

# Business Crime and the Public Interest: Lawyers, Legislators, and the Administrative State

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I. An Introduction to Business Crime .....	872
II. Challenges for Private Lawyers .....	874
III. Challenges for Prosecutors .....	877
IV. Challenges for Legislators .....	881
Conclusion.....	883

Criminal law would seem to qualify as public interest law almost by definition. Consider the caption of a criminal law case. The first party listed is the government, whether labeled *People* or *State* or *Commonwealth* or *United States*. This is because a criminal prosecution is a form of collective litigation, brought by a public prosecutor on behalf of all the citizens of the government entity that the particular prosecutor represents. As the Supreme Court has pointed out, in representing the public, the prosecutor's interest is not the narrow one of winning a case. Rather, prosecutors must be "guided solely by their sense of public responsibility for the attainment of justice."<sup>1</sup>

Even defense lawyers practicing criminal law can be considered to be involved with public interest law. True, they are required to be zealous advocates for their clients, to whom their loyalty is owed. But the criminal law system requires this zealous advocacy to assure citizens that the power of the state is being wielded properly. History teaches us that no matter how lofty our aspirations for the public prosecutor, not every prosecutor is pure and not every prosecution is meritorious.

If criminal law is public interest law, does it matter if we put the word *business* in front of *crime*? Isn't the prosecution and defense of business crime as much a

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1. *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 814 (1987); *see also Berger v. United States*, 295 U.S. 78, 88 (1935).

matter of public interest law as the prosecution and defense of any other type of crime?

The short answer is yes; the longer answer is yes and no. Business crime is a branch of the criminal law, but it is also a branch of economic regulatory law. As in all criminal matters, prosecutors must still act to advance the public's interest in justice, and defense lawyers must still act to protect their clients' interests and check potential abuses of public power. But the regulatory aspect of business crime also poses some particular challenges and opportunities for all participants in the criminal justice process. This includes not only prosecutors and defense counsel, but legislators as well.

In this Article, I explore some of the unique connections between business crime and the public interest. I begin with providing some definition for the types of crimes I am discussing. Next, I discuss some examples of the particular challenges facing prosecutors, defense counsel, and legislators in this area. I conclude with some observations on achieving the public good in business crime in the administrative state.

## I. AN INTRODUCTION TO BUSINESS CRIME

I define a business crime as a crime committed during the normal course of business operations, for economic reasons, mostly by or on behalf of legitimate business organizations.<sup>2</sup> As a general matter, these are not crimes of intentional violence, although some of them do cause physical harm. Nor are these crimes defined by the socioeconomic status of the offender, although many of the defendants in business crime prosecutions are white-collar criminals. Rather, most business crime is organizational crime, and most business crime statutes are but one aspect of a more complex effort to regulate harmful business behavior. In this sense, business crimes are a component of the regulatory, or administrative, state.

The initial period of business crime legislation came at the dawn of the regulatory state, from 1887 to 1914. This period featured the enactment of the Interstate Commerce Act in 1887,<sup>3</sup> the Sherman Act in 1890,<sup>4</sup> and the Pure Food and Drug Act in 1906.<sup>5</sup> The Interstate Commerce Act established the first major federal regulatory agency, the Interstate Commerce Commission.<sup>6</sup> The Commission was given jurisdiction over a number of railroad practices, many of which involved discrimination in price or service between shippers, and Congress made it a crime (a misdemeanor) willfully to violate the Act.<sup>7</sup> Subsequent

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2. See HARRY FIRST, BUSINESS CRIME: CASES AND MATERIALS, at xxi (1990).

3. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (codified as amended in scattered sections of 49 U.S.C.).

4. Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended in 49 U.S.C. §§ 1–7 (2006)).

