fault if they succeeded, it is a person's fault if they failed.

Paige Lavender, *Herman Cain: Occupy Wall Street Protesters Should 'Go Home and Get a Job and a Life'*, HUFFINGTON POST (Oct. 28, 2011, 12:40 PM), [http://www.huffingtonpost.com/2011/10/28/herman-cain-occupy-wall-street\\_n\\_1063703.html](http://www.huffingtonpost.com/2011/10/28/herman-cain-occupy-wall-street_n_1063703.html).

72. In the late 1980s and early 1990s, the United States experienced a similar financial crisis with the collapse of the savings and loans. The Department of Justice (DOJ), and more specifically the FBI, were provided a number of tools through the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) and Crime Control Act of 1990 (CCA) to combat the aforementioned crisis. As stated in Senate Bill 331 dated January 27, 2009, "in the wake of the Savings and Loan crisis of the 1980s, a series of strike forces based in 27 cities was staffed with 1000 FBI agents and forensic experts and dozens of federal prosecutors. That effort yielded more than 600 convictions and \$130,000,000 in ordered restitution."

Statement of John S. Pistole, *supra* note 61, at 102.

73. See *The Dallas Division: A Brief History*, FBI, <http://www.fbi.gov/dallas/about-us/history/history>.

74. See REIMAN, *supra* note 3, at 136.

\$130 million in ordered restitution along with more than 600 convictions of key actors.<sup>75</sup>

Between the 1980s and today, the War on Drugs was in full swing and continues.<sup>76</sup> The National Office of Drug Policy reports that the U.S. federal government spent over \$15 billion dollars in 2010 on the War on Drugs, at a rate of about \$500 per second.<sup>77</sup> There has been no lack of aggressive pursuit of drug cartels and organizations. This Article does not suggest that drug offenses are not serious crimes, or that they should not be prosecuted. There are, however, an overwhelming number of men of color sitting in prisons today for crack cocaine convictions, suffering under sentences that are harsher than the corresponding sentences imposed for cocaine convictions.<sup>78</sup> The broader implication in the drug prosecutorial policies is that the government will focus its efforts on certain criminal conduct to the exclusion of other wrongs.<sup>79</sup> A properly funded War on Greed, with as much emphasis and resources as the War on Drugs, could possibly minimize or even prevent some of financial harms we are witnessing. If a fair comparison is made between the harms suffered by the mortgage fraud, for example, and the drug victims, one can make a sound argument that the financial fraudster inflicts more harm on the individuals and communities. Again, a focus on the act rather than the status of the actor is revealing.

The basic definition of a crime is the actus reus triggered by the criminal mens rea.<sup>80</sup> The criminal mind must precede the actions by the corporation or individual and cause the harm.<sup>81</sup> In every criminal case, prosecutors tackle these legal questions to satisfy the burden of proof beyond a reasonable doubt.<sup>82</sup> In this Article, I argue that if it

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75. *See id.* at 137–41.

76. The War on Drugs has had a huge impact on the criminal justice system, ranging from investigations to sentencing. A huge amount of government resources has gone into fighting this war on both the federal and state levels. The Drug War Clock keeps real time of the financial impact of the War on Drugs. *Drug War Clock*, DRUGSENSE, <http://www.drugsense.org/cms/wodclock>.

77. *Id.*

78. *See Hearing on Retroactivity of the Fair Sentencing Act of 2010 Amendments Before the U.S. Sentencing Comm.*, 111th Cong. 1 (2010) (written testimony of Jesselyn McCurdy, Senior Legislative Counsel, American Civil Liberties Union), [http://www.ussc.gov/Legislative\\_and\\_Public\\_Affairs/Public\\_Hearings\\_and\\_Meetings/20110601/Testimony\\_ACLU\\_Jesselyn\\_McCurdy.pdf](http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_ACLU_Jesselyn_McCurdy.pdf).

79. *See* JEFFREY A. MIRON, A CRITIQUE OF ESTIMATES OF ECONOMIC COSTS OF DRUG ABUSE 17–18 (2003), [http://www.dpffmass.org/pdf/miron\\_report.pdf](http://www.dpffmass.org/pdf/miron_report.pdf).

80. 21 Am. Jur. 2D *Criminal Law* § 117 (2011).

