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INFORMATION AS A COMMODITY IN THE REGULATORY WORLD

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I. INTRODUCTION

> As [Karl] Marx saw, when technologies change fundamentally, the economic, social, and political relationships premised on them must sooner or later change as well.[1]

Marx could have added: and so do crime, graft, and wrongdoing. This Article addresses the fact that crime and wrongdoing have changed as our world has changed and suggests how the regulatory world should respond. As Robert Wright notes: "With the coming of TV, the computer, the microcomputer, and allied technologies, [the twentieth] century has seen breakthroughs in information technology that rival all past such breakthroughs, even the inventions of writing, money, and the printing press."[2] Given our increasingly global and interconnected world,[3] wrongdoing can wreak unprecedented

1. ROBERT WRIGHT, NONZERO: THE LOGIC OF HUMAN DESTINY 204 (2000).

2. *Id*. at 207; *see also* Walter B. Wriston, *Bits, Bytes, and Diplomacy*, *in* 76 FOREIGN AFF. 172, 172 (1997) (discussing the "Third Technological Revolution"). *See generally* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999) (describing today's "new" global system, its effect on communities and individuals, the backlash against globalization, and the role of the United States as a stabilizer of the global market).

3. Several commentators have written interesting discussions on the globalization of our modern world. *See* DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 9 (1997)

havoc. We have no choice but to think in new ways about how to deal with wrongdoing. To be effective, a public regulatory system should include a new institutional design—that of private justice.

Private justice is the use of private persons to detect, prove, and deter public harms.[4] Private justice dominated law enforcement hundreds of years ago for two reasons: (1) it was

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("Advances in communications and transportation mean that large segments of national economies are much more exposed to international trade and capital flows than they have ever been . . . ."); Saskia Sassen, *Global Financial Centers*, 78 FOREIGN AFF., 75, 75–87 (1999) (discussing the birth of a few cities as "global financial centers"); Wriston, *supra* note 2, at 174–75 (recognizing that modern communications allow ideas to pass through borders as though the borders do not exist); Dirk Beveridge, *World Bank Warns of Danger in Few Rich, Many Poor Nations*, PITT. POST-GAZETTE, Sept. 22, 2000, at D7 (discussing the World Bank and its role in, and effect on, "global growth and stability"); *Measuring Globalization*, FOREIGN POL., Jan./Feb. 2001, at 56–57 (introducing the A.T. Kearney/*Foreign Policy* magazine "Globalization Index" as a comprehensive guide to globalization in fifty developed countries); *No World Lifeline for Us*, BOSTON GLOBE, Apr. 8, 2001, at G2 (interviewing international economist Nariman Bahravesh about the roles of the United States, Japan, and Europe in globalization); Steven Pearlstein, *A New Politics Born of Globalization: Leaders Coming to a Consensus on the Need for Rules to End the Excesses of Free Trade*, WASH. POST, Oct. 1, 2000, at H1–H2 (reporting the increased recognition by international financiers that a compromise is needed between unfettered global capitalism and protection of developing countries); Lester C. Thurow, *Third World Must Help Itself*, BOSTON GLOBE, Aug. 7, 2001, at F4 (discussing globalization and its effects on per capita income disparity between First and Third World countries).

The Lexus and the Olive Tree by Thomas L. Friedman is especially informative, and enjoyable, reading. Friedman relates many stories that demonstrate globalization, including the following:

> A group of computer programmers at Tsinghua University in Beijing is writing software using Java technology. They work for IBM. At the end of each day, they send their work over the Internet to an IBM facility in Seattle. There, programmers build on it and use the Internet to zap it 5,222 miles to the Institute of Computer Science in Belarus and the Software House Group in Latvia. From there, the work is sent east to India's Tata Group, which passes the software back to Tsinghua by morning in Beijing, back to Seattle and so on in a great global relay that never ceases until the project is done. . . . "It's like we've created a forty-eight-hour day through the Internet."

FRIEDMAN, *supra* note 2, at 111 (citing Kevin Maney's April 24, 1997, story in *USA Today*, which quoted John Patrick, Vice President of Internet Technology for IBM). As John Chambers, President of Cisco Systems, told Friedman in 1998:

> The Internet will change everything. The Industrial Revolution brought together people with machines in factories, and the Internet revolution will bring together people with knowledge and information in virtual companies. And it will have every bit as much impact on society as the Industrial Revolution. It will promote globalization at an incredible pace. But instead of happening over a hundred years, like the Industrial Revolution, it will happen over seven years.

Id. at 117.

4. Pamela H. Bucy, *Private Justice*, 75 S. CAL. L. REV. (forthcoming 2002) (manuscript at 1.5, on file with author) [hereinafter Bucy, *Private Justice*]; *cf.* Pamela H. Bucy, *Private Justice and the Constitution*, 69 TENN. L. REV. (forthcoming 2002) (manuscript at 2, on file with author) (discussing constitutional issues raised by private justice).

necessary because few public resources were available for law enforcement, and (2) it was consistent with societal values of the time. Today, private justice is as much of a necessity. It is uniquely able to provide the regulatory world with an essential commodity[5]—inside information about wrongdoing—that cannot be found elsewhere. Because the game of crime has changed, no amount of public resources, used alone, will be able to keep up. In addition, although building upon different values than those extolled in the middle ages, private justice today builds upon values lauded, or at least needed, in contemporary American society.

For purposes of this Article, "inside information" refers to "significantly helpful information about wrongdoing motivated by economic gain, produced by someone who has experience, insight, or contacts to the industry or perpetrator involved."[6] It is important to note that the individuals who have this inside information are unlike other human sources of information the regulatory world traditionally has relied upon.[7] Historically, people have given law enforcement information about wrongdoing for one of two reasons: (1) the person is the victim, or likely victim, of such conduct and wants law enforcement to protect her or punish the perpetrators, or maybe both, or (2) the person has been caught because of her own wrongdoing and offers information about wrongdoing by others as part of the bargaining process regarding her liability. The "inside information" this Article focuses on is different. It comes from people who have many disincentives to bring information of wrongdoing to public regulators. This difference affects the benefit-cost analysis for all parties involved.

This Article presents its argument in five parts. Part I reviews the historical use of private justice, drawing lessons that are helpful in fashioning a private justice regulatory model for today. Part II addresses the harm caused by wrongdoing that is motivated by economic gain and notes how this type of wrongdoing erodes the tangible and intangible structures of society and people's confidence in society. Part III focuses on how and why inside information can help detect, prove, and deter

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5. *Cf.* STEPHEN BREYER, REGULATION AND ITS REFORM 26 (1982) (explaining that "information is a commodity that society must spend resources to produce" in the context of buyers and sellers needing information for a market economy to function properly).

6. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.6).

7. *See id.* (manuscript at 1.9–.10) (suggesting that inside information must be "priced high enough to overcome the disincentives to providing it" and "valued high enough to alter existing personal and societal values against providing it").

wrongdoing. Part IV examines the costs for people who are capable of producing inside information and the payment which the regulatory world must be prepared to make if it hopes to acquire inside information. Part V concludes with a hypothetical that demonstrates why a private justice model that effectively obtains inside information is not enough; private justice must also align the private interest of the informer with public interest.

II. LESSONS FROM HISTORICAL USE OF INSIDERS

Qui tam actions in which any person could bring suit against another alleging violations of the law, were common in England beginning in the thirteenth century[8] and, although they became rare, such actions existed until they were abolished by Parliament in 1951.[9] Qui tam actions were also present in the American colonies; they became common after the American Revolution, and remained in use until the end of the nineteenth century.[10] Both the

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8. 2 WILLIAM BLACKSTONE, COMMENTARIES *437 (discussing the right of an informer to collect penalties by bringing public actions); 3 *id.* at *160 (describing the right of a plaintiff in a former action to bring a suit based on contract principles to collect damages awarded by a jury); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND (1628), *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY IN THE MODERN ERA 191–95 (David S. Berkowitz & Samuel E. Thorne eds., 1979) [hereinafter CLASSICS OF ENGLISH LEGAL HISTORY] (discussing the Act "Against Vexatious Relators, Informers, and Promooters upon Penall Statutes"); *see* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 368–69 (8th ed. 1824) (outlining the plea requirements for the suit called "Information Qui Tam").

Several commentators have provided excellent summaries of the English development of qui tam actions. *See* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 565–607 (2000); *see also* David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 103–08 (1996) [hereinafter Friedman, *Tort/Crime Distinction*] (discussing the English shift from private prosecution to public prosecution); Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83–91 [hereinafter *Qui Tam History*] (offering an overview of the linguistic origin, legal structure, and historical development of English qui tam actions).

Professor Beck's work includes fascinating research into many original sources. Despite Professor Beck's excellent historical summary, this Author disagrees with his conclusion about changes that should be made to the civil False Claims Act. *See* Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.86 n.399).

9. Common Informers Act of 1951, 14 & 15 Geo. 6, ch. 39 (Eng.).

10. STAFF OF CONSERVATION & NATURAL RES. SUBCOMM. OF THE HOUSE COMM. ON GOV'T OPERATIONS, 91st CONG., QUI TAM ACTIONS AND THE 1899 REFUSE ACT: CITIZEN LAWSUITS AGAINST POLLUTION OF THE NATION'S WATERWAYS 3–4 (Comm. Print 1970) (listing the federal statutes that allowed qui tam actions); *Qui Tam History*, *supra* note 8, at 94–101 (citing examples of early American statutory qui tam actions and reviewing the "historical evolution" of America's qui tam doctrine); Dan D. Pitzer, Comment, *The Qui Tam Doctrine: A Comparative Analysis of Its Application in the United States and the British Commonwealth*, 7 TEX. INT'L L.J. 415, 424–27 (1972) (recounting several nineteenth-century cases and noting that twentieth-century American courts have

English and American qui tam actions were available to persons harmed by the defendant's conduct and to those who were not affected by the defendant's conduct but were motivated to bring suit because they could collect a financial recovery.[11] Actions brought by the latter were known as "informer" actions.

In thirteenth century England and in colonial America, informer actions were needed because there was no police force or prosecuting authority.[12] Moreover, given the rural life which dominated both countries until the nineteenth century, private citizens, especially victims, could do a pretty good job of enforcing the law by identifying crimes, locating witnesses and other evidence, and even finding fugitives.[13] Because there was no law enforcement, self-help was the only option, and apparently, it was a necessary option.[14] If victims of wrongdoing did not initiate prosecution, they were viewed as targets for criminals.[15] To avoid getting a reputation as easy prey, potential victims formed associations whereby members of the association contributed financially to prosecute those who violated the rights of an association member.[16] Associations published the names of their members so that criminals could see who would pursue them.[17] There were thousands of these associations in eighteenth and nineteenth century England.[18]

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approached qui tam actions with an "unfavorable attitude").

11. 2 BLACKSTONE, *supra* note 8, at *437 (describing the process of a "popular," or informer, action); Beck, *supra* note 8, at 606–07 (noting that one motivation for bringing informer actions was "purely for private gain"); *Qui Tam History*, *supra* note 8, at 84–85, 94–95; *cf.* Pitzer, *supra* note 10, at 431 (discussing the rights of an informer in the mid-twentieth century).

12. *See* 483 PARL. DEB., H.C. (5th Ser.) (1951) 2153 (statement of Attorney General Shawcross); *id.* at 2159 (statement of Mr. MacColl); *see also* Beck, *supra* note 8, at 576, 606 ("Reliance upon qui tam legislation was perhaps a matter of necessity given the shortage of police, prosecutors, and other regulatory officials in Tudor England."); Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 49–50 (1996) (hypothesizing that "relying upon victims to initiate and direct criminal proceedings may simply have been a practicality"); *Qui Tam History*, *supra* note 8, at 86 (citing "lack of an effective public police force" as a cause of the courts' giving permission to private accusers to bring bills to enforce penal laws).

13. Heriot, *supra* note 12, at 49–50.

14. *See Qui Tam History*, *supra* note 8, at 86 (noting that private actions to enforce early English criminal law resulted from the lack of an effective police force).

15. Friedman, *Tort/Crime Distinction*, *supra* note 8, at 104 (explaining that if criminals "expect to be prosecuted, convicted, and punished" because a private citizen has the reputation for energetically prosecuting crimes, the criminal may not commit the crime).

16. *Id.* at 104–05.

17. *Id.* at 105.

18. *Id.*

Several factors came together which changed the need for private prosecutions. Because of increasing urbanization, victims did not always know all of the individuals involved in the criminal conduct and, given the greater distances in urban life, victims could not easily conduct investigations or locate witnesses.[19] Also, inchoate crimes came into existence.[20] With crimes of attempt and conspiracy, there were no identifiable victims or victims with enough at stake who would choose to prosecute. For these inchoate offenses, the State had to prosecute.[21] In addition, the Crown began to see some of the advantages of prosecuting wrongdoing.[22] With the advent of forfeiture laws, criminal law enforcement became lucrative for the Crown.[23] Convicted criminals were required to make restitution to victims, unless the Crown initiated and prosecuted the criminal; in that case, forfeited property came to the Crown.[24] Also, the Crown saw that its authority was enhanced when it was able to vindicate and protect its citizens' rights.[25] Moreover, professional law enforcement became more of a necessity as support grew for criminal defendants' rights during investigations and trials.[26] In America, prosecutors' powers increased even more when, consistent with a populist tradition, prosecutors became elected officials; this transformed American prosecutors into more proactive players.[27]

Interestingly, a change in fundamental values also led to the demise of the early qui tam actions. When first developed in England, the Church taught that vengeance was a virtue, even a duty.[28] Thus, victims who initiated prosecution against their

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19. *Id.* at 106.

20. *See* 2 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750 18 (1956) ("Public order further required that strict supervision be exercised over those sections of the population which included all persons who might be dangerous to society, either as potential criminals or as aiders and abettors facilitating illegal transactions and the disposal of ill-gotten gains.").

21. *Id.*

22. Friedman, *Tort/Crime Distinction*, *supra* note 8, at 107 ("The right to run courts and collect fines was a valuable property right . . . . Both kings and barons regarded the power to enforce the law as a potential source of income.").

23. *Id.*

24. *Id.* at 107.

25. *See id.*

26. *See* John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 445–46 (1974); *cf.* Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750–1850: Policing, Private Prosecution, and the State*, *in* POLICING AND PROSECUTION IN BRITAIN 1750–1850 46–47 (Douglas Hay & Francis Snyder eds., 1989) [hereinafter POLICING AND PROSECUTION].

27. Langbein, *supra* note 26, at 445.

28. 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA 1115–18 (Fathers of the English

wrongdoers were not simply protecting themselves, they were performing their religious duty.[29] Consistent with this view, victims were active participants in prosecutions, even imposing the punishment upon conviction. For example, a rape victim was expected to personally castrate her wrongdoer.[30] A widow and the children of a slain man would personally drag the killer to the gallows.[31] This sense of virtuous revenge affected lawsuits from beginning to end. Often, when crime victims had the choice of which remedy to seek, which they did in almost every instance, victims chose the option that provided for severe punishment rather than compensation.[32] As the religious value of vengeance subsided, there was less cultural support for the personal revenge that early qui tam actions made possible.[33]

Dominican Province eds. & trans., 1947) (recognizing that the "Old Law" permitted revenge in order to safeguard justice); MARY BONAVENTURE MROZ, DIVINE VENGEANCE: A STUDY IN THE PHILOSOPHICAL BACKGROUNDS OF THE REVENGE MOTIF AS IT APPEARS IN SHAKESPEARE'S CHRONICLE HISTORY PLAYS 66–84 (1941) (published dissertation) (discussing the moral and historical justifications for the blood feud); David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 63 (1996) ("The church taught that vengeance was a virtue and sometimes a duty."); *cf.* Tamar Frankel, *Lessons From the Past: Revenge Yesterday and Today*, 76 B.U. L. REV. 89 (1976) (noting that modern society has changed since the Middle Ages in that the right to revenge is now seen "as uncivilized and perhaps even un-Christian"); Friedman, *Tort/Crime Distinction*, *supra* note 8, at 104 n.7 (finding vengeance was the motive behind private prosecution).