5. Pure Food and Drug Act, Pub. L. No. 59-384, ch. 3915, 34 Stat. 768 (1906) (repealed 1938).

6. See Interstate Commerce Act § 11.

7. *Id.* § 10.

prosecutions for violating railroad regulatory legislation established some of the important precedents in the business crime area.<sup>8</sup> The Sherman Act made it a crime to engage in unreasonable restraints of trade and to monopolize. Prosecutions under this statute similarly established important precedents, and Sherman Act prosecutions continue to be an important part of business crime enforcement today.<sup>9</sup> Finally, the Pure Food and Drug Act initiated government supervision over foods and drugs offered in interstate commerce to ensure that they were not adulterated or misbranded, with violations of the Act to be criminally prosecuted.<sup>10</sup> Prosecutions under a successor statute helped establish the validity of no fault public welfare criminal offenses.<sup>11</sup>

The second important period for business crime legislation was the New Deal, when the major shift to the modern administrative state occurred. For business crime, key statutes during this period were the Securities Act of 1933<sup>12</sup> and the Securities and Exchange Act of 1934,<sup>13</sup> establishing the Securities and Exchange Commission (SEC) to oversee the issuance and trading of financial securities in the United States, as well as to regulate the exchanges on which these securities are traded. In addition to the enforcement powers given to the newly-created SEC, the Acts criminalized willful violations of their provisions.<sup>14</sup> As a result, responsibility for the enforcement of the securities laws is shared by the administrative agency (the SEC) and the prosecutor (the Justice Department). Violators may thus face administrative and criminal penalties.

The third important period was the environmental/consumer protection period, from 1968 to 1977. During this period, Congressional attention was focused on some of the significant negative effects of a successful industrial economy—polluted air and water and unsafe products and workplaces. As with the early regulation of food and drugs, a major concern here was that business firms, in their drive for profits, might cause substantial physical harm, an important traditional concern of the criminal law, of course. In these statutes,

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8. See, e.g., *New York Central & H.R.R. Co. v. United States*, 212 U.S. 481, 494–95 (1909) (establishing the principle of corporate criminal liability and upholding the constitutionality of the Elkins Act of 1903).

9. See, e.g., *Hale v. Henkel*, 201 U.S. 43 (1906) (application of Fourth and Fifth Amendments to investigation of corporations for criminal conduct); Scott D. Hammond, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Speech at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), available at <http://www.justice.gov/atr/public/speeches/255515.pdf> (reviewing the growth of criminal antitrust prosecutions); *Sherman Act Violations Yielding a Corporate Fine of \$10 Million or More*, U.S. DEPT. OF JUSTICE, <http://www.justice.gov/atr/public/criminal/sherman10.pdf> (listing ninety-seven fines as of Sept. 20, 2012).

10. See *supra* note 5.

11. See, e.g., *United States v. Dotterweich*, 320 U.S. 277, 278–79 (1943).

12. Securities Act of 1933, ch. 38, 15 U.S.C. §§ 77a–77z, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)).

13. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2006)).

14. See 15 U.S.C. §§ 77x, 78ff (2006).

Congress replicated the pattern set in earlier regulatory legislation—the establishment of regulatory agencies with civil enforcement powers (e.g., the Occupational Safety and Health Administration and the Environmental Protection Agency) and the criminalization of willful or knowing violations, with enforcement to be handled by the Justice Department.<sup>15</sup>

Supporting the regulatory superstructure of business crime is a wide variety of general and specific federal statutes that prosecutors can use as the situation warrants. The broadest statutes are the mail and wire fraud statutes, descendants of the original mail fraud statute enacted in 1872 to prevent large-scale swindles,<sup>16</sup> and the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>17</sup> which increases penalties for certain multiple violations of business crime statutes. These statutes have been supplemented by more specific statutes criminalizing, for example, health care fraud and foreign bribery.<sup>18</sup>

Although there is no single source of statistics regarding the incidence of business crime or its prosecution, it is safe to say that the criminal prosecution of business behavior was generally considered to be weak through the mid-twentieth century.<sup>19</sup> More recently, however, there has been a decided increase both in the public perception that criminal sanctions are appropriate in business crime cases, as well as an increased willingness of prosecutors to bring such cases. Large fines and lengthy prison terms for a wide range of behavior—off-label pharmaceutical drug sales, price fixing cartels, foreign bribery, insider trading, to name a few—have underscored the importance of this area of the criminal law.<sup>20</sup>

## II. CHALLENGES FOR PRIVATE LAWYERS

The traditional paradigm of the criminal lawyer is the zealous advocate defending a client at trial or, perhaps more realistically, in plea negotiations. For a

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15. See Occupational Safety and Health Act, 29 U.S.C. § 666 (2006); Clean Air Act, 42 U.S.C. § 7413(c) (2006).