81. *See id.*

82. 21A Am. Jur. 2D *Criminal Law* § 1198 (2011).

looks like a crime, smells like a crime, fits the definition of a crime, one should call it a crime and treat it as such. Much of white collar criminal activity is no less deserving of criminal investigation and punishment than the “street crime” and, as such, should be pursued as aggressively. To segregate white collar criminal offenses as deserving of civil penalties and deferred prosecution agreements maintains the notion that white collar crime is not really crime at all, but merely an offense, a violation, or mistaken accounting practices. It is precisely this view of crimes of privilege that has placed us in a parallel universe concerning the treatment of criminal conduct by the affluent.

## VI. VICTIMIZATION, MORTGAGE FRAUD, AND DRUG OFFENSES

With respect to the mortgage crisis, the depth of victimization is so wide that its consequences are just being revealed and the potential ramifications are unknown at this point in time.<sup>83</sup> Based on what we do know, the numbers are staggering.<sup>84</sup> Some have projected that what we know is only the tip of the iceberg.<sup>85</sup>

Victims of white collar and corporate crime suffer in extreme disproportion to those who are victims of so-called street crimes.<sup>86</sup> The financial losses are astronomical with devastating consequences for the victim, families, and communities.<sup>87</sup> The crimes of the elite extract a much greater cost on individuals and society than those of the so-called street criminals.

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83. FBI, MORTGAGE FRAUD REPORT 2010 YEAR IN REVIEW, <http://www.fbi.gov/stats-services/publications/mortgage-fraud-2010/mortgage-fraud-2010> (last visited Mar. 19, 2012).

84. In 2010, foreclosure filings have increased to 2.9 million homes. *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, REALTYTRAC (Jan. 12, 2011), <http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309>.

85. Robbie Whelan, *Mortgage Fraud is Rising, With a Twist*, WALL ST. J. (Aug. 23, 2010), <http://online.wsj.com/article/SB20001424052748703824304575435383161436658.html> (“The real losses to banks won’t be known for several years when banks are forced to write off the value of the [loan].”). As with most white collar crime, the criminals are quick to adapt to new laws and restrictions, often staying a step ahead of the government investigators. *Id.* (“Fraudsters have adapted to the new restrictions. With banks less apt to lend to borrowers with shaky finances, criminals rely more on falsifying documents, recruiting loan officers and other bank insiders to work for them, and stealing identities to get loans, federal investigators and mortgage industry research reports.”).

86. See RODNEY HUFF, ET AL., NATIONAL WHITE COLLAR CRIME CENTER., NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME (2010).

87. *See id.*

The numbers are overwhelming in this current fiscal crisis. The damage to individuals who have lost their homes through fraud is one thing, but the additional parallel damage exposes the true extent of the problem. One example is the effect of the current financial crisis on some of the most vulnerable victims: children. Not only does mortgage fraud and deceit affect the parents, but it has also contributed to the growing number of homeless youth.<sup>88</sup> School administrators are reporting more and more children who are moving from shelters to park benches to cars because their families have lost their homes to foreclosure.<sup>89</sup> Our nation's children are at risk and the harm they are suffering is further evidence of the damages resulting from the financial meltdown. These harms are comparable to the harms that children suffer when their parents are involved in drug activities that directly impact their homes and communities.<sup>90</sup>

Closer to "home," neighborhoods suffer when foreclosures escalate. There is a rippling effect because the impact of mortgage fraud is not limited to the individual mortgage criminals, but extends well beyond to adverse impacts on the community and region. As our banking crisis clearly demonstrates, the country came to the brink of economic collapse, stemming mostly from banking and mortgage related activities.<sup>91</sup> The prevalence of foreclosures and vacancies, once seen in more limited numbers in low-income neighborhoods, has moved to the suburbs.<sup>92</sup> Even the McMansions are affected when a

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88. Children suffer because of foreclosures. When their families lose their housing, it impacts their education, emotional well-being, health, and safety. Dina Elboghday, *Foreclosure Takes Toll on Increasing Number of Children*, WASH. POST (Nov. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/21/AR2010112104255.html>.

89. The impact on children is reverberating through communities, schools, and institutions. See Linda Hall, *Children of Foreclosure Falling Behind in School*, CNN (Feb. 27, 2009), [http://articles.cnn.com/2009-02-27/living/am.foreclosures.education\\_1\\_education-of-homeless-children-kids-at-greater-risk-move?\\_s=PM:LIVING](http://articles.cnn.com/2009-02-27/living/am.foreclosures.education_1_education-of-homeless-children-kids-at-greater-risk-move?_s=PM:LIVING).

90. The success or failure of the so-called War on Drugs is beyond the scope of this Article. I draw comparisons to the harms suffered by victims of financial crimes, like mortgage fraud, to compare and contrast these harms with those suffered by victims of the War on Drugs. See generally NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2005).