29. *See* MROZ, *supra* note 28, at 71–73, 84 (noting that "the fundamental idea of vicarious merit as embodied in the Christian concept of Communion of Saints" was translated in terms "of family solidarity and blood vengeance").

30. EYRE OF KENT, 6 & 7 EDWARD II A.D. 1313–1314, *reprinted in* 5 YEAR BOOKS ON EDWARD II 134–35 (Frederick William Maitland et al. eds., 1910) (outlining the punishment for rape); *see also* Seipp, *supra* note 28, at 63 (recounting the record of "a victim of rape [who] personally castrated and blinded her wrongdoer").

31. Y.B. 11 Hen., fol. 11, Mich. pl. 24 (1409), *reprinted in* LES REPORTS DEL CASES EN LEY, QUE FURENT ARGUES EN LE TEMPS DE TRES HAUT & PUISSANT PRINCES LES ROYS HENRY LE IV. & HENRY LE V. 12 (1679), *microformed on* Early English Books; 1641–1700; 1555:15 (Univ. Microforms Int'l) (translated from French as "the woman and all the blood of the dead man transport the man/felon to execution" by David Durham and Paul M. Pruitt, Jr., staff at the University of Alabama School of Law library); *see also* Seipp, *supra* note 28, at 63 (recalling the virtuous position that vengeance held in the eyes of the Church and reviewing some of the punishments put to early felons).

32. Frankel, *supra* note 28, at 89 ("[T]he right of revenge was considered a higher right that the victim was expected to exercise, and sometimes even administer."). Moreover, victims who chose to prosecute their cases faced risks. Victims who chose to bring the claim seeking vengeance rather than compensation—they chose to proceed by felony appeal rather than writ of trespass—had to settle the case by a physical battle or by letting a jury of twelve decide the merits. *See* Seipp, *supra* note 28, at 65–66. In the mid-thirteenth century, a victim who was found to have brought false accusations was punished by death; a victim who brought an unsuccessful prosecution went to prison until pardoned or until he paid the Crown. *Id.* at 66.

33. *See* Frankel, *supra* note 28, at 89–90 (describing the modern shift in thinking about revenge as moving toward the conclusions that personal revenge is "uncivilized"

Before they disappeared, qui tam actions fell into serious disrepute because of many abuses by informers.[34] One such abuse was collusion between a defendant and a friendly informer.[35] In the early days of informer actions, resolution of the action precluded further prosecution by the government.[36] Thus, some culpable defendants would locate a friendly informer who would file suit, settle for less than the defendant would have paid had he been prosecuted by the government, and thereby obtain immunity for the defendant from government action.[37] In response, Parliament enacted legislation removing the preclusive effect of informer actions;[38] American legislatures followed suit.[39]

Another common abuse by informers was filing suit in a venue far from where the defendant lived.[40] Farmers in rural England, for example, would be sued in London.[41] Unable to afford to leave their farms, pay for the journey, or be away as long as court delays required, these defendants would be forced to settle.[42] In response, Parliament passed several laws limiting the choice of venue for informer actions.[43]

Informers also brought suit under obsolete or little-known statutes, or for popular conduct that constituted a technical

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and that wrongs are not committed against a victim alone but "against society as a whole").

34. *Qui Tam History*, *supra* note 8, at 89 (discussing several types of informer abuses and the subsequent public outrage); *see also* Beck, *supra* note 8, at 579 (summarizing the unscrupulous practices of "self-interested" informers).

35. Beck, *supra* note 8, at 574.

36. *Id*.

37. *Id*. at 580–81.

38. *See* Accions Populers, 4 Hen. VII ch. 20 (Eng.) (1488), *reprinted in* 2 THE STATUTES OF THE REALM 543 (Dawsons of Pall Mall 1963) (1816); *see also Qui Tam History*, *supra* note 8, at 89.

39. *Qui Tam History*, *supra* note 8, at 97 (stating that America's legislatures, which faced the same problems as England's Parliament with vexatious and collusive informers, used many of the English remedies to informer suits, such as fines on wrong-doing informers, strict venue statutes, and short statutes of limitations).

40. Beck, *supra* note 8, at 583 (exposing the common tactic used by informers of filing in a location that "made defense impossible or inconvenient").

41. *Id*.

42. *Id*.; *Qui Tam History*, *supra* note 8, at 90.

43. *See* An Act for the Ease of the Subject Concerning Informacons Uppon Penall Statute, 21 Jam. I ch. 4 (Eng.) (1623) [hereinafter Act of 1623], *reprinted in* 4 THE STATUTES OF THE REALM 1214–15 (Dawsons of Pall Mall 1963) (1819); *see also* 3 COKE, *supra* note 8, *reprinted in* CLASSICS OF ENGLISH LEGAL HISTORY, *supra* note 8, at 191–94 (commanding, for example, that informer suits shall be prosecuted and tried in the county in which the offense was committed and that informers bringing suits must pledge that the alleged offense occurred less than one year prior to filing suit in that specific county); *Qui Tam History*, *supra* note 8, at 583 (summarizing the three parts of Parliament's 1623 Act).

offense.[44] For example, informers brought suits under "Spirituous Liquors" laws, which prohibited small, street vendors from selling alcohol.[45] As Professor Beck has noted, these laws were enormously unpopular, and English commoners rioted against them.[46] Informers who sued under them were despised.[47] Especially vilified were informers who entrapped offenders by bringing suit for drinks they (the informers) had ordered.[48]

Another set of hated laws under which informers often sued were those that enforced religious rules and practices.[49] For example, informers often sued under "Sunday laws," which prohibited most non-religious activity on Sundays.[50] Even the Crown worried about informers bringing suit if government-sponsored festivals took place on Sundays.[51] Informers often targeted Catholics who, in violation of English law, sought to practice their religion by attending or saying Mass or by refusing to attend Anglican services.[52] Informers also pursued Protestants, prosecuting them for participating in services "not . . . in the form and manner prescribed by the *Book of Common Prayer*."[53]

In addition to prosecuting popular or innocuous activities, many informers were corrupt and extorted money through agreements not to prosecute.[54] Courts,[55] the English Parliament,[56]

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44. *See* Beck, *supra* note 8, at 583–84 (observing that, by attempting to enforce outdated statutes, "informers on occasion interfered both with individual liberty and with important avenues of commerce"); *see also Qui Tam History*, *supra* note 8, at 89 (characterizing this type of abuse as "the vexatious use of *qui tam* suits").

45. Beck, *supra* note 8, at 597.

46. *Id.* at 597–98.

47. *Id.* at 597–99.

48. *See id.* at 597–601; *see also* POLICING AND PROSECUTION, *supra* note 26, at 356–59 (discussing a similar scenario in which poachers would threaten people with prosecution under the games laws).

49. Beck, *supra* note 8, at 592 ("For instance, an Elizabethan statute imposed penalties for saying or hearing a Catholic mass, refusing to attend Anglican services, or even employing a schoolmaster who refused to attend Anglican services.").

50. *See id.* at 596 (reviewing the Sunday Observance Act of 1780).

51. *Id.* at 604–05 (noting the introduction of the Sunday Openings Bill to protect the government from informer suits).

52. *Id.* Refer to note 49 *supra*.

53. Beck, *supra* note 8, at 591–93.

54. *Id.* at 574; *Qui Tam History*, *supra* note 8, at 89.

55. *See, e.g.*, Marcus v. Hess, 317 U.S. 537, 551–52 (1943) (restricting the ability of private prosecutors to bring qui tam actions); Commonwealth v. Frost, 5 Mass. 53, 58 (1809) (reiterating the statutory requirement that informer actions must be brought within one year of the offense); Pike v. Madbury, 12 N.H. 262 (1841) (shortening the statute of limitations for informer actions to one year); Gadley v. Whitecot, 78 Eng. Rep. 790 (K.B. 1596) (dismissing an informer suit for failure to comply with pleading requirements).

56. *See generally* Common Informers Act, 1951, 14 & 15. Geo. VI ch. 39 (Eng.)

and American legislatures[57] tried to reign in abusive informers through court decisions or legislation. Ultimately, Parliament banned informer actions altogether.[58]

Given the societal and cultural obsolescence of informer actions and the abuse by informers, it is little wonder that qui tam actions disappeared from the landscape. Their history is instructive, however, giving us at least two lessons about private justice.

The first lesson is that private justice is helpful to public regulation when it brings needed resources to public regulatory efforts. The early qui tam actions, like some of the private justice actions available today, brought two resources to public regulators: information about ongoing or committed offenses, and investigative and litigative support to prove, publicly, that these wrongs had been committed.[59] These resources were crucial in early English society and the early American colonies. Every society that is going to flourish, if not simply survive, must be able to protect its citizens from crime, banditry, and commercial fraud.[60] Because private justice supplied this protection, it helped

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(abolishing informer's actions); An Act Concerning Monopolies and Dispensations with Penall Lawes and the Forfeyture Thereof, 21 Jam. I ch. 3 (Eng.) (1623), *reprinted in* 4 STATUTES OF THE REALM, *supra* note 43, at 1212–14 (prohibiting special grants of authority to certain informers); Act of 1623, *supra* note 43, at 1214 (requiring sanctions against informers who brought vexatious suits); An Acte to Redresse Disorders in Comon Infourmers upon Penall Lawes, 18 Eliz. I ch. 5, ¶ IV (Eng) (1575), *reprinted in* 4 STATUTES OF THE REALM, *supra* note 43, at 616 (requiring sanctions against informers who make agreements with defendants to settle, thus denying the Crown its share of the proceeds); *id*. ¶ 3, at 615 (requiring sanctions against informers who file suits too far from where the offense occurred).

57. *See* 31 U.S.C. § 3730 (2002) (restricting qui tam actions when the government is already aware of the wrongdoing); MASS. STAT. ch. 123 § 8 (1860), *reprinted in* CHARLES U. BELL, THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS. AND ADDITIONAL LAWS TO THE PRESENT TIME. REDUCED TO QUESTIONS AND ANSWERS tit. II ch. CXXIII, at 123–25 (1874) (imposing strict venue choices for informer suits); PA. STAT. ch. 21 (1705), *reprinted in* 2 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682–1801 ch. XXI, at 19 (1896) (repealed by the Queen in Council, 1706) (decreeing that defendants could recover double costs in cases of malicious prosecutions).

58. Refer to note 9 *supra* and accompanying text.

59. *See* Beck, *supra* note 8, at 563, 609 (explaining that qui tam actions encourage whistleblowers and "supplement the activities of public law enforcement personnel").

60. *See, e.g.*, WRIGHT, *supra* note 1, at 99 (positing that, to succeed, governments "had to build a new anti-cheating technology, a new technology of trust—trust not just in economic justice, but in the larger social contract, the mutual nonaggression pact that, by relieving people of fear and suspicion, smooths all kinds of cooperative efforts"); *id*. at 114 (suggesting that one reason for affluence in the Aztec culture was that "the government did a good job of breaching the trust barrier that can impede exchange" by having its "[i]nspectors prowl[] the urban markets in search of unscrupulous commerce, ranging from false measurement to passing counterfeits (wax or dough) of the cocoa-bean quasi-currency"); *id*. at 170 ("The Ottoman Empire had flourished for a time—not just on the

stabilize these early societies. When the early private justice system worked, it gave the citizenry confidence that their society could protect them from illegality.

Private justice is still needed in modern society because it can deliver at least one resource: inside information about complex wrongdoing, that is essential to regulatory efforts and difficult to acquire through any mechanism other than private justice.

As our world becomes more crowded, complex, interconnected, and computerized, public regulation desperately needs a certain type of information. It needs information about sophisticated economic wrongdoing committed within the bowels of large organizations and hidden from public view.[61] One of the clearest, most consistent, and saddest truths about economic wrongdoing is that by the time people know about the wrongs committed, it is generally too late—too late to save the lives of people killed from defective buildings or equipment built with corruption; too late to find money that was stolen; too late to stop environmental damage. Usually, it is too late to find out who all was involved and who is responsible. It is almost always too late to restore the faith people had, and need to have, in their country, their leaders, and their economy. Information of complex, concealed, inchoate, or ongoing wrongdoing, committed by persons in positions of trust and for economic gain, is essential

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strength of conquest, but also by restoring security to international trade routes and charging for the service."); *id*. at 157 ("Indeed, one of Muhammad's greatest accomplishments, and one key to Islam's potency, was making the larger world safe for commerce. In the early seventh century . . . violence was forbidden in [the] vicinity [of the Kabah, the sacred shrine], so otherwise contentious Arab tribes could meet and trade.").

61. The 2001 Enron bankruptcy, which was the largest in American history at the time, is an example. *See* Richard B. Schmitt, *Bankruptcy Is a Field of Gold for Weil Gotshal*, WALL ST. J., July 23, 2002, at B1 (listing recent major bankruptcies). The bankruptcy caught off-guard the regulators, creditors, and most sadly of all, the employees who not only lost their jobs, but their life savings. *See* Kemba J. Dunham & Kris Maher, *Your Career Matters: After Layoffs, More Workers Band Together*, WALL ST. J., Feb. 26, 2002, at B1 (stating that Enron had laid off six thousand employees between December 2, 2001, and the end of January 2002); Lori Rodriguez, *Bentsen Heads Roundtable Session: Congressman Gathers Questions for Hearing from Ex-Enron Employees*, HOUS. CHRON., Feb. 4, 2002, at 11A (noting that employees were unaware of Enron's financial troubles); Michael Schroeder & Tom Hamburger, *Democrats Try to Make Hay of Enron Fall: Lieberman to Hold Hearings as Party Aims to Play Up Company's Ties to GOP*, WALL ST. J., Jan. 3, 2002, at A10 (stating that the average Enron employee had 60% of their retirement portfolio in Enron stock, which dropped in value 99% to only $0.26 per share, resulting in the loss of 90% of their retirement assets); Henry Sender, *How to Spot Signs of Companies' Distress*, WALL ST. J., Dec. 31, 2001, at C1 (reciting Enron's stock price two days before it filed for bankruptcy). For a more complete discussion of Enron and how it is the "poster child" for private justice, see Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.68–.71).

to public regulators if a society hopes to detect, prove, and deter such acts.

Designing a private justice model so that it brings forth helpful information about this type of wrongdoing is only the first part of an effective private justice paradigm. A private justice model must also provide control over private justice litigants. This is the third lesson from the historical use of private justice. Private justice is susceptible to abuse. To avoid such abuse, public regulators must exercise control over private justice to ensure that private justice actions further the public interest.

At least one of the private justice models present in American jurisprudence today embodies these lessons from historical qui tam actions. The qui tam provisions of the civil False Claims Act (FCA)[62] have proven enormously successful in bringing forth inside information.[63] The FCA also provides a mechanism for public regulators to supervise private justice actions.[64]

III. WRONGDOING

Although there are practical reasons for distinguishing between criminal and civil law,[65] it is important to realize that some activities do not fit well in either category. Wrongdoing committed by persons in positions of trust and for economic gain often does not fit in either the criminal or civil arena. Known as "white collar crime," such conduct is difficult to pursue criminally because the high level of mens rea typically and appropriately required for criminal liability either is not present or is incapable of proof, given the complex transactions and diffuse responsibility usually at the heart of such wrongdoing.[66] However, the

62. False Claims Act, 31 U.S.C. §§ 3729–3732 (2000).

63. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.61).

64. *See* 31 U.S.C. § 3730(c) (setting forth the rights of the government and the qui tam plaintiff in a civil action for false claims).

65. Of greatest significance is the fact that constitutional and procedural rules differ. *See, e.g.*, Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives*: *Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1389–92 (1991) (detailing the constitutional rights afforded a person in criminal proceedings and how these rights may be undermined when a defendant is subject to both a criminal and a civil proceeding for the same conduct); Abraham S. Goldstein, *White-Collar Crime and Civil Sanctions*, 101 YALE L.J. 1895, 1897 (1992) (observing that civil sanctions provide fewer procedural protections, such as a lower burden of proof, than do criminal sanctions); Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 219–20 (1996) [hereinafter Marks, *Utility and Community*] (highlighting conceptual differences between criminal law and tort law).