16. See 18 U.S.C. § 1341 (2006).

17. 18 U.S.C. §§ 1961–1968.

18. See Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m(b)(2), 78dd-1, 78dd-2, 78ff (2006); 18 U.S.C. § 1347 (health care fraud).

19. For the classic critique, see generally EDWIN SUTHERLAND, WHITE COLLAR CRIME (1949).

20. See, e.g., Chad Bray, *Longest Sentence in Insider Case Set*, WALL ST. J., June 5, 2012, at C3 (noting a twelve-year sentence in an insider trading scheme); *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data*, U.S. DEP'T OF JUSTICE (July 2, 2012), <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>; *JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a \$218.8 Million Criminal Penalty*, U.S. DEP'T OF JUSTICE (Apr. 6, 2011), <http://www.justice.gov/opa/pr/2011/April/11-crm-431.html> (noting \$1.5 billion total penalties obtained so far for a scheme to bribe Nigerian government officials); *Yazaki Corp., Denso Corp. and Four Yazaki Executives Agree to Plead Guilty to Automobile Parts Price-fixing and Bid-Rigging Conspiracies*, U.S. DEP'T OF JUSTICE (Jan. 30, 2012), [http://www.justice.gov/atr/public/press\\_releases/2012/279734.htm](http://www.justice.gov/atr/public/press_releases/2012/279734.htm) (noting \$548 million in fines against two companies and jail sentences for four foreign nationals ranging from fifteen months to two years).

defense lawyer in the business crime area, however, going to trial represents a professional failure. Although sometimes trials cannot be avoided, a major goal of the business crime lawyer is to make sure that his or her client is never formally charged with a crime in the first place. Criminal charges can have a significant effect on a company's reputation and business, or on an executive's reputation. Even if an acquittal results, civil lawsuits may follow. Convictions can bring harsh penalties, including possible debarment from engaging in certain kinds of business.

Thus, for business crime, the real paradigm is lawyer as counselor. In traditional crimes, clients do not generally consult lawyers before engaging in criminal behavior. Business crimes, though, are done in the course of an ongoing business, presenting the opportunity for prior consultation and for a business crime lawyer to just say no.

Consider two recent cases. One involved a practice of rotating bids at public auctions for municipal tax liens. Apparently, for a nine-year period, a group of at least seven real estate investors would come to these auctions without a preconceived plan to allocate bids but would then informally practice a round-robin approach to bidding, with each bidder going in turn.<sup>21</sup> Had any of these bidders thought of consulting their lawyers they would have found out that an agreement could be inferred from this practice, even if the parties did not formally agree to this behavior beforehand. A good counselor would have pointed out that such auction behavior could land the participants in jail and that they should stop doing it. Whether these investors ever sought such advice is not known, but the Justice Department has brought criminal charges against six of the investors, all of whom have pleaded guilty.<sup>22</sup>

The second case is unfolding as this Article is being written. It involves rather extensive email correspondence and likely other discussions between executives of two major oil and gas exploration companies—Chesapeake Energy Corp. and Encana.<sup>23</sup> These emails show that executives from both companies were in contact with each other regarding their bidding on land that potentially contained extensive amounts of oil and gas.<sup>24</sup> Prior to these emails, the two companies had bid against each other at land auctions; after the emails, they did not.<sup>25</sup> What seems clear at this point is that both companies and their executives

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21. Telephone Interview with David Glovin, Reporter, Bloomberg News (Mar. 15, 2012).

22. See *New York Financial Investor Pleads Guilty to Bid Rigging at Municipal Tax Lien Auctions in New Jersey*, U.S. DEPT OF JUSTICE (Mar. 27, 2012), [http://www.justice.gov/atr/public/press\\_releases/2012/281630.htm](http://www.justice.gov/atr/public/press_releases/2012/281630.htm); see also David Voreacos & David Glovin, *Tax-Lien Probe Wins Sixth N.J. Plea as Lawyer Admits Guilt*, BLOOMBERG (Mar. 27, 2012), <http://www.bloomberg.com/news/2012-03-27/tax-lien-probe-wins-sixth-n-j-plea-as-lawyer-admits-guilt-1-.html>.