91. See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009). HBO also produced a documentary of the same name, describing the historic bailout of Wall Street and the ramifications of the financial crisis. *TOO BIG TO FAIL* (HBO Films 2011).

92. See *A Suburb Once Set Apart Now Feeling the Foreclosure Crisis*, CBS ST. LOUIS (Oct. 7, 2011, 12:30 PM), <http://stlouis.cbslocal.com/2011/10/07/a-suburb-once-set-apart-now-feeling-the-foreclosure-crisis>.

vacancy attracts people intent on committing further crimes from the new home base.<sup>93</sup> The cycle of fraud and danger is astounding when viewed through the lens of traditional crimes and from the victims' perspectives. In many ways, the fallout from fraudulent mortgages has similarities to the fallout from criminal drug activities.<sup>94</sup>

Vacant housing is one example. The oversupply of empty homes allows criminals to use the houses as fronts for further criminal activity.<sup>95</sup> Homes that have been foreclosed due to the financial crisis are sitting empty in previously stable neighborhoods. The vacant homes are prime targets for vandalization and destruction.<sup>96</sup> Vacancies in a community present a prime opportunity for criminals to operate. If the community is in an upscale area, the criminal conduct can go undetected because law enforcement might not be looking in that area or region.<sup>97</sup> Criminal conduct in the suburbs can flourish in the absence of law enforcement scrutiny. Financial crimes can operate behind closed doors in the comfort of a quiet subdivision.

Because of the vacancies, squatters can, and do, move in.<sup>98</sup> Squatters may cause destruction to the house, resulting in a fraudulent in-

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93. See generally Christopher B. Leinberger, *The Next Slum?*, THE ATLANTIC (Mar. 2008), <http://www.theatlantic.com/magazine/archive/2008/03/the-next-slum/6653>.

94. See OHIO PIRG, FORECLOSURES, FAILED BANKS AND FEES: WHY OHIO NEEDS A NEW CONSUMER FINANCIAL PROTECTION AGENCY 6 (2009), <http://www.ohiopirg.org/sites/pirg/files/reports/Why-Ohio-Needs-a-New-Consumer-Financial-Protection-Agency.pdf>.

95. Any type of criminal activity can be conducted in the shadow of a "safe" neighborhood. McMansions can be turned into fronts for money launderers and drug traffickers hiding in the suburbs. Regardless of the relative affluence of the neighborhood, these new residents will surely bring down the values of surrounding properties because the occupants have no vested interest in maintaining the value of the property. Thus, surrounding homes are slowly devalued, which triggers other adverse consequences. See Leinberger, *supra* note 93.

96. A vacant and unattended home is a prime target for thieves to strip the house of anything valuable, such as appliances, lighting, carpet, electrical wiring, doors, windows, heating and air conditioning systems, and copper piping. See Kat Zemen, *How Your Home Insurance Can Vanish Overnight*, INSURE.COM, <http://www.insure.com/home-insurance/home-insurance-can-vanish.html> (last updated Apr. 30, 2010) (stating that most home insurance companies will not cover a home that is vacant because the likelihood of vandalism increases).

97. It is well documented that police put most of their law enforcement efforts into poor communities where they get a bigger "bang for their buck." As a result of law enforcement inattention, crime in the suburbs can flourish. See, e.g., Charles Thomas, *South 'burbs See More Crime as Chicago Rate Drops*, ABC 7 NEWS (Oct. 3, 2011), <http://abclocal.go.com/wls/story?section=news/local&id=8377123>.

98. Jonathan Mummolo & Bill Brubaker, *As Foreclosed Homes Empty, Crime Arrives*, WASH. POST (Apr. 27, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/26/AR2008042601288.html>.

insurance claim processed by the individuals who secured the foreclosure, often initially through fraudulent means.<sup>99</sup> Squatters, who are not members of the community via purchase, can cause disruption for all, including children who may come into contact with the squatters.<sup>100</sup> The potential for abuse of children is prevalent, and demonstrates a consequence of the mortgage fraud crisis that is not often discussed. Squatter danger is similar to the presence of any other type of stranger without a legitimate right to be present in a neighborhood, including drug dealers. Vacancies and the occupants can pose a threat to children and other residents.