66. *See* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the*

egregiousness of the conduct and the culpability that must be proven (reckless disregard for the truth), makes imposition of typical civil liability inappropriately mild. Thus, punitive civil causes of action, the "middleground" between criminal and civil law, fit most "white collar offenses" well.[67] Evidence of mens rea is required for such actions but a lower burden of proof[68] makes proving intent feasible in the complex, convoluted situations presented. The sanctions imposed in these actions can have an enormous deterrent impact for they impose large penalties and can lead to imposition of collateral sanctions,[69] such as exclusion from conducting future business or from one's profession altogether.

There are problems with the use of punitive civil sanctions as an alternative to criminal prosecution, such as whether defendants are entitled to greater procedural protections than available in most civil actions,[70] and whether we are creating a two-tiered system of justice—one for the rich and one for everyone else.[71] These are important issues and have been

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Ambiguous, 31 AM. CRIM. L. REV. 391, 400 (1994) (noting an increase in prosecutorial power resulting from diminishing mens rea requirements in many white collar offenses).

67. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798–1800 (1992) ("Punitive civil sanctions are replacing a significant part of the criminal law in critical areas of law . . . because they carry tremendous punitive power."); *see also* PAMELA H. BUCY, WHITE COLLAR CRIME: CASES AND MATERIALS 1–4 (2d ed. 1998) [hereinafter BUCY, WHITE COLLAR CRIME] (commenting on the tendency of white collar crime to blur the distinction between criminal and civil law and noting the increasing use of civil prosecution of white collar crime); John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 198–99, 230–31 (1991) (chronicling trends in criminal law and the resultant interchangeability of criminal law with civil remedies); Podgor, *supra* note 66, at 393–95 (highlighting the difficulties of applying traditional criminal sanctions to corporations guilty of white collar crime).

68. Goldstein, *supra* note 65, at 1899 (recognizing "preponderance of the evidence" as the required burden of proof for applying civil sanctions).

69. Alan L. Adlestein, *A Corporation's Right to a Jury Trial Under the Sixth Amendment*, 27 U.C. DAVIS L. REV. 375, 442–44 (1994) (explaining that from 1984 to 1990, 624 convicted corporate defendants paid collateral sanctions—including restitution and forfeiture—totaling $986 million, four times the approximately $215 million in criminal fines assessed).

70. *See, e.g.*, Cheh, *supra* note 65, at 1389–92 (commenting that "there are unique constitutional problems that arise simply because defendants are subject to concurrent civil and criminal proceedings arising out of the same conduct"); Goldstein, *supra* note 65, at 1897 (concluding that the hybrid criminal/civil nature of white collar crime may require the use of hybrid procedures in order to prevent "the stigma and sanctions associated with 'crime'" to result from civil proceedings); Marks, *Utility and Community*, *supra* note 65, at 219–20 (noting that procedural protections differ between criminal and civil actions).

71. *Cf.* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409 (1980) (discussing sentencing of white collar defendants and suggesting that fines may be more appropriate than imprisonment, from an economic perspective).

addressed thoughtfully by others.[72] The point of this Article is that the labels "criminal" and "civil" are unhelpful when we are talking about complex wrongdoing committed for economic gain. For this reason, this Article speaks of "wrongdoing," including in this generic category both crimes and civil causes of action.

A. The Nature of Wrongdoing Changes

The way people live affects the way they cheat. When the world changes, the way people lie, steal, and cheat also changes. Wrongdoing that used to be worthwhile from a perpetrator's point of view ceases to be when the costs outweigh the gains. When society changes, new types of wrongdoing become lucrative; thus new crimes are committed and old crimes are committed in new ways. Regulators have no choice but to change.

Two stories of crime are a helpful beginning to a discussion about the changing nature of wrongdoing and the regulatory world's need to change in response. In 1934, Bonnie Parker wrote the following poem and sent it to newspapers:

> You've heard the story of Jesse James
> Of how he lived and died;
> If you're still in need
> Of something to read
> Here's the story of Bonnie and Clyde.[73]

Bonnie Parker and Clyde Barrow, bank-robbing bandits, were on the vanguard of crime. They optimized new technology, capitalized on changes in culture,[74] and committed a new genre of crime. Their bank robberies and escapes from law enforcement involved brutal murders of policemen, a line not crossed before.[75] Everything about their crimes—the types of banks they targeted,[76] the "astonishing number" of bank robberies they

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72. Refer to notes 40–41 *supra* and accompanying text (noting the differences between criminal and civil law).

73. CLAIRE BOND POTTER, WAR ON CRIME: BANDITS, G-MEN, AND THE POLITICS OF MASS CULTURE 6 (1998). Professor Potter's book is a scholarly, captivating discussion of the early twentieth century bandits, culture, and law enforcement. Her approach is feminist, which is a fascinating, if not a sometimes oxymoronic, method for examining J. Edgar Hoover and the FBI.

74. *See id.* at 75–105.

75. *Id.* at 77, 90, 93, 96 ("Killing police was a line many bandits chose not to cross; the brief freedom it offered almost ensured death at the hands of other police. This frontier . . . adds a grim luster to the crime spree that cemented Bonnie and Clyde's reputation as national public enemies.").

76. *Id.* at 69 (noting that the target banks were rural and had little security).

committed,[77] and their almost "superhuman" escapes[78]—was made possible by affordable access to new technology—the automobile.[79] As Professor Claire Bond Potter has noted: "Ironically, Bonnie and Clyde's career as auto bandits was made possible by the state: three hundred thousand miles of hard-topped interstate highways . . . financed through the Federal Highway Act after World War I."[80] In 1928, the Pennsylvania state police explained, "'the national rise in armed robbery was due to . . . [g]ood highways, motor cars and other means of rapid transit [that had] opened up the rural districts to the sudden attack and quick getaway of the criminals of the cities.'"[81] Apparently, Clyde was an excellent, fearless driver, and his "superhuman driving abilities led to the popular belief that he might show up anywhere, anytime."[82]

Bonnie and Clyde became celebrities because of another new technology—expanded media.[83] Many of the poor and middle class, disillusioned by the Depression, were fascinated by Bonnie and Clyde's blatant challenges to social mores.[84] Their daring escapades made for gripping stories. The newspapers were full of their "adventures": how, after wrecking their car, Clyde pulled Bonnie from the burning car;[85] or, on another occasion, when Clyde rescued Bonnie and swam with her downstream, evading their chasers;[86] or, when Clyde kidnapped the police who had surrounded the farmhouse to which he had taken Bonnie for care, then proceeded to tie the police to a tree, loaded the delirious Bonnie into a car, and escaped.[87]

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77. *Id.* at 77.

78. *Id.*

79. *Id.* at 84–85, 93–94.

> The car, as technology and as a cultural sign, identified the Barrow gang as modern but also as disorderly. Automobile theft, an act increasingly associated with juvenile delinquents, was Clyde's most frequent felony. He drove hard and on bad roads and needed to steal new cars regularly (usually the powerful, roomy and anonymous Ford V-8).

Id. at 93–94.

80. *Id.* at 84.

81. *Id.*

82. *Id.* at 93. "[Clyde's] fast driving, memory for southwestern back roads, and quick reflexes kept the gang out of the hands of police in . . . many . . . situations." *Id.* at 92.

83. *Id.* at 8, 85, 92, 96–97, 144, 152. Bonnie Parker enhanced Clyde's and her own notoriety by penning poems and sending them to newspapers. Refer to text accompanying note 75 *supra*.

84. POTTER, *supra* note 73, at 76, 78, 87–88, 90.

85. *Id.* at 94.

86. *Id.* at 95.

87. *Id.* at 94–95.

Bonnie contributed to their lore. She was a masterful publicist,[88] regularly taunting law enforcement by sending poems to newspapers.[89] Police officers even engaged in the poetry-publicity act. One Dallas officer penned the following about the Barrow gang:

> For they once had Barrow locked tight in a cell
>
> And Ross [Superintendent of Prisons] let him out so what the Hell
>
> Now its up to someone to ketch him agin
>
> So let that thar Pardon board fetch him in.
>
> If this was rule thar ain't no doubt
>
> They'd be a darn sight carefuller who they let out.[90]

The point of the Bonnie and Clyde saga for our purpose is that law enforcement made substantial changes in response to a new form of crime epitomized by Bonnie and Clyde.[91] The large distances traveled and state lines crossed by auto bandits made necessary a national police force that could coordinate efforts of multiple jurisdictions. The Federal Bureau of Investigation (FBI), still young and struggling for identity, filled this role.[92] The FBI developed scientific techniques for collecting information such as fingerprints, criminal profiles, and surveillance;[93] created national databases of crime intelligence;[94] developed new evidence collection techniques, including a greater willingness to work with informants and collect information from law-abiding citizens;[95] and worked with local law enforcement to gather intelligence and establish new systems for sharing such data.[96]

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88. *See id.* at 93.

89. *See id.* at 6, 101–03. Refer to text accompanying note 75 *supra*.

90. POTTER, *supra* note 73, at 95.

91. Without delving into the merits of these changes, it is clear that law enforcement officials gathered support for desired changes because of, if not through manipulation of, the sensationalism bandits such as Bonnie and Clyde generated. *See, e.g.*, *id*. at 105 (noting that the omnibus crime bill came about partially because of Bonnie and Clyde's crime spree).

92. *See id*. at 40–41.

93. *See id*. at 39.

94. *See id*. at 36–37.

95. *See, e.g.*, *id*. at 172–73.

96. Apparently, federal oversight of local law enforcement was necessary in part because of graft and corruption at the local level, which began on a large scale with Prohibition. *See, e.g.*, *id*. at 22–23.

> As journalist Walter Liggett testified [before a House Committee Hearing], investigations in Detroit revealed 'that not only [did] this act [result] in wholesale crime, more drunkenness, more debauchery, disorder of every sort, but it [was] directly responsible, everywhere . . . , for the corruption of high officials, for the

The FBI pioneered professionalization of law enforcement by imposing strict codes of selection, training, conduct, and even dress of its agents.[97] Capitalizing on the media's sensationalization of banditry and the resulting public outcry, law enforcement careerists such as J. Edgar Hoover obtained unprecedented public and inter-governmental support for law enforcement's growth and transformation.[98]

Our second story of crime involves Kevin Mitnick, a 1980s and 1990s computer hacker. Like Bonnie and Clyde, Mitnick has proven incorrigible. He obtained his first conviction for computer hacking at age seventeen, became a fugitive, and upon apprehension years later, served time in a federal penitentiary.[99] Mitnick was released in 2000.[100] His ultimate fate, thus far anyway, promises to be far

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> hypocrisy of high officials.' Liggett described 'a wild party given at a road house' where the liquor was donated by a gangster. Guests included the governor, several chiefs of police, local politicians, socialites, and 'gamblers, criminals, bootleggers, all there fraternizing in the spirit of the most perfect equality . . . and . . . there were four judges of the circuit court . . . at that drunken revel, at which naked hoochy-koochy dancers appeared later in the evening, and . . . the next day [these officials] said that they would enforce the law and that they believed in the dry law.'

Id. (alterations in original).

97. *See id*. at 35.

98. *Id*. at 1–9, 196–98, 200–02.

99. *See* BUCY, WHITE COLLAR CRIME, *supra* note 67, at 894–95.

> In 1981, at age 17, Mitnick was convicted for stealing computer manuals from a Pacific Bell switching station. He received parole. In 1982, Mitnick broke into the North American Air Defense Command computer, seized control of three central telephone company offices in Manhattan, gained access to all phone switching centers in California, and reprogrammed one person's telephone to ask for a coin deposit each time the phone was picked up. In 1986, Mitnick posed as a computer technician, obtained the password of an authorized user and broke into the NCSC's Dockmaster Computer. In 1988, Mitnick received a second conviction for his computer activity. Mitnick had been secretly monitoring e-mail of Digital Equipment and MCI. Digital claimed that Mitnick caused $4 million in damage and stole $1 million in software. In 1992, Mitnick disappeared as federal agents sought him for parole violations. In 1993, California issued a warrant for Mitnick's arrest. He was accused of 'wiretapping calls from the FBI to the California DMV [Division of Motor Vehicles] and using law enforcement access codes gleaned from the wire taps to illegally gain entry to the . . . [DMV] database.' In 1995, Kevin Mitnick was arrested for breaking into the San Diego Supercomputer Center and leaving death threats on the home computer of a renowned computer security expert. When arrested Mitnick was in possession of $1 million in stolen data, including 20,000 credit card numbers of subscribers to an Internet service and stored data on some of California's wealthiest residents. Mitnick pled guilty.

Id. (alterations in original).

100. Upon his plea of guilty, Mitnick was incarcerated, indicted on more computer crime and fraud charges, and imprisoned on those charges. *See* Greg Miller, *Judge Accepts Mitnick's Guilty Pleas on 7 Counts*, L.A. TIMES, Mar. 27, 1999, at C1 (reporting that Mitnick's fifty-four month prison sentence was the stiffest ever for a computer hacker). After his release in 2000, Mitnick's parole terms severely restricted his access to technology. *See Hacker Mitnick Ok'd for*

brighter than that of Bonnie and Clyde.[101] Congress seeks his advice[102] and chief information officers (CIOs) appear eager to hire him.[103] Mitnick's explanation: "I have real-world experience circumventing security measures."[104]

Like the 1930s bandits, Mitnick's activities were on the vanguard of crime in two ways: he capitalized on a new technology and he presented a larger scale of destruction. Distinct from economic crime seen thus far, cybercrime has the potential to bring devastation upon legitimate economic markets worldwide. Experts have described this new frontier: "Computer crime . . . creates opportunities for modern criminals beyond anything we've previously experienced";[105] "The Internet has opened up a whole new vista for fraud activity";[106] and "[Cybercrime is] like the Wild West. . . . There are no boundaries and no rules."[107]

Traditional crimes are not simply easier to commit because of computerization; there are new crimes.[108] These crimes blur the line between criminal and civil law,[109] are

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Some Computer Work, L.A. TIMES, July 13, 2000, at C16 (noting that, following his prison release, Mitnick's parole terms allow him to pursue only certain computer-related projects); John Schwartz, *Hacker Gives a How-To: Mitnick Tells Panel Loose Lips Sink Systems*, WASH. POST, Mar. 3, 2000, at E10 [hereinafter Schwartz, *Hacker*] ("Under the unusually stringent conditions of Mitnick's parole, he cannot use a computer or cellular phone for three years; . . . he was not allowed to buy a pocket organizer and even had to get permission from his probation officer to get a pager.").

101. Bonnie's and Clyde's deaths were as violent as their lives as bandits. *See* POTTER, *supra* note 73, at 103–04. They were killed on May 23, 1934, by Texas Rangers who were lying in wait after being tipped off to Bonnie and Clyde's travel plans by a Barrow gang member's relative. *Id*. More than 167 rounds were fired at the tan V-8 in which Bonnie and Clyde were driving. *Id*. at 104. Riddled with bullets, Clyde was found with a sawed-off shotgun in his lap; Bonnie had a submachine gun in her lap. *Id*. In their car were found "two other machine guns, another sawed-off automatic shotgun, six automatic pistols, a revolver, a saxophone, sheet music, a half-eaten sandwich, a bloody pack of cigarettes, and $507 in cash." *Id*.

102. *See* Schwartz, *Hacker*, *supra* note 100, at E1, E10 (reporting Mitnick's testimony to a Senate committee regarding computer hacking).

103. Daintry Duffy, *Pro and Con*, CIO 76, June 1, 2000 (noting that CIOs are forming alliances with hackers in order to boost corporate security), *available at* http://www.cio.com/archive/060100/con-content.html (last visited Aug. 28, 2002).

104. *Id*.