23. See generally Brian Grow et al., *Energy Rivals Plotted to Suppress Land Prices*, REUTERS (June 25, 2012), <http://graphics.thomsonreuters.com/12/06/ChesapeakeLand.pdf>.

24. *Id.* at 2.

25. *Id.* at 4–5.

could have avoided their coming legal problems had they been better counseled (or, perhaps, had they paid more attention to what their lawyers told them). Proper counseling would have enabled them to understand that they should not discuss sensitive bidding matters with their competitors and could face possible criminal charges for doing so.

As these two cases show, in some ways the private lawyer's role as counselor in business crime matters is analogous to a role played by government officials in the criminal justice system. Counseling a client not to commit a crime advances not only the client's true self-interest but also the public's interest in crime prevention.

Private lawyers in the business crime area also play a public interest role in advancing the detection and investigation of business crime. Today, they do so in at least two ways.

The first is through assisting clients in adopting and implementing an "effective compliance and ethics program," as set out in the U.S. Sentencing Guidelines.<sup>26</sup> These programs are corporate-wide processes designed to "prevent and detect criminal conduct" and to promote corporate compliance with the law.<sup>27</sup> As part of these compliance programs, the Sentencing Guidelines envision that companies will not only investigate corporate wrongdoing but will also take "reasonable steps" after detecting criminal conduct to prevent future violations, including "self-reporting and cooperation with authorities" when appropriate.<sup>28</sup> As incentive to adopt and implement these compliance programs, as well as to report violations to prosecutors, the Sentencing Guidelines provide that companies can obtain steep discounts from normally imposed criminal fines, potentially reducing their fines to five percent of what they would otherwise have been.<sup>29</sup>

The second way that business lawyers take on the investigative role of the public prosecutor is more case-specific. Beginning with the corporate accounting scandals of the early 2000s, prosecutors have developed a new tool to investigate and prosecute business crime.<sup>30</sup> The tool involves either deferring the prosecution of a corporation (a deferred prosecution agreement or DPA), or agreeing not to prosecute the corporation at all (a non-prosecution agreement or NPA), in return for the corporation's agreement to investigate the wrongdoing in question and turn the results of that investigation over to the prosecutor.<sup>31</sup> The benefit to the targeted corporation is that it will not be convicted of (or, in an NPA, not even charged with) a crime. The benefit to the prosecution is that private lawyers,

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26. See U.S. Sentencing Guidelines Manual § 8B2.1 (2011).

27. See *id.* § 8B2.1(a)(1).

28. See *id.* § 8B2.1 cmt. n.6.

29. See *id.* §§ 8C2.4–8C2.6.

30. See generally Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23 (2010) (discussing prosecutorial approaches to business crime).

31. See generally *id.* (discussing the history and use of these agreements).

working with corporate personnel, may be able to investigate corporate wrongdoing more efficiently than can an outside prosecutor.

As a result of prosecutorial use of DPAs and NPAs, the public corporation has now become, in effect, a branch office of the prosecutor. Many defense lawyers and commentators have been critical of this new branch-office role, believing that these agreements are coercive of corporations and indifferent to the welfare of individual employees, who may too readily be thrown under the bus by their corporate employers anxious to avoid criminal charges.<sup>32</sup> Nevertheless, the use of these agreements is now well-established, having been used by the Justice Department in both Republican and Democratic administrations, and these agreements are likely to be a continuing feature of business crime cases.<sup>33</sup>

The counseling and investigating function that private counsel must perform in business crime prosecutions represents a paradigm shift for the criminal justice system. It constitutes a more explicit alignment of private counsel with the public interest goal of preventing, detecting, and punishing crime. The challenge for private counsel is to perform this public interest role while at the same time performing the traditional role of defense counsel in the criminal justice system—to be zealous advocates for their clients' private interests.