If squatters are not in the homes, then the criminals might turn the houses into rentals, assisted-living facilities, or half-way houses.<sup>101</sup> This category of new residents is not necessarily involved or even knowledgeable about the initial fraudulent schemes, and perhaps entirely innocent of any wrongdoing which may have caused the vacancy. The impact on the community is devastating nonetheless. Ramifications of these “secret” occupants can result in further deterioration of the community through increased violence, as residents flee in fear of criminal activity.<sup>102</sup> What once was a stable residential community can deteriorate quickly into a crime ridden region, through no fault of the original residents. Just as a neighborhood can turn from a stable middle class community to one with a criminal drug

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99. There is a squatters’ movement taking advantage of the huge number of vacant homes. Empty homes are stripped of all valuable appliances, carpet, lighting, copper piping, and sit ready for a person in need of housing to move in. These modern day squatters justify their actions because they see themselves as providing a needed and essential service: housing. “Let the record reflect, there was no lock on the door . . . I am not breaking in,” says Take Back the Land’s director, Max Rameau of his Miami area squatters’ efforts on behalf of the homeless. John Leland, *With Advocates’ Help, Squatters Call Foreclosures Home*, N.Y. TIMES (Apr. 9, 2009), <http://www.nytimes.com/2009/04/10/us/10squatter.html>.

100. See *Neighbors Say Park Lane Home Disrupting Neighborhood*, THE FORUM NEWSGROUP (Jan. 19, 2012), <http://theforumnewsgroup.com/2012/01/19/neighbors-say-park-lane-home-disrupting-neighborhood>.

101. Some organizations have actively advocated for the reuse of empty houses as a way to address the housing crisis for the homeless. For example, Women in Transition seeks housing for victims of domestic violence as a way to provide shelter to women fleeing domestic abuse situations. Jim the Realtor, *Squatters on the Move*, BUBBLEINFO (Apr. 10, 2009, 8:55 AM), <http://www.bubbleinfo.com/2009/04/10/squatters-on-the-move/>.

102. When a house turns into a crystal meth lab or a marijuana farm, the addition of new “customers” present a new public nuisance to law-abiding residents.



organizational presence,<sup>103</sup> similarly a community can lose its stability when mortgage fraud impacts its residents. Describing one type of activity as “white collar” crime and the other as “ordinary” crime does not lessen the impact on the victimized residents.

Financial impact is another category of harm. When residents flee a neighborhood, the adverse consequences continue. Millions of home owners are now faced with negative equity in their home,<sup>104</sup> a fact that has huge consequences for the middle class and baby boomers nearing retirement. Housing prices are expected to continue to fall as a result of this economic downturn.<sup>105</sup> Although the value of the homes has declined, many of the innocent homeowners continue to be taxed based on the tax assessment prior to the deflation of their home’s value.<sup>106</sup> In this way, they are subsidizing the fraud. Moreover, property values eventually will decline to reflect the newly adjusted reality as homes reset to true value in a post-recession world. When this occurs, the tax base suffers.<sup>107</sup> County tax values decline,

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103. The economic cost of drug abuse and trafficking is estimated at \$215 billion. See *Impact of Drugs on Society National Drug Threat Assessment 2010*, U.S. DEP’T JUST. (Feb. 2010), <http://www.justice.gov/ndic/pubs38/38661/drugImpact.htm>.

104. CoreLogic indicates that 11.1 million, or 23.1%, of all residential properties with a mortgage were in negative equity (totaling \$750 billion) at the end of the fourth quarter 2010, up from 10.8 million, or 22.5%, in the previous quarter. *New CoreLogic Data Shows 23 Percent of Borrowers Underwater with \$750 Billion Dollars of Negative Equity*, CORELOGIC (Mar. 8, 2011), <http://www.corelogic.com/downloadable-docs/corelogic-q4-2010-negative-equity-report.pdf>.

105. According to the National Association of Realtors, pending home sales decreased 6% from 2009 to 2010, and existing home sales decreased 5.7% for the same period. *Pending and Existing Home Sales Data*, NAT’L ASS’N REALTORS (Mar. 2011), <http://www.realtor.org/wps/wcm/connect/11ba7d00468defab88eccf60f51ebbfd/REL1103SF.pdf?MOD=AJPERES&CACHEID=11ba7d00468defab88eccf60f51ebbfd>.

106. See, e.g., Stewart E. Sterk & Mitchell L. Engler, *Property Tax Assessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1042 (2006) (tax assessments in New York do not reflect the true value of a property for homeowners).