105. DAVID ICOVE ET AL., COMPUTER CRIME: A CRIMEFIGHTER'S HANDBOOK 15 (1995).

106. Timothy Huber, *California: Legislature Ponders Consumer Safety Net for 'Net Fraud Victims*, WEST'S LEGAL NEWS, May 24, 1996, *at* 1996 WL 282954.

107. Brian C. Mooney, *AG on Offensive in Cybercrime War*, BOSTON GLOBE, Feb. 9, 2000, at B3.

108. *See generally* BUCY, WHITE COLLAR CRIME, *supra* note 67, at 890–98 (explicating numerous types of computer claims).

109. Refer to notes 67–69 *supra* and accompanying text (detailing the coalescence of criminal and civil law with regard to white collar crime).

committed by different types of criminals than in the past,[110] and require new law enforcement detection and deterrence tactics.[111]

As with the 1930s gangsters, today's cybercriminals are topics of media fascination and moral ambivalence. As one newspaper editor explained about an eighteen-year-old Israeli Pentagon hacker, "'He's become a folk hero. . . . People see him as the outlaw of our time, and they really like the fact that this little Israeli went up against the big guys—the Pentagon.'"[112] Just as bank bandits of the 1930s made necessary cooperation among law enforcement agencies and their jurisdictions, cybercrime and the globalization of economic markets make obvious the benefit of cooperation across national boundaries: "In an age when cybercriminals can reach across borders with the click of a mouse, the world's leaders are realizing they will

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110. *See, e.g.*, BUCY, WHITE COLLAR CRIME, *supra* note 67, at 897–98 (characterizing three types of computer offenders: crackers, criminals, and vandals); Bob Drogin, *Intent Called Major Difference in Lee, Deutch Cases*, L.A. TIMES, Feb. 20, 2000, at A28 (reporting that a nuclear scientist was jailed for "mishandling classified information"); John Ellement, *Student Charged in Computer Trespass*, BOSTON GLOBE, Jan. 8, 2000, at A1 (reporting that a computer science student was charged with computer trespass for stealing another student's identification number and then harassing her in cyberspace); *High-Speed Net Access Opens a Door to Hackers*, L.A. TIMES, July 12, 1999, at C9 (reporting that hackers had attacked computers at the White House, the Senate, the FBI, and the Army's main website); Greg Miller & Davan Maharaj, *Spurned Suitor Charged in 1st Cyber-Stalking Charges*, L.A. TIMES, Jan. 22, 1999, at A1, A13 (reporting that a fifty-year-old man was charged with cyber-stalking for posting online ads and sending e-mails in the name of woman who had rejected him).

111. Refer to notes 24, 95–96 *supra* and accompanying text. For example, the FBI has developed an electronic surveillance tool named "Carnivore." *The "Carnivore" Controversy: Electronic Surveillance and Privacy in the Digital Age: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 6 (2000) (statement of Sen. Patrick J. Leahy, member, Senate Comm. on the Judiciary). Carnivore is an electronic filter that scans Internet traffic, looking for desired information such as communication between terrorists. *Id.* at 9, 11 (statement of Donald M. Kerr, Assistant Director, Laboratory Division, FBI). It may legally do so only with a court order. *Id.* at 11. Kerr explained why Carnivore is needed:

> I would like to say that over the last ten years or more, we have witnessed a continuing, steady growth in computer . . . crimes, including extremely serious acts in furtherance of terrorism . . . as well as the more conventional serious and violent crimes . . . which have been planned or carried out, in part, using . . . the Internet . . . . In turn, the ability of the law enforcement community to effectively investigate and prevent these serious crimes is, in part, dependent upon our ability to lawfully and effectively [collect] vital evidence of these crimes. . . . As the Internet becomes more complex, so too do the challenges placed upon us to keep pace. Without the continued cooperation of our industry partners and important technological innovations such as the Carnivore system, such a task would be futile.

Id. at 21 (statement of Donald M. Kerr, Assistant Director, Laboratory Division, FBI).

112. Rebecca Trounson, *Hacker Case Taps into Fame, Fury*, L.A. TIMES, Apr. 27, 1998, at A1, A8.

have to work together to crack down on Internet attacks."[113] Law enforcement is trying to respond to this new world with new tactics.[114]

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113. Anick Jesdanun, *World Leaders Convene to Combat Cybercrime*, CHI. SUN-TIMES, May 15, 2000, at 30. As one computer security expert stated, to catch Internet hackers "'[y]ou are going to have to pass over a dozen time zones and have hundreds of different countries to deal with.'" John Schwarz & Ariana Eunjung Cha, *Respite Follows Hacker Attacks: Vandals Pursued by Law and Peers*, WASH. POST, Feb. 11, 2000, at E10. Another expert explained, "What is scary . . . is as we've become more dependent on technology and its availability, we become more vulnerable to any 18-year-old in a garage anywhere in the world." John Schwartz et al., *Hackers Attack Top Web Sites for Third Day: Government Launches Probe*, WASH. POST, Feb. 10, 2000, at A12 [hereinafter Schwartz et al., *Hackers Attack*]; *see also* John-Thor Dahlburg, *G-8 Seeks Unity on Policing Internet*, L.A. TIMES, May 18, 2000, at C3, C7 (reporting on the G-8's Paris conference on cybercrime and the countries' attempts to police the Internet); Pamela Ferdinand, *Argentine Pleads Guilty to Hacking U.S. Networks: Wiretap Led Authorities to Arrest*, WASH. POST, May 20, 1998, at A23 (reporting the sentencing of an Argentine national to three years' probation for hacking into U.S. university and military networks); John Schwartz & Ariana Eunjung Cha, *Clinton Pledges to Help Industry Fight Hackers*, WASH. POST, Feb. 16, 2000, at E1 (observing that the FBI's dragnet to catch computer vandals has expanded across the border into Canada); *Viruses Across Borders*, WASH. POST, May 11, 2000, at A34 (indicating that various international organizations have taken notice of cybercrime and that the Council of Europe has drafted a treaty that obligates signatory countries to pass computer crimes laws and coordinate enforcement).

114. Law enforcement is responding by:

- Seeking passage of new statutes. *See, e.g.*, 18 U.S.C. § 1030 (2000) (Fraud and Related Activity in Connection with Computers); CAL. PENAL CODE § 502 (West 1999 & Supp. 2002) (Unauthorized Access to Computers, Computer Systems, and Computer Data); VA. CODE ANN. § 18.2-152.2–.4 (Michie 1996 & Supp. 2001) (Article 7.1 Computer Crimes).
- Changing its recruiting and training practices. *See, e.g.*, Maria Glod, *Fighting Crime with a Mouse and Modem: Increasingly, Computers Hold the Clues to Cracking a Case*, WASH. POST, Mar. 29, 1998, at B1, B10 (reporting on the increased use of computer forensics to retrieve stored data in crime investigations); Kathy Sawyer, *For NASA Whiz, Busting Hackers Isn't Rocket Science: 23-Year-Old Builds Low-Cost Computer System Safeguard*, WASH. POST, Aug. 28, 1998, at A23 (reporting NASA's recruitment of a twenty-three-year-old computer genius to build a computer system to detect intrusions).
- Integrating new techniques for monitoring markets that are vulnerable to modern economic pirates. *See, e.g.*, Bradley Graham, *U.S. Studies New Threat: Cyber Attack: Hackers, Simulation Expose Vulnerability*, WASH. POST, May 24, 1998, at A1, A18 (reporting that the Pentagon is establishing a joint task force on cyber security and improving the training of military computer system operators).
- Generating new databases of intelligence of criminals and their activities. *See, e.g.*, Robert O'Harrow, Jr., *Digital Storm Brews at FBI: Information Technology Expansion Raises Privacy Concerns*, WASH. POST, Apr. 6, 2000, at A1, A20 (recognizing an FBI initiative to establish an "'enterprise database' that would enable agents to analyze huge amounts of data and share them via a secure World Wide Web-style network").
- Creating computer attack simulation centers. *See, e.g.*, Vernon Loeb, *Launching a Counteroffensive in Cyberspace: Program Training Corp of Experts in Computer Security*, WASH. POST, Feb. 5, 2000, at A3 (describing one such simulation center at the Northern California branch of Sandia

With computerization and the Internet, economic wrongdoing has entered a different world. Those familiar with the field echo the same points—illegality is easier to commit and harder to stop.[115] Because of the Internet, we are vulnerable to the most sophisticated organized crime as well as "'to any 18-year-old in a garage anywhere in the world.'"[116] The descriptions of this new world are sobering:

- "[E]xperts fear the use of computers by white-collar criminals will mushroom in the coming years."[117]
- "'It's the magnitude of the extraction that is alarming to us.'"[118]
- "[T]he Internet has created huge new opportunities, as well as frightening vulnerabilities . . . ."[119]
- "With half of the world's computer capacity and more than 60 percent of Internet assets, the United States is the most advanced and most dependent user of information technology. Widespread electronic thefts or disruptions

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National Laboratories).

- Establishing specialized task forces. *See, e.g.*, Jean Merl, *Golf Course Struck by Landslide Gets Hit by Hackers*, L.A. TIMES, July 13, 1999, at B1 (noting the crime was investigated by a special computer crime unit in Los Angeles); Patricia Nealon, *Justice Reboots as Criminals Go On Line*, BOSTON GLOBE, Apr. 6, 1998, at B1 (detailing the establishment of computer crime units by the FBI and by the Massachusetts attorney general); Leef Smith, *State Tackles Computer Crimes: Task Force to Target Cyberspace Outlaws, Protect Industry*, WASH. POST, July 24, 1999, at B4 (noting the establishment of a computer crimes strike force in Virginia); Aaron Zitner, *A Surplus in Clinton's Budget Plan Blueprint Will Spur Jockeying with Congress*, BOSTON GLOBE, Feb. 3, 1998, at A1 (showing that President Clinton's proposed 1998 budget included money for the establishment of FBI computer crime units in six cities).
- Working in partnership with industry. *See, e.g.*, David A. Vise, *FBI Says It Is Hot on Trail of Hackers*, WASH. POST, Feb. 17, 2000, at E1, E7 (describing an investigation that was using the combined efforts of both the FBI and computer specialists from various universities).

115. Refer to notes 80–84 *supra* and accompanying text.

116. Schwartz et al., *Hackers Attack*, *supra* note 113, at A12.

117. Sharon Walsh & Robert O'Harrow, Jr., *Trying to Keep a Lock on Company Secrets: Law Enforcement Officials Fear Rise in Computer Crimes, Made Easier by Technological Advances*, WASH. POST, Feb. 17, 1998, at D1.

118. Bob Drogin, *Yearlong Hacker Attack Nets Sensitive U.S. Data*, L.A. TIMES, Oct. 7, 1999, at A14 (discussing the lack of computers at the Department of Defense, quoting Arthur L. Money, Assistant Secretary of Defense of Command, Control, Communications, and Intelligence).

119. *Id.*

could shake public confidence in the emerging new economic order and wreak financial havoc."[120]

- "The Internet is nearly impossible to police . . . ."[121]
- "Over the course of the past ten years, cyber-crimes have progressed from being malicious pranks by disenchanted teenagers to a serious threat that will tax the resources of crime enforcement and potentially destabilize society."[122]

The World Trade Center attack on September 11, 2001, may be the ultimate example, thus far, of the globalization of

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120. MacDonnell Ulsch & Scott Stinert-Evoy, *We're Not Ready for Cyber Attacks*, BOSTON GLOBE, May 23, 2000, at E4.

121. *Hacker Attacks on the Internet*, N.Y. TIMES, Feb. 11, 2000, at A30.

> The recent [hacker] attacks highlight some of the challenges we face in combating cybercrime. The challenges come in many forms: technical problems in tracing criminals operating online; resource issues facing federal, state, and local law enforcement in being able to undertake online criminal investigations and [in being able to] obtain evidence stored in computers; and legal deficiencies caused by changes in technology. . . .
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> . . . .
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> Even if criminals do not hide identities online, we still might be unable to find them. The design of the Internet and practices relating to retention of information means that it is often difficult to obtain traffic data critical to an investigation. Without information showing which computer was logged onto a network at a particular point in time, the opportunity to determine who was responsible may be lost. There are other technical challenges, as well, that we must consider. The Internet is a global medium that does not recognize physical and jurisdictional boundaries. A hacker—armed with no more than a computer and a modem—can access computers anywhere around the globe.

Cybercrime: Hearing Before the Subcomm. on Commerce, Justice, & State, the Judiciary, & Related Agencies of the Senate Comm. on Appropriations, 106th Cong. 11 (2000) [hereinafter *Cybercrime Hearing*] (statement of Janet Reno, Attorney General, Department of Justice).

122. Eric J. Sinrod & William P. Reilly, *Cyber-crimes: A Practical Approach to the Application of Federal Computer Crime Laws*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 177, 229 (2000).

> [C]ybercrime [is] one of the fastest evolving areas of criminal behavior and a significant threat to our national and economic security.
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> [To take one example,] [i]n January and February 1999 the National Library of Medicine (NLM) computer system, relied on by hundreds of thousands of doctors and medical professionals from around the world for the latest information on diseases, treatments, drugs, and dosage units, suffered a series of intrusions where system administrator passwords were obtained, hundreds of files were downloaded which included sensitive medical "alert" files and programming files that kept the system running properly. The intrusions were a significant threat to public safety . . . .

Cybercrime Hearing, *supra* note 121, at 23–24 (statement of Louis J. Freeh, Director of the FBI).

wrongdoing.[123] In fact, law enforcement is concerned that terrorists may be behind the hacking into top-secret Pentagon and NASA research sites, and are preparing for future attacks:[124] Because "'[c]omputer networks are the roads and bridges of the information age, . . . [t]hey are prime terrorist targets.'"[125]

In summary, as the world changes, wrongdoing changes. Today's world faces wrongdoing of new types, new methods of commission, and new and different criminals, some with spell-binding skill. Wrongdoing today promises unprecedented complexity and ease in accomplishing massive, global malfeasance that permeates every aspect of a society. An effective regulatory response must recognize that there is a new world of wrongdoing, think imaginatively about how to approach it, and respond effectively. Private justice is one key to doing so.

B. The Impact of Wrongdoing on Society

It is no wonder that scholars and observers of illegal economic activity have long noted that the impact of illegal economic activity is sinister and insidious precisely because it

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123. Many sources discuss the increasing globalization of crime. *E.g.*, EDWARD M. WISE & ELLEN S. PODGOR, INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS § 17.01, at 496–99 (2000) (providing a general overview of international crime); Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 249–54 (1997) (discussing the adverse consequences of bribery and corruption in developing countries); Peter J. Vassalo, Note, *The New Ivan the Terrible: Problems in International Criminal Enforcement and the Specter of the Russian Mafia*, 28 CASE W. RES. J. INT'L L. 173, 173–76 (1996) (characterizing the Russian mafia as "nearly 6,000 organized criminal groups operating world-wide" that participate in activities such as "drug trafficking, money laundering, prostitution, and . . . trafficking in nuclear weapons materials"); James Risen, *Attacks Justify Easing Curbs Intelligence Leaders Say*, N.Y. TIMES, Sept. 16, 2001, at 1; *see also* Robert D. McFadden, *Bin Laden's Journey from Rich Pious Boy to the Mask of Evil*, N.Y. TIMES, Sept. 30, 2001, at B5 (reporting that Al Qaeda has trained over five thousand militants and positioned them in "perhaps 50 countries to await their turn to strike"); Judith Miller et al., *Old War Escalates on a New Front: The Trail of Relentless Martyrs*, N.Y. TIMES, Sept. 16, 2001, at 18 (indicating that Osama bin Laden's type of terrorism "transcends geographic, religious, and ideological boundaries"). There is some suggestion that the September 11, 2001, World Trade Center attack will chill globalization because its threat reduces foreign travel and discourages global business endeavors due to increased security costs. *See Marketplace Morning Report* (Minnesota Public Radio radio broadcast, Nov. 2, 2001) (discussing increased inspections of imported cargo, decreased foreign travel, and the costs of providing security for overseas staff—all a result of terrorism—as reasons to retreat from globalization), *available at* 2001 WL 23999258; Laura M. Holson, *Sudden Sense of Insecurity at Many Companies*, N.Y. TIMES, Sept. 16, 2001, at BU5 (discussing security measures U.S. companies are taking worldwide to mitigate the dangers of terrorism).