### III. CHALLENGES FOR PROSECUTORS

Business crime is generally organizational crime, often involving behavior that is not clearly morally wrong and which might be handled through the administrative process rather than (or in addition to) the criminal process. All of these factors add layers of complexity to the kinds of decisions that prosecutors normally make. I have picked a few examples to highlight some of the challenges that prosecutors face.

I start with the Betty Vinson story to illustrate the problems of the charging decision.<sup>34</sup> Betty Vinson was a senior-level accountant at WorldCom, which was a small long-distance telephone company when she joined. It grew, however, to be a major telecommunications company, primarily through its acquisition of MCI Communications Corp. In the mid-2000s she was asked by her boss to make an adjustment in certain accounts so that the company would meet Wall Street's earnings expectations for the quarter.<sup>35</sup> Although she made the changes, she was

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32. See, e.g., Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 913–19 (2007) (discussing criticisms); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 71–75 (2006) (discussing arguments about abusive government tactics).

33. See Gibson, Dunn & Crutcher, *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements* (Jan. 4, 2012), <http://www.gibsondunn.com/publications/documents/2011yearendupdate-corporatedeferredprosecution-nonprosecutionagreements.pdf> (detailing continued use of agreements in 2010 and 2011).

34. For details see Susan Pulliam, *Over the Line: A Staffer Ordered to Commit Fraud Balked, Then Caved*, WALL ST. J., June 23, 2003, at A1.

35. *Id.* at A6.

sufficiently uncomfortable with them to indicate that she was going to resign.<sup>36</sup> A meeting with the chief financial officer of WorldCom ensued, in which he promised her that he would try to fix the company's problems and asked her not to leave before they were fixed. So she stayed.<sup>37</sup> Each quarter, though, things got worse, and she continued to make adjustments that she knew were improper. As the fraud began to unravel, Vinson and two co-workers met with representatives from the Justice Department, the SEC, and the FBI and told them what they had done.<sup>38</sup> One day later, WorldCom contacted the SEC and disclosed that it had found \$3.8 billion in improper accounting entries.<sup>39</sup>

Vinson's meeting took place in Jackson, Mississippi, the location of WorldCom's headquarters.<sup>40</sup> The U.S. Attorney in Jackson initially indicated to Vinson's lawyer that he would likely view her as a witness, not as a defendant. Soon after the investigation began, however, Justice Department officials in Washington decided to assign the case to the U.S. Attorney for the Southern District of New York.<sup>41</sup> Prosecutors in that office have traditionally been very aggressive in securities fraud prosecutions.<sup>42</sup> They saw her statements as a confession, not a tip-off of wrongdoing. To them, she was no longer a witness but, ultimately, an indicted defendant.<sup>43</sup> Vinson eventually pleaded guilty and was sentenced to five months in jail and five months of house arrest.<sup>44</sup>

What was the correct prosecutorial decision in Betty Vinson's case? Good arguments can be made either way. She was a fairly high-level employee but was still subject to the directives of upper management. She physically made the fraudulent entries but wrestled with what she was doing and eventually disclosed her wrongdoing at a time when government investigators did not know all that had happened. In fact, different offices of the same Justice Department viewed the case differently (all U.S. Attorneys Offices are part of the Department of Justice). Of course, some decision had to be made, one way or the other. Vinson's case is a reminder that the decision will likely be difficult.

My second story involves Andrew Fastow, the former chief financial officer of Enron, and it involves the question of trading up. Unlike Vinson, Fastow was a key player in an accounting fraud, one that eventually led to the bankruptcy of his employer, Enron. Unlike Vinson, Fastow engaged in his own schemes to defraud

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36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See Benjamin Weiser & Peter Lattman, *U.S. Prosecutor Sends a Message to Wall Street*, N.Y. TIMES, May 13, 2011, at B1 (discussing aggressive litigation of securities law violations).