107. A decrease in property values actually results from an initially false inflation of property values. As a fraudulent transaction might involve several inflated transfers of property, each one raising the price, the property value has little relation to the true value of the property. When the bubble bursts, the criminals walk away with thousands of dollars. The original homeowner has lost the house, but the tax assessor has an inflated property on the books of the tax rolls. In one widely publicized case, there is a documented increase in assessed value over the course of a eight year time period. As the values increased, property tax assessments for other neighboring homeowners rose. After the fraud was uncovered, residents were being overcharged on their property taxes to the tune of \$10.36 million. See Andrew T. Carswell, *Effects of Mortgage Fraud on Property Tax Assessments*, 6 J. PROP. TAX ASSESSMENT & ADMIN. 5, 5 (2009); Kevin Duffy, *Study: Poor Neighborhoods Face Unfair Proper-*

which further impacts schools and neighborhood services dependent on tax revenue for sustainability. The cycle continues as businesses in the community close because of decreased demand for goods and services.<sup>108</sup> The need for basic services, such as police and fire protection, continues, but with decreased revenue to support governmental obligations.

### CONCLUSION

Mortgage schemes are committed by a variety of individuals as well as huge financial institutions.<sup>109</sup> As a concept, we should decide whether to treat mortgage fraud as a type of white collar offense or more as a “street” offense. Categorization is important for a variety of reasons. White collar crime is seen in many circles as not as serious as common street offenses.<sup>110</sup> As a result, the punishments are not as harsh, the need to investigate subsidies, and the quest for justice diminishes.<sup>111</sup>

With this current mortgage fraud crisis, I argue that we cannot continue to view the perpetrators as mere fraudsters with the resulting ramifications.<sup>112</sup> Foreclosures, negative amortization, and government inaction to address this conduct have all widened the disparity between the richest 1% and the other 99%. Law enforcement should give this crisis the attention it deserves, just as they do with criminal drug activity. After all, the harms are often parallel, the devastation on communities is analogous, and the prospect is even grimmer for the economy. Rather, to a certain extent the mortgage fraud crisis has had some of the most wide-ranging impact on society, affecting the individuals directly impacted and many beyond. In fact, this trickling down effect is one of the motivations for the Occupy Wall Street movement, which has spread world-wide. The Occupiers are discon-

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*ty Taxes*, ATLANTA J.-CONST. (Oct. 9, 2008), [http://www.ajc.com/homefinder/content/metro/stories/2008/10/09/property\\_tax\\_study.html](http://www.ajc.com/homefinder/content/metro/stories/2008/10/09/property_tax_study.html).

108. *See supra* note 67 and accompanying text. A recent report highlighted the ways that the foreclosure crisis causes reduced tax bases, decreased revenue for local government services, and other financial harms to the impacted neighborhoods. *See* CHRISTINE VIDMAR, NEIGHBORHOOD WORKS AMERICA, SEVEN WAYS FORECLOSURES IMPACT COMMUNITIES, (2008), *available at* <http://www.nw.org/network/neighborworksprogs/foreclosuresolutions/reports/documents/7ForeclosureImpacts.pdf>.

109. *See, e.g.*, *United States v. Bank of New England*, 821 F.2d 844, 854–59 (1st Cir. 1987) (discussing liability as premised on actual knowledge of fraud by both the Bank and its employees).

110. *See supra* note 52 and accompanying text.

111. *See id.*

112. *See supra* notes 60–70 and accompanying text.

tented with the critical disparity between the rich and the poor, and their motivations focus partly on the big banks and financial institutions which should be blamed for some part of the fiscal melt down.<sup>113</sup>

Looking solely at the mortgage crisis, I focus on the victim impact. In this Article, I drew a comparison between the harm caused by mortgage fraud and the harm that results from drug distribution networks.<sup>114</sup> Many of the harms suffered by the affected communities are comparable, and I urge a new view of white collar crime that would discard the language that prevents us from treating the harm similarly.<sup>115</sup> As we continue to use terms that minimize the impact of certain types of white collar offenses, our approach to addressing these crimes will retain the vestiges of the language differentiation. This is one of the rallying cries of those who Occupy Wall Street, both here and across the globe.

It is not easy to prosecute those responsible for mortgage fraud, and I do not mean to suggest otherwise here. Rather, I compare the governmental response to the S&L crisis in the 1980s as an example of quick and appropriate disposition of some of the key players.<sup>116</sup> As we know, the S&L crisis had some of the same devastating consequences for home ownership and communities as we are witnessing today. Perhaps if we recognize the crimes as real crimes, the investigative response would be more appropriate and address the widespread destruction that the housing crisis is inflicting today. Moreover, the collective knowledge doctrine, used successfully in *Bank of New England*, is a viable theory to address criminal mortgage fraud.

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113. See OCCUPY WALL STREET, *supra* note 1.

114. See *supra* notes 85–106 and accompanying text.

115. See *supra* notes 45–47 and accompanying text.

116. See *supra* Part V.