124. Jon Swartz, *Experts Fear Cyberspace Could Be Terrorists' Next Target*, USA TODAY, Oct. 9, 2001, at 1B.

125. *Id.* at 2B (quoting Stanton McAndlish, Electronic Frontier Foundation).

"'erode[s] society from the inside.'"[126] Weakening society's institutions weakens everything in a society.[127] In fact, in India the word for "corruption" translates as "a weak sense of loyalty to organized society."[128] Because such activity is rampant in many developing countries, international studies of illegal economic activity and corruption demonstrate most dramatically the corrosive effect such activity has on every aspect of society.[129]

Countries with high levels of corruption experience slower economic growth,[130] less direct investment by foreign companies and governments,[131] lower levels of investment in

126. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION XIII (1983) (quoting a U.S. Attorney for New Jersey in a statement before a congressional committee). Edwin Sutherland, the sociologist who identified and coined the term "white-collar crime," was one of the first to note the insidious and destructive effect to society from such activity. *Id*. at 7, 10.

127. *See* TALCOTT PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 239 (rev. ed. 1954) (describing society's institutional structure as the "backbone" of the social system); Donatella della Porta & Alberto Vannucci, *The "Perverse Effects" of Political Corruption*, 45 POL. STUD. 516, 537 (1997) ("By attacking two of the fundamental principles on which democracy is based, the equality of citizens before institutions and the open nature of decision making, corruption contributes to the delegitimatization of the political and institutional systems in which it takes root.").

128. Gurharpal Singh, *Understanding Political Corruption in Contemporary Indian Politics*, 45 POL. STUD. 626 (1997) (quotation marks omitted). Reformers in India, where corruption permeates almost every aspect of life, have called for "a cultural revolution for the construction of a new public morality" that would condemn corruption. *Id*. at 637. As it is, "[m]ost voters do not see an issue of corruption; they see that they themselves have not been successful enough in corrupting." *Id*. (quoting Robert Wade, *The Market for Public Office: Why the Indian State Is Not Better at Development*, 13 WORLD DEV. 467, 487 (1985)).

129. *See, e.g.*, della Porta & Vannucci, *supra* note 127, at 517 (illustrating what political corruption can do to a society using an Italian case as an example).

130. Comparative studies show that a country's bureaucratic efficiency, of which corruption is one factor, is inversely proportional to a country's investment rate. For example, "'if Bangladesh with a [bureaucratic efficiency] score of 4.7 were to improve the integrity and efficiency of its bureaucracy to the level of that of Uruguay [score 6.8] . . . its investment rate would rise by almost five percentage points and its yearly GDP growth rate would rise by over half a percentage point.'" SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 3 n.2 (1999) (alterations in original) (some brackets omitted). As one expert on Bangladesh explained:

> [P]ervasive corruption distorted the entire economy and contributed to uncompetitive, overpriced goods, and sick industries. The cost of credit was high because only 10 percent of development finance institution loans were repaid. Utility costs kept rising because of massive loss rates and uncollected bills. Industries were sanctioned based on payoffs and not on the bas[i]s of the economic viability of the project.

STANLEY A. KOCHANEK, PATRON-CLIENT POLITICS AND BUSINESS IN BANGLADESH 101–02 (1993).

131. The World Bank's policy on disbursements of loans is that disbursement decisions will be guided by:

> • Whether Bank projects are likely to be affected by corruption during design or implementation, or thereafter.

education,[132] greater support of unproductive public investment,[133] awarding of public contracts to ill-prepared or incompetent vendors and suppliers,[134] unfair competition for

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• The extent to which the achievement of development objectives is compromised by corruption.

• The willingness of the government to act to control corruption if it threatens the effectiveness of Bank projects and/or economic and social development.

THE WORLD BANK, HELPING COUNTRIES COMBAT CORRUPTION 4 (1997) [hereinafter WORLD BANK, HELPING COUNTRIES], *available at* http://www1.worldbank.org/publicsector/anticorrupt/helping.htm (last visited Nov. 10, 2002). There is reason for this policy. For example, The World Bank and Asian Development Bank loaned over one-half million dollars to two large development finance institutions in Bangladesh. The funds were to be spent on private-sector projects approved by the Bangladesh government. The loans were handed out as patronage. Fewer than half of the projects financed became operational, 13% failed and there is no trace of 24% of the projects. Finally, the donors refused to provide additional funds and have insisted on a "rigorous debt recovery program and stiff conditions for future loans in an effort to restore discipline to the financial sector." KOCHANEK, *supra* note 130, at 264. Kenya is another example. The International Monetary Fund (IMF) and World Bank have "advised the Kenyan Government to stop corruption in public offices. . . . The Danish Government . . . has cut its aid to Kenya . . . citing corruption and the failure by the Kenya Government to prosecute corrupt officials . . . ." THE ANATOMY OF CORRUPTION IN KENYA: LEGAL, POLITICAL AND SOCIO-ECONOMIC PERSPECTIVES 171 (Kivutha Kibwana et al. eds., 1996) [hereinafter ANATOMY OF CORRUPTION]. As Professor Rose-Ackerman notes: "[C]orruption acts like a tax on [foreign direct investment]. An increase in the corruption level from relatively clean Singapore to relatively corrupt Mexico is the equivalent of an increase in the tax rate of over 20 percentage points." *See* ROSE-ACKERMAN, *supra* note 130, at 3.

132. Using 1991 government expenditures data, Paolo Mauro conducted a cross-country analysis to examine the correlation between corruption and government expenditures. Paolo Mauro, *Corruption and the Composition of Government Expenditure*, 69 J. PUB. ECON. 263 (1998). He found that corruption reduces government spending on education. *Id.* at 264. Presumably, this is because education does not present as many lucrative opportunities for public officials to solicit and obtain bribes as do high-technology goods or large infrastructure projects. *Id.*

133. A few examples of the ways in which corruption distorts allocation systems include the allocation of: subsidized housing in the United States; irrigation water in India and Pakistan; commercial real estate in Russia; drivers' licenses, passports, old age pensions, and scores on entrance exams to professions in Thailand; and business permits and licenses in Mexico. ROSE-ACKERMAN, *supra* note 130, at 13–14, 18.

For another example, in 1986 the Paraguayan government awarded a contract to a French consortium, BCEOM, to expand an existing cement plant and to build an additional plant. R. Andrew Nickson, *Democratisation and Institutionalised Corruption in Paraguay*, *in* POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA 237, 244–45 (Walter Little & Eduardo Posada-Carbó eds., 1996). The magnitude of the project was not necessary. *Id.* at 245. The expansion of the existing plant rendered it capable of producing 460,000 mt/yr. *Id.* The new plant was capable of producing 600,000 mt/yr. *Id.* The domestic demand, however, was only 350,000 mt/yr. *Id.* Therefore, the new plant was "mothballed." *Id.* The cost of the two projects was estimated at $341 million, but an audit was able to trace only $215 million of the expenditures as going into the projects. *Id.* In 1989 two Paraguayan public officials were convicted of embezzling part of the missing funds. *Id.*

134. For example, in 1998 Turkey was devastated when approximately one-third of the buildings in and around the cities of Adana and Ceyhan proved unable to withstand earthquakes. John Barham, *Political Aftershocks Rumble On After Turkish Earthquake*, FIN. TIMES, July 6, 1998, at 3. Government-built schools and hospitals

businesses not engaging in illegal activity,[135] inefficient public services,[136] infiltration, often domination, of economic systems by illegal businesses and organized crime,[137] unwillingness by

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were particularly hard hit. *Id*. Most observers blamed corrupt building inspectors and contractors for the multiple building deficiencies made obvious by the earthquakes. *Id*. Korea made similar discoveries when a shopping mall and a bridge inexplicably collapsed. *Owner, Son Jailed in Fatal South Korea Store Collapse; City Officials Also Found Guilty of Accepting Bribes*, BALT. SUN, Dec. 28, 1995, at 14A (reporting the conviction of two owners and twelve city officials in connection with a collapsed mall's poor construction).

For another example, corrupt governments or banks may engage in high-risk lending:

> Interviews with business people in Eastern Europe and Russia indicate that payoffs are frequently needed to obtain credit. In Lebanon a similar survey revealed that loans were not available without the payment of bribes . . . . In Kenya . . . one well-placed observer estimated that a third of banking assets were close to worthless in 1992 as a result of political interference in the financial system.

ROSE-ACKERMAN, *supra* note 130, at 10–11 (citations omitted).

> The allocation of scarce import and export licenses is another example: In the Philippines in the early 1950s both [payoffs and patronage with bribes] operated. Those with political connections could easily obtain licenses so long as they paid a 10 percent commission. In Nigeria, the regime in power in the early 1980s resisted free trade reforms favored by the [IMF] apparently because the existing system of import licensing was a major source of payoffs and patronage.

Id. at 11 (citations omitted).

135. *See* ANATOMY OF CORRUPTION, *supra* note 131, at 112, 114 ("The deterioration in the business environment [in Kenya] was . . . strongly felt by local investors especially if they were suspected not to have a strong allegiance to the political establishment. Many indigenous firms were adversely affected by favouritism . . . . Some became victims of officially sanctioned discrimination and corrupt practices . . . .").

136. "In Italy, where long bureaucratic delays are the rule, officials often ask for bribes just to do their job." ROSE-ACKERMAN, *supra* note 130, at 17. And,

> In highly corrupt countries managers spend many hours dealing with state officials. In surveys of business people from a number of countries, Ukraine is an extreme case. In 1996 proprietors and senior managers spent an average of 30 percent of their time dealing with officials. Elsewhere the percentages range from 7 percent in El Salvador to 15 percent in Lithuania and Brazil.

Id. at 16. For further discussion, see della Porta & Vannucci, *supra* note 127, at 517–25, 527–30. They discuss the inefficiency to the administration of public services caused by corruption, including distortion of public demand, *id*. at 517–22; elevation of costs, *id*. at 522–25; time and energy spent in keeping corruption ongoing and secret, *id*. at 527–28; and selection of inefficient providers of public services, *id*. at 528–30.

137. *See* ROSE-ACKERMAN, *supra* note 130, at 23 (describing how illegal businesses corrupt police, politicians, and judges through payoffs). Such businesses seek not only safety from prosecution, but also assistance in running off competitors. *Id*.

> In both the United States and Latin America, gamblers and drug dealers have paid officials to raid their competitors or to restrict entry. In Thailand some local public authorities shelter criminal enterprises both from competition and from the law. In Russia those engaged in illegal businesses sometimes engage in outright intimidation of potential rivals, often paying off the police not to intervene in their private attempts to dominate the market.

Id. (citation omitted). Illegal businesses use their profits, obtained tax-free, to infiltrate

legitimate businesses to invest and compete,[138] an ineffectual judiciary,[139] avoidance of taxes,[140] and inaccurate economic data and indicators.[141] In Uganda, for example, where "[t]he

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legitimate businesses. *Id.* at 23–24. This discourages legal businesses from entering or staying in the market: "The stakes are especially high in Eastern Europe and the countries formed after the collapse of the Soviet Union. Nothing less than the entire wealth of the state is up for grabs." *Id.*

138. KOCHANEK, *supra* note 130, at 345 (noting that "[f]oreign capital will continue to be reluctant to invest if they feel there exists no effective legal remedy available to redress legitimate grievances"). For example, although Bangladesh has implemented policies to encourage private investment, the existing infrastructure inhibits development because of its "[t]ime-consuming procedures, the lack of responsibility and accountability, the overcentralization of decision-making, bureaucratic ineptitude, patronage, and corruption." *Id.* at 342; *cf.* WORLD BANK, HELPING COUNTRIES, *supra* note 131, at 18 (asserting that a company's choice to do business or invest in a country where corruption is present is largely an economic decision—if the costs are low, it is part of the cost of doing business, but if costs are high or unpredictable they may disengage). Interestingly, one expert suggests that foreign aid has facilitated corruption as it has enriched those in power, allowing them to consolidate and maintain their position. *See* ANATOMY OF CORRUPTION, *supra* note 131, at 142.

139. *See* ROSE-ACKERMAN, *supra* note 130, at 153. According to Professor Rose-Ackerman:

> The Latin American judiciary is reportedly so deficient that most business people try to avoid using the courts to resolve disputes. As a result, an informal sector has arisen. In Peru, for example, . . . this involves pseudo-attorneys, false documents, forged title deeds, nonexistent identities, and virtually no legal guarantees. . . . In Eastern Europe and Russia murders of businessmen and bankers are common. Many appear to be execution-style killings that are part of a brutal private system of dispute resolution.

Id. (quotation marks and citations omitted). Professor Rose-Ackerman summarizes the effects of a corrupt judiciary as follows:

> A corrupt or politically dependent judiciary can facilitate high-level corruption, undermine reforms, and override legal norms. When the judiciary is part of the corrupt system, the wealthy and the corrupt operate with impunity, confident that a well-placed payoff will deal with any legal problems. The impact extends beyond the public sector to purely private disputes over contracts and property. Business deals may be structured inefficiently to avoid encounters with the judicial system, and ordinary people may be systematically taken advantage of because they lack access to an impartial system of dispute resolution. Bidding wars may develop in which parties on opposing sides compete in making payoffs.

Id. at 151. In Bangladesh, "[t]he vague and evasive provisions of economic regulation leave almost everything to the discretion of the rule-making authority or administrative official. The result is the frequent resort to corruption." KOCHANEK, *supra* note 130, at 206.

140. *See* ROSE-ACKERMAN, *supra* note 130, at 19 ("For example, in Pakistan one study estimated that if the leakages caused by corruption and mismanagement could be reduced by 50 percent, the tax to Gross Domestic Product (GDP) ratio would increase from 13.6 to over 15 percent."); *see also* Shahid Javed Burki, *Governance, Corruption and Development: The Case of Pakistan*, presented at the Workshop on Governance Issues in South Asia (Nov. 19, 1997) (calculating the cost of misgoverance and corruption during Pakistan's second Bhutto administration to be "20 to 25 percent of the 1996–97 gross domestic product," which translates into nearly $15 billion). Similarly, "[i]n Gambia, in the early nineties, forgone revenue from customs duties and the income tax was 8 to 9 percent of GDP. . . . Income tax evasion alone was 70 percent of revenue due. Only 40 percent of small- and medium-sized enterprises paid taxes, and many individuals did not file returns." ROSE-ACKERMAN, *supra* note 130, at 19–20.

141. Paraguay provides the following example:

majority of the population is adversely affected by corruption,"[142] there is "colossal economic destruction":[143]

> Corruption has led to bad roads; poor medical services; poor schools; falling educational standards; disappearance of whole projects which have been funded; delayed completion of projects; foreign aid has disappeared without leaving a trace of what was done with it; . . . national assets have been run down and ruined; the production capacity in industry, agriculture, services etc.. [sic] has been reduced; repairs of buildings, equipment, vehicles, roads etc. were paid for but not done; goods and services are paid for many times over but are not delivered . . . .[144]

It is estimated that the cost of illegal economic activity in America, where such activity occurs but does not dominate public life, is hundreds of billions of dollars.[145] Studies show that this

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> Where goods are brought across borders without any records being kept, their value will not be recorded in trade flows and the balance of payments will understate the real size of the foreign trade sector. . . . [D]uring the 1970s and 1980s[,] . . . the contraband trade diversified and expanded . . . , becoming an integral feature of the economy. . . . [T]he World Bank estimated that unregistered imports and exports were equal to, or possibly larger than, registered trade.

Nickson, *supra* note 133, at 240.