43. Pulliam, *supra* note 34, at A6.

44. See Shawn Young & Dionne Searcey, *Executives on Trial: Former Executive at WorldCom Gets 5-Month Jail Term*, WALL ST. J., Aug. 8, 2005, at C3.



others dealing with his firm and was not simply following the directives of his superiors. Vinson's financial gain was that she kept her job and her \$80,000 salary; Fastow made millions.<sup>45</sup>

Fastow did not escape criminal prosecution, and his conduct was not as morally ambiguous as Vinson's. But he did have an important asset that Vinson lacked, and this is where another challenge to prosecutors lies. Fastow had detailed understanding of what his superiors—the former CEOs of Enron, Kenneth Lay, and Jeffrey Skilling—had done and how they had done it.<sup>46</sup> With his testimony, the prosecutors would have a good chance of convicting the people at the very top of Enron; without his testimony (or the testimony of other participants in the fraud), the prosecutors would likely have to rely on documentary evidence, a much less compelling form of evidence.

Standard practice in these situations is to trade up—to reduce the penalty for smaller fish in order to get the larger. Ironically, this means that those who know little have little to trade; only the more culpable individuals have a tradable asset.<sup>47</sup> The question then becomes, how much can a highly culpable but slightly low-level or mid-level executive get for disclosing his knowing involvement in a business crime and implicating his superiors?

The deal the prosecutors struck with Fastow was a ten-year sentence in return for a guilty plea and cooperation.<sup>48</sup> The original deal carried the threat of additional charges if Fastow did not cooperate fully. It did not promise a sentence reduction if he did; in fact, the agreement specifically provided that the prosecutors would not ask for a sentence reduction because of cooperation.<sup>49</sup> By the time Fastow came up for sentencing two years later, however, Skilling and Lay had been convicted, and Fastow had provided very effective testimony, along with his deep understanding of how Enron functioned. The sentencing judge, with no objection from prosecutors, reduced the agreed-upon sentence by forty percent, from ten years down to six.<sup>50</sup>

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45. See Plea Agreement at 11–16, *United States v. Fastow*, 300 F. Supp. 2d 479 (S.D. Tex. 2004) (detailing self-dealing transaction in which Fastow was personally enriched), available at <http://news.findlaw.com/wp/docs/enron/usafastow11404plea.pdf>.

46. See John R. Emshwiller & Thaddeus Herrick, *Fastow Plea Deal May Boost Cases Against Enron's Ex-CEOs*, WALL ST. J., Jan. 15, 2004, at A3.

47. For instance, Betty Vinson's former boss, Scott Sullivan, the CFO of WorldCom, received a five-year sentence after testifying against WorldCom's CEO, Bernie Ebbers, who received a twenty-five year sentence. See Allan Murray, *Executives in Trouble Now Know to Sing*, WALL ST. J., Aug. 17, 2005, at A2 (Sullivan's testimony allowed the government to "land" Ebbers, its "biggest fish").

48. See Plea Agreement, *supra* note 45, at 2.

49. See *id.* at 13.

50. See Kate Murphy & Alexei Barrionuevo, *Fastow Sentenced to 6 Years*, N.Y. TIMES, Sept. 27, 2006, at C1.

My question here is not whether the four year reduction was a proper judicial decision.<sup>51</sup> My focus is on the challenges that prosecutors face. At the sentencing hearing, should prosecutors have been insistent that the judge stick to the original bargain? Would that have been a more just result? Would that have been better for deterrence? Was even the original deal just? Skilling was eventually given a sentence of over twenty-four years.<sup>52</sup> Are the sentences of the two defendants proportional to their guilt?

The question of the appropriate use of the prosecutor's bargaining and charging power can arise in the corporate context as well, and this leads to my third story—the deferred prosecution agreement that the Justice Department entered into with the accounting firm KPMG. The Justice Department began investigating KPMG after Congressional hearings into KPMG's promotion of abusive tax shelters.<sup>53</sup> As a public accounting firm, KPMG's survival as a business firm might be in serious doubt if it were to be convicted of criminal tax fraud. Seizing on this vulnerability, government lawyers pressed KPMG to enter into a deferred prosecution agreement under which KPMG would pay \$456 million in fines and restitution but, more significantly, would help the Department investigate the individual partners and employees involved in selling these tax shelters.<sup>54</sup> KPMG was to effectuate this assistance by waiving its attorney-client privilege and making its employees available for government questioning, the latter backed by a threat that noncooperating partners or employees would have their legal fees for private counsel withheld and would be fired.<sup>55</sup>

The challenges that a prosecutor faces in negotiating a deferred prosecution agreement are not quite the mirror image of the challenges that private counsel face, as discussed earlier. The challenge for the government prosecutor is to consider whether he or she is misusing the power to prosecute and forcing bargains inappropriately. In fact, the district court and court of appeals in the KPMG case decided that the Justice Department had overstepped its power and deprived the subsequently indicted individual defendants of their Fifth and Sixth Amendment rights. The language that the trial judge used is particularly telling:

Justice is not done when the government uses the threat of indictment—a matter of life and death to many companies and therefore a matter that threatens the jobs and security of blameless employees—to coerce companies into depriving their . . . employees of the means of defending

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51. See, e.g., Joe Nocera, *Fastow's Long Walk to Less Time*, N.Y. TIMES, Sept. 30, 2006, at C1 (describing criticism of the judge's decision to reduce the sentence).

52. Skilling's sentence was subsequently vacated, but he has yet to be resentenced. See Jeff Ifrah & Jeffrey Hamlin, *Five Years Later, Skilling's Sentence Is Still up in the Air*, HOUS. CHRON. (Oct. 15, 2011), <http://www.chron.com/opinion/outlook/article/five-years-later-skilling-s-sentence-is-still-up-2219563.php>.

53. See First, *Branch Office of the Prosecutor*, *supra* note 30, at 50–52.

54. See *United States v. Stein*, 435 F. Supp. 2d 330, 341–50 (S.D.N.Y. 2006).

55. See *United States v. Stein*, 541 F.3d 130, 147 (2d Cir. 2008).

themselves against criminal charges in a court of law. . . . [T]he determination of guilt or innocence must be made fairly—not in a proceeding in which the government has obtained an unfair advantage long before the trial even has begun.<sup>56</sup>

Again, I am not so much concerned with whether the court's decision was correct as with the particular challenges that a prosecutor in a business crime case faces.<sup>57</sup> Prosecuting business crime may be public interest work, but there are no perfect guides to ensure that each exercise of prosecutorial discretion is in the public interest. For business crime cases, prosecutions must advance not only the general interests of justice but also the specific goals of the regulatory regime involved. We know that winning a case is not everything, but it is something. How to balance the use of tactics that win cases and help deter violations of important regulatory statutes against the negative impact of prosecutorial overreaching is the prosecutor's difficult public interest challenge.

#### IV. CHALLENGES FOR LEGISLATORS

The U.S. Code is filled with criminal law, scattered through its many volumes—there is no single federal criminal code that has gathered all federal crimes in one spot.<sup>58</sup> In fact, no one really knows how many federal criminal laws exist. Estimates vary from 3,000 to 4,500, but these estimates could be wrong by some unknown order of magnitude.<sup>59</sup>

As a general matter, it is easier to add to the unorganized corpus of federal criminal law than to remove laws that are no longer sensible or, perhaps, never were. For political reasons, federal criminal law seems to be a one-way ratchet. Being tough on crime offends few; repealing crimes can offend many. This has been particularly true with the criminal provisions of economic regulatory statutes. When Congress enacts a regulatory scheme its focus is usually on the regulatory aspect of the legislation rather than on the criminal provisions of the legislation, provisions that are often tacked on for good measure and without much apparent thought.

The result of congressional inattention has been to leave the actual implementation of federal business crimes to prosecutorial discretion. In so doing, Congress has placed on nonelected prosecutors the burden of making the difficult sort of decisions discussed above. The likelihood that Congress will step back into its legislative role at this point, however, is slight. Indeed, given how Congress

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56. *Stein*, 435 F. Supp. 2d at 381–82.

57. I have criticized the court's decision elsewhere. See First, *Branch Office of the Prosecutor*, *supra* note 30, at 75–81.