142. Augustine Ruzindana, *Combating Corruption in Uganda*, *in* UGANDA: LANDMARKS IN REBUILDING A NATION 191, 195 (P. Langseth et al. eds., 1995). The following types of corruption have been found in Uganda:

> bribery; extortion: illegal use of public assets for private gain; over-invoicing and under[-]invoicing: payment of salaries and wages to non-existent workers or "ghost workers"; payment for goods not supplied or services not rendered ("air supply"): undercharging of taxes and duties on exports and imports involving false classifications: false declarations and false tariffs: purchases of goods and services at inflated prices: "ten percent commission[s"]; fraud and embezzlement; improper payments; misappropriation of public assets: court decisions in which awards for damages of very large sums of money do not correspond to the injury actually suffered or the indefinite number of adjournments of hearing of cases or of giving judgments: the removal of documents from case files or even the disappearance of whole files . . . [;] [n]epotism and patronage sometimes called tribalism or sectarianism . . . .

Id. at 193.

143. *Id.* at 195.

144. *Id*. at 194.

145. *See* STEPHEN M. ROSOFF ET AL., PROFIT WITHOUT HONOR: WHITE-COLLAR CRIME AND THE LOOTING OF AMERICA 16 (1998). "[P]ersonal frauds alone—such as repair scams and 'free prize' swindles, [are estimated to] cost American[s] . . . $40 billion annually." *Id*. "[B]ribery, fraud, kickbacks, payoffs, [and other such crimes]" are estimated to cost another $40 billion. *Id*. Antitrust violations are estimated to cost Americans an additional $30 to $60 billion annually. *Id*. Health care fraud alone is estimated to cost Americans up to $100 billion per year. *Id.* at 318. Without even considering the money laundering aspect of drug crimes, Professors Rosoff, Pontell, and Tillman conservatively estimate that white collar crime costs Americans $250 billion per year. *Id.* at 16. They draw some interesting comparisons. According to the U.S. Department of Justice, Bureau of Justice Statistics, in 1992 the monetary costs to all victims of personal crime, which includes assault, larceny,

cost is not borne equally, but is shifted to lower and middle class citizens.[146] One example, from the 1980s, is the savings and loan failures where white-collar crime was a "key ingredient."[147] The total loss figures will not be known for years, but estimates range from $200 billion to $1.4 trillion, which is "about $5,500 for every man, woman, and child in the United States."[148]

In addition to economic costs, there are social costs from illegal economic activity. Such activity breeds cynicism and weakens respect for the law. As noted about Kenya: "Corruption has permeated the entire fabric of the Kenyan society. . . . There is a growing sense of defeatism amongst Kenyans. Corrupt people are not punished, nor are they socially stigmatized. Instead they gain both in status and in material prosperity."[149] In Italy, "[c]orruption [has] distort[ed] democratic politics and [made] citizens skeptical of government."[150] The Attorney General

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and robbery, was $17.6 billion in that year. *Id.* The loss from all bank robberies in 1992 was $35 million. *Id.* at 17. Compare those figures to the loss from one institution, Lincoln Savings and Loan—fraud by its executives eventually resulting in paying of debts of $3.4 billion. *Id.* at 16–17.

146. Professors Rosoff, Pontell, and Tillman explain:

> Because [the] costs [of white collar crime] are typically passed on to taxpayers, they represent a "regressive tax" imposed on those individuals least able to pay. At the same time, companies victimized by white-collar crime or slapped with punitive fines for their own offenses often pass the costs on to consumers.

Id. at 410.

147. *Id.* at 202. A General Accounting Office study of the twenty-six most costly thrift failures found that "*every one* of these institutions was a victim of major insider fraud and abuse." *Id.*

148. *Id.*

149. ANATOMY OF CORRUPTION, *supra* note 131, at 191 (basing these observations on the analysis of people's responses to questionnaires). As noted by the *Kenya Times*: "Corruption today can be said to be one of the greatest evils facing our country. It grows in an octopus-like manner strangling any progress achieved." *Id.* at 41 (quoting KENYA TIMES, May 6, 1990) (quotation marks omitted).

> One of the adverse effects of corruption in the country is the loss of confidence among the people that merit was important in selection or appointment of people to various offices or positions in the country . . . .
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> . . . .
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> Whether these perceptions were right or wrong, the fact that they were so widespread means that a large proportion of the Kenyan population is unlikely to strive much to enhance their skills, qualifications and work performance because such attributes are not expected to be used as criteria for selection, advancement or promotion. This is likely to become a major bottleneck in the development of professionalism, human skills and labour efficiency in the country.

Id. at 110–11.

150. Silvia Colazingari & Susan Rose-Ackerman, *Corruption in a Paternalistic Democracy: Lessons from Italy for Latin America*, 113 POL. SCI. Q. 447, 457 (1998) (acknowledging further that because of the cooperative relations between the parties in Italy, "the revelation of the scale of illegal contributions had serious political

of Venezuela spoke of how corruption "does not only affect public morale and the public purse but also gravely wounds the values that support democracy."[151] In the United States after Watergate, where multiple crimes were committed with the knowledge of, if not under orders from, President Nixon and many of his aides, surveys of grade school children showed that they were less respectful of the presidency and more cynical about politics.[152] More recently, commentators have identified the intangible harm from recent accounting scandals[153] as damage to the public trust, "a trust upon which capitalism itself depends."[154]

Illegal economic activity destabilizes political and financial institutions, especially when organized crime moves in. Russia demonstrates this. According to one expert, "[w]hile organized crime in the West occasionally collaborates with certain incumbents, Soviet organized crime was, from the outset, inextricably enmeshed in the system of power. . . . In ordinary Russian usage today, the word 'mafia' remains synonymous with political power rather than with traditional organized crime in the Western sense."[155] The symbiotic relationship between crime and business is not confined to the developing world. On June 14, 2000, the U.S. Department of Justice (DOJ) indicted 120 defendants in a securities fraud scheme.[156] According to DOJ sources, "members of the country's five largest organized-crime families conspired to manipulate publicly traded securities in 19

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consequences for politicians of all parties").

151. Walter Little & Antonio Herrera, *Political Corruption in Venezuela*, *in* POLITICAL CORRUPTION IN EUROPE AND LATIN AMERICA 282 (Walter Little & Eduardo Posado-Carbó eds., 1996) (quotation marks omitted).

152. *See generally* F. Christopher Arterton, *The Impact of Watergate on Children's Attitudes Toward Political Authority*, 89 POL. SCI. Q. 269 (1974) (surveying 367 grade school children from a high socioeconomic-status suburb of Boston, Massachusetts, and finding their attitude toward the presidency, after Watergate, to be very negative); Jack Dennis & Carol Webster, *Children's Images of the President and of Government in 1962 and 1974*, 3 AM. POL. Q. 386 (1974) (evaluating the results of surveys of comparable samples of children conducted in 1962 and 1974 and noting that the president's perceived role had declined markedly).

153. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.69) (commenting on the profound effect the Enron scandal will forever have on the "Enron employees who have been victimized by Enron leaders' greed and poor judgment").

154. *The Real Enron Scandal*, NEW REPUBLIC, Jan. 28, 2002, at 7.

155. Virginie Coulloudon, *The Criminalization of Russia's Political Elite*, E. EUR. CONST. REV. 74–75 (1997) (theorizing that the Communist Party that ruled Russia became one and the same with the Russian mafia).

156. Randall Smith & Michael Schroeder, *Stock-Fraud Case Alleges Organized-Crime Tie: Prosecutors Say Stocks of 19 Firms Were Manipulated*, WALL ST. J., June 15, 2000, at C1 (noting that this was the largest single-day arrest involving a securities fraud scheme).

companies, bilking investors out of $50 million over five years."[157] According to one securities expert: "The size and the scope of this indictment which combines both organized crime and securities fraud violations is unprecedented. . . . The notion that markets would be influenced by the threat of violence rather than the threat of a margin call . . . is disturbing."[158] This indictment is but one of several in the past few years alleging organized crime's involvement in the American stock market.[159]

Although we tend to think of illegal economic activity as "victimless," there are individual victims. Some situations are humorous.[160] One woman won a mink coat in a sweepstakes.[161] Unfortunately, the fur was from the animal's genital area and "had a unique odor when it rained."[162] In Chicago, a dance studio that targeted lonely widows "reportedly sewed small coke bottles into the pants of male instructors in a way designed to make the women think that their teachers had become sexually aroused by dancing with them."[163] Other deceitful economic activity brings tragedies. For example, to collect insurance payments, security guards from a Texas psychiatric institution abducted a fourteen-year-old boy from his home and held him for six days based upon false reports of drug use and a commitment order signed by a "doctor" using false credentials.[164] During his detention, the boy was permitted no contact with his family and was released only after a state senator intervened.[165] The psychiatric hospital billed the boy's family's insurance plan $11,000 for his six days of "treatment."[166] In another instance, 23,000 savings and loan

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157. *Id*. The indictment alleges that organized crime members pressured union officials to invest large union funds in the various stock schemes. John Sullivan & Alex Berenson, *Dozens Named in Stock Fraud Linked to Mob*, N.Y. TIMES, June 15, 2000, at C1, C27. In addition, organized crime members subjected brokers who did not cooperate to "beatings, intimidation and threats." Smith & Schroeder, *supra* note 156, at C1. The indictment resulted from a year-long undercover investigation. *Id*. According to prosecutors, "millions of dollars more would have been lost if the investigation had not stopped a number of frauds." Sullivan & Berenson, *supra*, at C1.

158. Smith & Schroeder, *supra* note 156, at C1 (quoting Jerry D. Bernstein, head of the white collar criminal practice group at Holland & Knight LLP).

159. Sullivan & Berenson, *supra* note 157, at C27.

160. *See* ROSOFF ET AL., *supra* note 145, at 30 (quipping that some instances are indeed "so preposterous that even solemn Thomas Aquinas might have struggled to suppress a grin").

161. *Id*. at 31.

162. *Id*. (quotation marks omitted).

163. *Id*.

164. Gordon Witkin et al., *Health Care Fraud*, U.S. NEWS & WORLD REP., Feb. 24, 1992, at 38, 41 (relating the abduction of Jeremy Harrell, which occurred in April 1991).

165. *Id*. at 38.

166. *Id*. at 44. The boy's insurer was CHAMPUS, an insurance program for U.S.

customers spent their life savings buying worthless bonds from Lincoln Savings and Loan.[167] In yet another investment scam, in which investors lost $460 million, one eighty-four-year-old man was forced to return to work after losing his life savings.[168]

It is the poorest in a society who are hurt the most by corruption. The World Bank has noted that:

> When access to public goods and services requires a bribe, the poor may be excluded. Given their lack of political influence, the poor may even be asked to pay more than people with higher incomes. Furthermore, when corruption results in shoddy public services, the poor lack the resources to pursue "exit" options such as private schooling, health care, or power generation.[169]

Illegal economic activity also carries environmental costs, which is alarming because our environment is not in robust shape to begin with. According to a 1998 report, "50 percent of the world's 233 known primate species are now threatened with extinction and . . . 52 acres of the world's forests are lost every minute."[170] Illegal use and abuse of the environment is rampant, worldwide. According to the World Bank:

> Complying with environmental regulations imposes on firms costs that can be avoided by bribery. There are huge rents to be earned from activities such as logging in tropical rain forests, where permits can be obtained corruptly or where inspectors can be bribed. The environmental costs of corruption may take the form of ground water and air pollution, soil erosion, or climate change, and can be global and intergenerational in their reach.[171]

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military personnel and their families to cover extensive psychiatric treatment including in-patient treatment for drug use. *See id*. *See generally Mental Hospitals Blasted*, HOUS. CHRON., Dec. 21, 1995, at 23A (reporting that the Illinois state mental hospitals were "filthy, backward institutions" and that the Illinois mental health system was "badly broken"); Mark Smith, *Claims of "Bounty Hunting" for Patients Probed*, HOUS. CHRON., Sept. 8, 1991, at 20A (discussing allegations of fraud against Texas psychiatric hospitals in soliciting patients and falsifying diagnoses to exploit a patient's insurance coverage or other medical benefits).

167. *See* James Flanigan, *S & L Disaster Holds a Lesson*, HOUS. CHRON., Dec. 7, 1996, at C1 (pondering the changes in the financial world following the savings and loan debacle of the 1980s).

168. *Convicted Fraud Gets Genuine Punishment*, HOUS. CHRON., Mar. 8, 1977, at 3C. The retired teacher was among thousands of investors who lost money in a pyramid scheme. *Id*.

169. WORLD BANK, HELPING COUNTRIES, *supra* note 131, at 19.

170. FRIEDMAN, *supra* note 2, at 224 (emphasis omitted) (asserting that "technological breakthroughs alone will not be enough to neutralize the environmental impact of the [human] herd").

171. WORLD BANK, HELPING COUNTRIES, *supra* note 131, at 19.

In India, basic sanitation services are available only if one pays "speed money."[172] In 1997, the Bangalore Public Affairs Centre interviewed several hundred slum dwellers in five cities of India.[173] It found that public services including "[w]ater, electricity, sanitation, garbage collection [and] transport are often only accessible at 'extra prices.'"[174] In Bangalore, Ahmedabad, and Madras, approximately one out of three slum dwellers had to pay bribes to get public services.[175]

Developed countries are not immune to the environmental costs of corruption. American harbors, beaches, and drinking water have been contaminated by illegal dumping or careless storage of wastes.[176] Contamination of drinking water presents a significant threat.[177] Each year, there are over 7.7 billion pounds of toxic releases into the air, water, and land of the United States.[178] A 1996 study reported that "[f]orty percent . . . of America's rivers, lakes and coastal waters remain unsafe for fishing, swimming or basic recreation."[179] During 2000, there

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172. Carel Mohn, "*Speedy*" *Services in India*, TI NEWSL., Mar. 1997, at 3 (addressing the effect of corruption in providing public services on slum dwellers in India).

173. *See id.* (specifying that the interviews, which were part of a series of Report Card Studies, were conducted in the cities of Ahmedabad, Bangalore, Calcutta, Madras, and Pune).

174. *Id.*

175. *See id.* (contrasting Bangalore, Ahmedabad, and Madras to Pune, where only one in seventeen slum dwellers reported paying speed money, and, based on this data, concluding that local authorities can be more effective in fighting petty corruption).

176. *See* ROSOFF ET AL., *supra* note 145, at 84–85 (observing that the sewage of three million Bostonians has turned Boston Harbor into a virtual "cesspool"; public beaches from Maine to Texas have served as dumping grounds for medical waste; and leaking underground storage tanks are contaminating the ground water in California); Robert G. Schwartz, Jr., Note, *Criminalizing Occupational Safety Violations: The Use of "Knowing Endangerment" Statutes to Punish Employers Who Maintain Toxic Working Conditions*, 14 HARV. ENVTL. L. REV. 487, 487–89 (1990) (describing incidents in Colorado and Massachusetts). In 1988, W.R. Grace & Co., which had previously settled with families injured by Grace's dumping of chemical wastes, pled guilty to providing false information to the EPA about its toxic waste disposal practices. Cass Peterson, *W.R. Grace Pleads Guilty to Lying on Chemical Use*, WASH. POST, June 1, 1988, at A3; PHIL BROWN & EDWIN J. MIKKELSEN, NO SAFE PLACE: TOXIC WASTE, LEUKEMIA, AND COMMUNITY ACTION 183 (1990) ("Even when companies may have contaminated their locales unintentionally, they have often covered up the outcome to avoid legal and financial liability.").

177. *See* Gary M. Marsh & Richard J. Caplan, *Evaluating Health Effects of Exposure at Hazardous Waste Sites: A Review of the State-of-the-Art, with Recommendations for Future Research*, *in* JULIAN B. ANDELMAN & DWIGHT W. UNDERHILL, HEALTH EFFECTS FROM HAZARDOUS WASTE SITES 4 (1987) ("From a public health standpoint, the contamination of drinking water probably represents the largest waste site-related health problem since it may pose adverse health risks to a large number of people.").

178. *See* TOXIC RELEASE INVENTORY, EXECUTIVE SUMMARY, Table E-1 (1999), *available at* http://www.epa.gov.triinter/tridata/tri99/state/index.htm (last visited Aug. 27, 2002).