58. The most recent effort to enact such a code failed in 1981. See FIRST, BUSINESS CRIME, *supra* note 2, at 12.

59. See Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More Ensnared*, WALL ST. J., July 23, 2011, at A1.

operates today, it is not even clear that the administration of the criminal side of federal economic regulation would be improved with additional congressional guidance.

What may be more likely today, however, is some retreat from federal economic regulation as a general matter, diminishing the criminal law as a necessary consequence. This may be more likely because our current political debate is very focused on the proper scope of federal government regulation. This debate does not focus on the civil/criminal distinction but, rather, on whether government regulation is a good idea at all.

An example of how this debate could affect federal business crimes, and not for the better, is the “Jumpstart Our Business Startups Act” of 2012, cleverly known as the “JOBS Act.”<sup>60</sup> This legislation was promoted as a deregulatory effort to free small firms from the restrictions of the Sarbanes-Oxley Act, passed in 2002 in the wake of the accounting scandals at companies like Enron and WorldCom.<sup>61</sup> The idea of the JOBS Act is to allow start-ups to raise capital more easily, and its proponents tied this proposition to the idea that start-ups are critical for increasing jobs.<sup>62</sup> This made the bill hard for both Democrats and Republicans to resist.

What the law may end up doing, however, is increasing the opportunity for fraud. The Act relieves firms with less than \$1 billion in revenue from financial disclosure obligations for up to five years after they go public and allows firms (in certain circumstances) to raise money via the Internet (crowdfunding) without having audited financial statements.<sup>63</sup> In these days of hyped IPOs for Internet-based companies, these changes could make it much easier to gull investors.<sup>64</sup>

Thus, legislators face a challenge when considering the public interest in connection with business crime legislation. Today’s well-organized interest groups are often looking to narrow down or abolish regulatory protections that restrict their ability to pursue profits. The administrative state may need trimming in certain circumstances, of course, and profit is, certainly, an important driver of economic progress and opportunity, but we also need business crime provisions to protect the most vulnerable from being victimized. Legislators could better

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60. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112–106, 126 Stat. 306 (2012).

61. See First, *Branch Office of the Prosecutor*, *supra* note 30, at 41–42 (discussing passage and content of Sarbanes-Oxley); Steven M. Davidoff, *From Congress Comes a Law Befitting a Sausage Factory*, N.Y. TIMES, Apr. 4, 2012, at B5.

62. See Andrew Ross Sorkin, *JOBS Act Jeopardizes Safety Net for Investors*, N.Y. TIMES, Apr. 3, 2012, at B1.

63. For critical descriptions of the bill, see, for example, Davidoff, *supra* note 61 (arguing that it is uncertain whether the Act “will create jobs or only encourage fraud”); Sorkin, *supra* note 62 (arguing that this legislation “dismantles some of the most basic protections for the most susceptible investors”).

64. See Susanne Craig & Ben Protess, *Wall Street Examines Fine Print in a Bill for Start-Ups*, N.Y. TIMES, Apr. 4, 2012, at B1 (noting that LinkedIn and Pandora Radio had revenues below \$1 billion when they went public).

advance the public interest by focusing on when the criminal law would be a superior vehicle for achieving these protections than private litigation or administrative agency action. Knee-jerk decriminalization of economic regulation, however, is not public interest law.

#### CONCLUSION

How do lawyers help to achieve the public good in today's administrative state? In looking at lawyers involved with the criminal side of regulation—whether they be prosecutors, defense counsel, or legislators—we can see two sometimes contradictory pulls. On the one hand, lawyers represent clients and legislators represent interest groups. These representational duties push them to win for their clients or for the relevant interest groups, to get the clients or the interest groups what is in their private interests. On the other hand, lawyers also advance public interests. Prosecutors must run a just system, defense counsel can counsel in a way that prevents crime, and legislators are responsible to all their constituents to use the criminal law in a way that fairly supports the goals of economic regulation.

As I have indicated with the examples in this Article, achieving the appropriate balance between private and public goals will always be challenging. The important point is not to forget the challenge. Unless lawyers remain aware of the public side of the balance, only private goals will be pursued. Of course, being aware of the challenge of the public interest will not necessarily conduce to the public good; forgetting about it, though, will be worse.