179. *See* JACQUELINE D. SAVTZ ET AL., DISHONORABLE DISCHARGE: TOXIC POLLUTION

were "at least 11,270 days of [beach or waterway] closings and advisories, 48 extended closings and advisories (6–12 weeks), and 50 permanent closings and advisories (more than 12 weeks)" at U.S. water recreation areas.[180] Unfortunately "[o]nce a water supply is contaminated, it can remain so for decades or even centuries or millennia."[181] Largely because of increasing air pollution, both indoors and outdoors, respiratory disease is "the most rapidly increasing form of death" in the United States.[182] Asbestos, dioxin, cotton dust, and radioactivity are some of the major airborne toxins that have been exposed in recent years as significant causes of death.[183] Exposure to airborne asbestos for even brief periods of time or in indirect ways leads to a greater likelihood of contracting lung cancer.[184]

In short, wrongdoing committed by persons in positions of trust for economic gain is rarely obvious, and its harm is seldom

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OF AMERICA'S WATER 5 (1996) (publication of the Environmental Working Group); *see also* MARK DORFMAN, TESTING THE WATERS: A GUIDE TO WATER QUALITY AT VACATION BEACHES v (2001) (pointing out that, despite an improvement during the last twenty-five years, 40% of U.S. waters remain too polluted for recreational use).

180. DORFMAN, *supra* note 179, at vi (arriving at a cumulative total of more than 14,168 closings and advisories).

181. ROSOFF ET AL., *supra* note 145, at 87; *see also* Marsh & Caplan, *supra* note 177, at 4, 9 (recognizing that toxic materials placed in landfills can remain toxic for hundreds of years, and that improperly managed sites may allow migration of the chemicals into the groundwater). About half of Americans depend on groundwater for drinking. ROSOFF ET AL., *supra* note 145, at 87. "When poisonous materials are dumped or seep into the earth, they mix with precipitation, percolate through the soil . . . and then become part of the water supply." *Id*.

182. *See id*. at 90 (citing a nine-city study conducted by the American Lung Association (ALA) that linked 3% of all deaths from 1981 to 1990 to air pollution); Center for Disease Control, *Populations at Risk From Particulate Air Pollution—United States, 1992*, 43 MMWR WKLY. 290, 290–93 (1994) (reporting estimates from the ALA of U.S. populations at risk from exposure to particulate air pollution in 1992), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/00030615.htm (last visited Aug. 28, 2002).

183. For example, in the Midland, Michigan area, massive amounts of dioxin were discovered in air emissions from the Dow Chemical plant after residents reported that the meat of deer they shot was green; additionally, there were sightings of three-legged chickens, bald cows, geese with backward wings, and squirrels with no tails. ROSOFF ET AL., *supra* note 145, at 91–92. Residents suffered a variety of physical maladies, birth deformities (one girl was born with black, rabbit-ear-shaped teeth), and an infant mortality rate 67% above normal. *Id*. at 91–93 (depicting the horrors of "Dow Country," where dioxin levels were found to be six times higher than those at the Love Canal site in New York). In another situation, workers at government nuclear weapons factories learned, after years of exposure to radiation, that they were subject to health risks such as the possibility of an earlier death and a greater incidence of lung, intestinal and blood cancers, leukemia, Hodgkin's disease, and suicide. *Id*. at 111.

184. *Id*. at 107–09 (noting the excessive incidence of fatal lung cancer among persons employed at an asbestos insulation plant for as little as one month or less, and attributing the contraction of lung cancer by a number of women to the washing of their husbands' asbestos-laden clothing).

immediately apparent, certainly not compared to assaults, rapes, murders or the like. This relative subtlety, however, should not lure us into complacency about the danger of this wrongdoing. It will corrode any and every society where it is allowed to flourish.

IV. THE ROLE OF INSIDE INFORMATION IN DETECTING, PROVING, AND DETERRING WRONGDOING

Inside information can alert regulators and the public to ongoing or inchoate wrongdoing; in many cases, before harm has occurred. Insiders can also guide public regulators as they investigate questionable activity and can help overcome concealment and cover-ups.

A. Alerting Regulators and the Public to Ongoing or Inchoate Wrongdoing

Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Assuming they are honest, public regulators will not be intimately familiar with the ongoing or inchoate wrongdoing committed by private individuals and businesses. Information from insiders about such activity is needed before regulators can address it. Complex economic activity usually is buried in paper trails and electronic messages and hidden within an organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality but, because they deal with only a small part of the activity, may not realize that anything improper is going on. Because of the complex nature of economic crime and the diffuse nature of the business environment where such activity takes place, it will not be apparent, perhaps for years, that malfeasance is afoot.[185] By then, records and witnesses will

185. *See, e.g.*, *The Operation of the Department of the Treasury's Financial Crimes Enforcement Network: Hearing Before House Subcomm. on Gen. Oversight & Investigation of the Comm. on Banking & Fin. Servs.*, 105th Cong. 30–34 (1998) (statement of William F. Baity, Acting Director, Financial Crimes Enforcement Network) (addressing the Treasury's "counter-money laundering efforts" and new investigative procedures that have enabled law enforcement to detect transactions previously virtually undetectable); *Medicare at Risk: Emerging Fraud in Medicare Programs: Hearing Before the Senate Permanent Subcomm. on Investigations of the Comm. on Gov't Affairs*, 105th Cong. 126–135 (1997) (statement of Pamela H. Bucy) (commenting on the ever-increasing complexity of health care fraud); Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers?*, 67 N.C. L. REV. 855, 875–79 (1989) (discussing the reasons why white collar crime, particularly when it takes place in a health care environment, can be difficult to investigate and prove); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutions to Go?*,

have disappeared and memories will have faded. Given these dynamics, use of insiders who are willing to blow the whistle before it is too late may be the only way to learn that wrongdoing is occurring and the only way to effectively piece together what happened.[186] Government officials confirm the importance of insiders: "Whistleblowers are essential to our operation. Without them, we wouldn't have cases."[187]

Insiders can highlight things to come. Knowledgeable insiders can identify abuses that public regulators do not even know to look for. Part A Medicare fraud is a good example of this. Medicare, created in 1965, pays for most health care expenses incurred by persons over the age of sixty-five.[188] Medicare is divided into Part A and Part B.[189] Part A reimbursements go primarily to institutional

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54 U. PITT. L. REV. 405, 406–07, 409–10 (1993) (distinguishing white collar crime from more traditional "street" crimes and noting the inherent complexities of the former); John C. Jeffries & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1103–17 (1995) (identifying the features of federal law and practice that help explain the enormous success achieved by federal prosecutors in RICO prosecutions of organized crime); William H. Webster, *An Examination of FBI Theory and Methodology Regarding White-Collar Crime Investigation and Prevention*, 17 AM. CRIM. L. REV. 275, 276–77 (1980) (characterizing white collar crime in the form of fraudulent practices as "an intricate shell game").

186. For example, if false claims have been submitted in violation of the FCA, chances are there is no simple way to determine that fact. If a health care provider submits claims to Medicare for services not performed, chances are the patient files have been falsified to reflect that the services were performed. Similarly, if quality control tests have not been performed on equipment under contract to the Department of Defense, chances are that records kept at the defense contractor have been falsified to reflect that such tests were performed. These are simple examples but demonstrate the point that in today's world, where government contractors are subject to audit, few government contractors would be so bold as to submit false claims without creating some type of paper trail to conceal their scam. Only an insider would know how to navigate the false paper trail to get to the evidence of the scam. *See* Pamela H. Bucy, *The Path From Regulator to Hunter: The Exercise of Prosecutorial Discretion in the Investigation of Physicians at Teaching Hospitals*, 44 ST. LOUIS U. L.J. 3, 35–36 (2000) [hereinafter Bucy, *Regulator to Hunter*] ("Recognizing the value of an insider's knowledge and the risk insiders often take when coming forward with information about a fraud, the FCA rewards insiders well, allocating to relators up to 30% of the recovery in any FCA lawsuit.").

187. Justin Gillis, *Whistleblowing: What Price Among Scientists?*, WASH. POST, Dec. 28, 1995, at A21 (quoting Lawrence J. Rhoades, a division director at the U.S. Department of Health and Human Services, which polices federal health research for scientific misconduct); *see also Health Care Initiatives Under the False Claims Act that Impact Hospitals: Hearing Before the House Subcomm. on Immigration & Claims of the Comm. on the Judiciary*, 105th Cong. 15 (1998) (statement by Lewis Morris, Assistant Inspector General for Legal Affairs, U.S. Department of Health and Human Services) (indicating that the FCA, a purpose of which is to encourage whistleblowing, has been an essential tool in combating fraud).

188. *See* Joe Baker, *Medicare: Nuts and Bolts*, 311 PLI/EST 83, 85 (2001). The Medicare provisions are codified at 42 U.S.C. §§ 1395–1395ggg (2000).

189. The Medicare program is actually divided into three parts; however, Part C, which contains the Medicare+Choice program, is not relevant to this discussion. *See*

health care providers like hospitals, home health agencies, and insurance companies that contract with the federal government to process Medicare claims.[190] Part B reimbursements go to individual providers like physicians.[191] The process by which Part A and Part B providers seek reimbursement differs considerably in philosophy, procedure, deadlines, and reimbursement rates.[192] Although health care fraud has been a top priority of the DOJ since the mid-1980s, most of the health care fraud investigations in the 1980s and 1990s were directed at Part B fraud.[193] It was not until whistleblowers alerted the DOJ to various types of Part A fraud that the DOJ began to focus closely on it.[194] Today, Part A Medicare fraud is a high priority of the DOJ.[195]

Enron provides a perfect example of how valuable inside information can be. In a single year, Enron tumbled from the seventh largest American company to the largest bankruptcy in American history.[196] Its stock dropped from a high of $86 per share to $0.27 per share, a plunge of more than 99%.[197] At the time it declared bankruptcy, Enron had corporate debt of $13.12 billion.[198] Although it is not clear yet which laws were broken, it

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Baker, *supra* note 188, at 85.

190. *See id.* (listing "inpatient hospital, skilled nursing facility (SNF), home health and hospice services" as reimbursable under Part A).

191. *See id.* (listing the following as reimbursable under Part B: "physician services, outpatient hospital care, therapy, laboratory tests, x-rays, mental health, ambulance services and durable medical equipment").

192. *See id.* at 85–96 (providing detailed explanations of Plan A and Plan B).

193. *See* Bucy, *Regulator to Hunter*, *supra* note 186, at 4–6 (discussing the Department of Health and Human Services' PATH initiative, which followed its investigation of Medicare Part B payment to teaching physicians); Gordon Witkin et al., *Health Care Fraud*, U.S. NEWS & WORLD REP., Feb. 24, 1992, at 34–43 (providing examples of Medicare Part B fraud); *see also* Mark Taylor, *Spotlight on CFOs: As Feds Have Grown Savvier, Bean Counters Increasingly Have Been Targets in Fraud Probes*, 52 MODERN HEALTHCARE, June 7, 1999 (reporting that federal prosecution of healthcare cases previously focused on Medicaid fee-for-service and Medicare Part B physician fraud because the few federal prosecutors and investigating agents were trained only in simple fraud schemes).

194. Barbara Bisno, Assistant U.S. Attorney, Southern District of Florida, Address at the American Bar Association White Collar Crime Institute, Session on Health Care Fraud, Miami, Florida (May 2000).

195. Geraldine Nicholson & Lena Roberts, *The Reasonable and Necessary Criterion and Medicare Contractor Review of Claims: Efforts to Combat Fraud, Waste and Abuse in the Medicare Program*, 43 ST. LOUIS U. L.J. 81, 84 (1999) (discussing the DOJ-administered Health Care Fraud and Abuse Control account, funded through the Medicare Part A Trust Fund).

196. James Nielsen, *The Enron Scandal By the Numbers*, USA TODAY, Jan. 22, 2002, at 3B; Howard Fineman & Michael Isikoff, *Lights Out: Enron's Failed Power Play*, NEWSWEEK, Jan. 21, 2002, at 15.

197. Nielsen, supra note 196, at 3B.

198. *Id.*

is clear that the true state of Enron's financial health was withheld, through fanciful accounting in offshore partnerships.[199] No one outside of a few Enron executives knew Enron's true state: not creditors, regulators, or most investors, including Enron employees whose 401(k) retirement plans were heavily invested in Enron stock.[200] A few insiders at Enron blew the whistle, but did so only internally, warning other Enron executives that Enron's habit of hiding its debt in partnership accounts would cause the company to "implode."[201] Their warnings were ignored, or referred for legal advice to professionals with what would appear to be conflicts of interest: lawyers who had set up the partnerships, and accountants who stood to make a considerable amount of money from Enron consulting fees.[202] It takes little imagination to see how helpful it would have been if the Enron insiders had been willing and able to bring their concerns to public regulators before Enron's "implosion."[203]

B. Providing Investigative and Litigative Assistance

Insiders are valuable not only in alerting regulators and the public to ongoing wrongdoing, but they can also provide helpful assistance during an investigation. A knowledgeable insider can point investigators to key records and witnesses, interpret

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199. *Id*. (reporting that Enron had about nine hundred offshore partnerships); *see also* Fineman & Isikoff, *supra* note 196, at 15 (reporting that Enron had lost 1.2 billion dollars in a "labyrinth of partnerships").

200. *Id*. (noting that 62% of the Enron 401(k) assets were in Enron stock); Rick Bragg, *Workers Feel Pain of Layoffs and Added Sting of Betrayal*, N.Y. TIMES, Jan. 20, 2002, § 1, at 1 (reporting that some of the former company's four thousand laid-off employees felt betrayed that company executives hid the financial problems from employees).

201. Matt Krantz, *Peeling Back the Layers of Enron's Breakdown*, USA TODAY, Jan. 22, 2002, at 1B (reporting that Sherron Watkins' letter to CEO Kenneth Lay warned him of her fears that Enron "will implode in a wave of accounting scandals"); Matt Krantz, *Trouble Grew in Enron's Interlinking Partnerships*, USA TODAY, Jan. 22, 2002, at 2B (tracing the history and workings of Enron's use of company-formed partnerships, which allowed Enron to mask billions of dollars of debt).

202. *Arthur Andersen Investigation: Criminal Case Goes to Jury; Other Developments*, FACTS ON FILE WORLD NEWS DIG., June 6, 2002, at 437B3 (noting that Arthur Andersen's conflict of interest arose by serving as "Enron's outside auditor . . . and as a consultant helping Enron present a favorable financial picture to investors"); *Enron Officials Also Warned Andersen About Accounting Problems*, BULLETIN'S FRONTRUNNER, Jan. 17, 2002 (reporting that after Sherron Watkins voiced her concern about Enron's accounting practices, Enron hired Vinson & Elkins, a law firm closely connected to the business deals in question, to review the problems at hand).

203. For a more complete discussion of the Enron scandal and how private justice could have affected it, see generally Bucy, *Private Justice*, *supra* note 4.

technical or industry information collected during an investigation, provide expertise, and explain the customs and habits of the business or industry. Having an insider's perspective available throughout an investigation can save time and expense for both regulators and putative defendants by focusing the investigation on relevant areas. Investigating even a middle-size fraud of unremarkable complexity is tedious and time consuming.[204] Often it is a hit-or-miss effort to find the relevant documents or bank accounts that fully reveal or corroborate allegations of fraud. To have an insider who can direct investigators to relevant information can be invaluable.

C. Overcoming Cover-ups

One may question whether whistleblowers are needed, especially given the complications that arise from using them.[205] In the United States especially, one may wonder if a "private justice" enforcement design that brings forth whistleblowers is needed given the emphasis on, and apparent success of, corporate compliance plans, internal investigations, and voluntary disclosure, all of which encourage good corporate citizenship and revelations, however unhappily provided, of corporate wrongdoing.[206] Presumably in today's business world, organizations realize that they have no choice but to implement corporate compliance plans that discourage and detect economic wrongdoing, no choice but to conduct their own internal investigations at the hint of wrongdoing, and, if they are a government contractor, no choice but to voluntarily disclose corporate wrongdoing.[207] In short, it is "organizational

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204. Refer to note 139 *supra* and accompanying text (discussing the surreptitious nature of economic crime, caused by its complexity and diffuse environment).

205. *See* Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.75–.86).

206. *See* JEFFREY M. KAPLAN ET AL., COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES: PREVENTING CRIMINAL AND CIVIL LIABILITY § 4:01 (2000) (debating the central principle "that organizations clearly exhibiting 'good citizenship' traits should be treated substantially more leniently . . . than those that do not").

207. Widespread implementation of corporate compliance plans began after implementation of the federal sentencing guidelines, which severely punish corporations that do not have corporate compliance plans. FEDERAL SENTENCING GUIDELINE MANUAL § 8C2.5 (2001), *available at* http://www.ussc.gov/2001guid/8c2_5.htm (last visited Sept. 13, 2002). Their importance was further underscored in *In re Caremark International*, which held that corporate directors could be held personally liable for losses arising from their failure to insure that the corporation has a viable corporate compliance plan. 698 A.2d 959, 970 (Del. Ch. 1996). It is also well established that implementing a poor or incomplete corporate compliance plan is worse than not having one at all. ROBERT FABRIKANT ET AL., HEALTH CARE FRAUD ENFORCEMENT AND COMPLIANCE § 9.03, at 9-10 to 9-11 (Release 9, 2001) (discussing the importance of having a well-designed corporate

suicide"[208] for American businesses not to have a corporate compliance plan. One would reasonably think that the standard features of corporate plans: periodic education and monitoring of employees, corporate-wide encouragement for coming forward with information of wrongdoing, ombudsmen, hotlines, and other internal creations for collecting information while also protecting workers from retribution,[209] would make whistleblowing outside of the organization unnecessary, or at least not worth the cost to society.

Simply put, not a chance. Lying, cheating, and stealing have always occurred and always will. The beneficial impact of corporate compliance plans, internal investigations, and voluntary disclosures is more than overcome by the ease of committing major economic frauds in today's computerized world and the slim chances of getting caught.[210] There are plenty of incentives for business executives to hide corporate wrongdoing, aside from the obvious personal pocket-lining potential. Once wrongdoing becomes public, profits and stock prices for publicly traded companies plummet,[211] corporate lenders become skittish, mergers are put on hold, and business opportunities evaporate.[212]

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compliance program); Karen Boxer & Helaine Gregory, *Compliance Is Good for Your Corporate Health*, 995 PLI/CORP 585, 587 (1997) ("A 'sham' [corporate compliance] program can engender greater penalties than no program at all. Without appropriate follow through, you [sic] compliance shield can be used against you.").

208. FABRIKANT ET AL., *supra* note 207, § 9.01, at 9-4 (quoting Karen Morrissette, Deputy Chief, Fraud Section, Criminal Division, U.S. Department of Justice).

209. *See id.* (asserting that effective corporate compliance programs include, inter alia, training and communication programs, monitoring and auditing by a compliance officer, and rewards for outstanding compliance); KAPLAN ET AL., *supra* note 206, § 4:06; William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1390 (1999) (asserting that effective compliance programs include ombudsmen, review boards, hotlines, disciplinary mechanisms, internal audits, and training programs).

210. *See* Richard S. Gruner, *Just Punishment and Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S. CAL. L. REV. 225, 236 (1992) (asserting that "[i]nevitably, some level of corporate crime will survive corporate fines and corresponding internal compliance efforts").

211. For example, when Columbia/HCA, the nation's largest hospital chain, became the target of a federal fraud investigation, its second-quarter net income sank 81% from one year earlier. Lucette Lagnado, *Columbia/HCA Quarterly Net Sank 81%*, WALL ST. J., July 30, 1998, at B7. Columbia/HCA's stock prices fell from $44-7/8 prior to disclosure of the government's case against the hospital chain to $24-3/8 after. Tom Lowry, *Loss Warning Hits Columbia/HCA Stock*, USA TODAY, Feb. 9, 1998, at 2B.

212. For example, when the Dartmouth-Hitchcock Medical Center (Dartmouth) underwent an audit by the Office of Inspector General (OIG), Department of Health and Human Services, the financing it had been negotiating for expansion was delayed because of the investigation. U.S. GEN. ACCOUNTING OFFICE, MEDICARE: CONCERNS WITH PHYSICIANS AT TEACHING HOSPITALS (PATH) AUDITS, GAO/HEHS-98-174, at 14 n.26

Those involved face prison, financial destruction, public shame, humiliation, embarrassment, and ridicule. In short, insiders are still needed because preventative programs will not always work.

Further, it appears collusion, concealment, and cover-ups are rampant.[213] Whistleblowers routinely experience cover-ups by supervisors and corporate executives. Too often, the internal systems in place for handling complaints, whether Boards of Directors, unions, outside auditors, or general counsels' offices, fail to respond, or participate in the cover-up. The experience of Evelyn Knoob is enlightening in this regard.[214] Knoob was a mailroom supervisor at Blue Cross Blue Shield of Illinois.[215] She discovered a large box of misplaced, overdue claims submitted by patients and providers for services already rendered.[216] These were claims for which Blue Cross was being paid by the federal government to process.[217] Knoob took the box to her boss, expecting that he would direct that the claims be processed.[218] Instead, he shut his office door and told her to help him shred the claims.[219] When she refused, her boss told Knoob to sit down or she would be fired.[220] Knoob then watched as her boss shredded claims for three hours, filling ten grocery bags.[221] When he was done, Knoob's boss told her not to report the shredding or, as Knoob related: "He told me that he would say that I did it and I would be the one going to federal prison."[222] Other managers also threatened Knoob: "Tell this story to the government . . . and you

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(1998). After the ten-month investigation, during which Dartmouth spent approximately $1.7 million to respond, the OIG concluded that Dartmouth had been overpaid by $778, which it did not deem worth collecting. Bucy, *Regulator to Hunter*, *supra* note 186, at 40, 41 & n.281.

213. *Cf. Protect Whistle-blowers*, SAN FRAN. CHRON., July 1, 2002, at B6 (discussing adoption of the "Whistle-Blower Act," a law designed to "end the practice of corporate insider coverups," passed during "one of the worst waves of financial corruption in recent times").

214. *See* Bruce Jaspen, *The Secret Inside the Box: Whistle-blowers Like the Woman at Illinois Blue Cross Get Rewards—and a Dose of Pain*, CHI. TRIB., July 18, 1998, at N1, N13 [hereinafter Jaspen, *Secret Inside the Box*]; Bruce Jaspen, *The Blue Cross Whistle-blower's Private Ordeal*, CHI. TRIB., July 24, 1998, at N1, N24 [hereinafter Jaspen, *Private Ordeal*].

215. Jaspen, *Private Ordeal*, *supra* note 214, at N24.

216. Jaspen, *Secret Inside the Box*, *supra* note 214, at N1.

217. *Id*.

218. *Id*.

219. *Id*.

220. Jaspen, *Private Ordeal*, *supra* note 214, at N24.

221. Jaspen, *Secret Inside the Box*, *supra* note 214, at N1.

222. Jaspen, *Private Ordeal*, *supra* note 214, at N24.

will be responsible for 350 people losing their jobs. Bring the feds in here, . . . and you'll be responsible when they shut us down."[223]

Sometimes regulatory agencies are part of the cover-up because they are compromised, or simply because they are ineffective. In these instances the publicity that whistleblowers can generate may be the only way to reveal the concealment. This was the experience of Dan Gellert, an Eastern Airlines pilot who became aware of a design defect he had experienced when piloting the L-1011 commercial plane for Eastern.[224] The defect, in the autopilot mechanism, was serious and ultimately caused an Eastern airline crash, killing all 103 persons on board.[225] After investigating the crash, the National Transportation Safety Board (NTSB) concluded that pilot error was to blame, even though it found the autopilot design defect.[226] Attributing the crash to pilot error rather than to design defect meant that Eastern, and Lockheed, the plane's manufacturer, were liable only for compensatory damages and not punitive damages.[227] This conclusion also reflected better on the Nixon Administration, which had just approved a government-guaranteed loan for Lockheed to stave off bankruptcy.[228] Ultimately, Eastern made the alterations in the L-1011 that were necessary to correct the design defect, but not until Gellert had filed written reports describing the defect and its safety implications to his superiors at Eastern, his union, and to the NTSB.[229]

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223. *Id*. After the shredding event, Knoob was placed on "stress leave." *Id*. She filed a qui tam action under the FCA. *Id*. The case ultimately settled for $144 million with $21 million to $35 million going to Knoob. *Id*. A. David Nelson's story is similar. *See* Barry Meier, *CSX Will Pay Whistle-Blower $1.18 Million*, N.Y. TIMES, Sept. 30, 1995, § 1, at 33. A. David Nelson told more than twenty other CSX employees, including several supervisors, about cost overruns he detected in work CSX performed on railroad crossings. *Id*. Nelson expected a pat on the back. *Id*. Instead, he lost his job, filed a qui tam FCA case, and collected about $1.18 million when the case settled for $5.9 million. *Id*.

224. *See* Dan Gellert, *Insisting on Safety in the Skies*, *in* WHISTLE-BLOWING: LOYALTY AND DISSENT IN THE CORPORATION 17–30 (Alan F. Westin et al. eds., 1981) [hereinafter WHISTLE-BLOWING] (discussing Gellert's experiences after he blew the whistle on the L-1011's design defect).

225. *Id*. at 19.

226. *Id*. at 20.

227. *Id*.

228. As Gellert explained: "Lockheed's long-term ability to repay the loan depended, to a large degree, on the company's success in selling its L-1011." *Id*.

229. *Id*. at 19–22. After his whistleblowing activities, Gellert was demoted, threatened, and grounded as a pilot. *Id*. at 23–30. He filed grievances and was reinstated with back-pay. *Id*.

V. WHAT DOES IT TAKE FOR A PUBLIC REGULATORY SYSTEM TO GET INSIDE INFORMATION?

What does it take for a public regulatory system to get inside information? A lot. Why? Because "[w]hat happens to whistleblowers shouldn't happen to a dog."[230] Whistleblowers have a choice.[231] They have not been caught by the government in illegality and thus need not cooperate to obtain a better bargain on their own liability. Nor are they victims or possible victims of wrongdoing and thus have no incentive to cooperate with law enforcement to catch those who have harmed them. The whistleblowers needed to have the choice of silence, and almost certainly will incur tremendous costs by coming forth. If the regulatory world wants information from insiders about complex, concealed wrongdoing motivated by economic gain, it must realize that information of this caliber from this type of whistleblower is expensive. If the regulatory world is not willing to pay for such information, it will not get it.

A. The Costs

1. Emotional and Personal Difficulties: "Setting Your Hair on Fire Publicly."[232] The experience of Joseph Rose is an appropriate beginning point for this discussion. In 1973, Rose, an attorney with seven years of legal experience, accepted a new job as counsel for Associated Milk Producers, Inc. (AMPI), a cooperative of dairy farmers.[233] AMPI managed the financial affairs for its dairy farmer members.[234] One of Rose's duties was to approve payments to outside counsel.[235] On the first day at his new job, Rose had lunch with Stuart Russell, one of AMPI's outside counsel.[236] Russell mentioned a pending antitrust case against AMPI and casually suggested paying a key witness to

230. Jane Bryant Quinn, *When Whistleblowing Backfires*, WASH. POST, May 24, 1998, at H2.

231. David R. Olmos, *Health Care's New Breed of Whistle-Blower*, L.A. TIMES, Feb. 17, 1998, at A1. "These are professionals who have access to information, the ability to discern its impact and who have a stature that allows them to come forward." *Id.* at A15 (quoting Neil V. Getnick, an experienced whistleblower's attorney).

232. N.R. Kleinfield, *Whistle Blowers Find Satisfaction but Lose Professions, Friends*, 99 L.A. DAILY J., Nov. 11, 1986, at 66 (quoting a whistleblower's description of his whistleblowing experience).

233. Joseph Rose, *Reporting Illegal Campaign Contributions*, *in* WHISTLE-BLOWING, *supra* note 224, at 31–32.

234. *Id*.

235. *Id*. at 31.

236. *Id*. at 32.

"clarify his testimony."[237] "Horrified," Rose spoke to AMPI's CEO about Russell's suggestion.[238] The CEO matter-of-factly explained that Russell was "kept on the payroll" because "he knows where all the dead bodies are," including, Rose soon learned, illegal campaign contributions made by AMPI to Richard Nixon's 1972 re-election campaign.[239] Believing it his duty as in-house counsel to alert AMPI's Board of Directors of his findings and concerns, Rose asked to speak with the Board.[240] He was not allowed to do so; instead, he was permitted to speak to a small committee of Board members who visited him in his hotel room.[241] Rose was fired a few days later.[242]

Over the next three years, Rose was subpoenaed to testify before various Senate committees.[243] During this time, AMPI Board members and officers contacted Rose's prior and potential employers in attempts to disparage him.[244] It was two years before Rose was able to get another job.[245] During these years he and his family suffered enormously.[246] Despite Mrs. Rose's poor health (she had already had several heart attacks), she returned to work to support their family of five small children.[247] The Roses had to give up their house and move to a small apartment; their meals consisted of bread and beans; they received threatening, anonymous phone calls.[248] As Rose explained: "[E]ven my father, who was dying of emphysema, received derogatory calls about me. My father passed away during this period, going to his grave believing that my career had been irreversibly destroyed."[249]

Rose's experience is not unusual.[250] Surveys of whistleblowers consistently show the hardship and retribution

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237. *Id*.

238. *Id*. at 32–33.

239. *Id*. Russell was one of the individuals who laundered AMPI's funds to Nixon's campaign. *Id*.

240. *Id*. at 34.

241. *Id*.

242. *Id*. at 35–36.

243. *Id*.

244. *Id*. at 35.

245. *Id*. at 36.

246. *Id*.

247. *Id*. at 32, 36.

248. *Id*. at 36.

249. *Id*. Ultimately, AMPI, its CEO, and Russell were convicted of crimes related to AMPI's illegal campaign contributions. *Id*. at 37.

250. Another whistleblower, who was fired from her position as a financial aid officer at a Baptist college after presenting information of fraud to her supervisors, described her experience: "I think I have aged 10 years in all of this. . . . It's hard going week after week applying for jobs, not knowing how your bills are going to get paid, not knowing how

these individuals experience. For example, in one survey of ninety whistleblowers, 54% said they were harassed at work, 82% were harassed by superiors, 80% reported physical deterioration following their whistleblowing experience, and 86% reported "negative emotional consequences, including feelings of depression, powerlessness, isolation, anxiety and anger."[251]

Insiders who remain employed after blowing the whistle do not usually last long at work.[252] It becomes too miserable. They face ostracism, hostility and rejection, taunting co-workers,[253] abusive supervisors,[254] attacks on their professional

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people at church feel about you." Ginger Thompson, *Whistle-Blower Gives Back to Target: She Found Fraud at Georgia College*, CHI. TRIB., June 16, 1998, at N11. The whistleblower, Martha Faw, filed suit under the FCA alleging that the college "was diverting financial aid funds from rightful recipients to athletes." *Id.* at N1. The case was settled for $4 million; Ms. Faw received $150,000, most of which she gave to the college to use for scholarships. *Id.*

Arthur Suchodolski, an internal auditor for a Michigan utility, candidly described his experience after blowing the whistle on fraud by the utility and the Michigan welfare program, and after his subsequent job loss. *See* Arthur Suchodolski, *Uncovering False Reporting to the Government*, *in* WHISTLE-BLOWING, *supra* note 224, at 86–91. "[A]fter four fruitless months of job-hunting, I went through a period of severe depression." *Id.* at 90. "My wife's worries about our family's future resulted in substantial weight loss, and my sons were disturbed about the limited amount of time I could spend with them." *Id.* at 90–91.

James Alderson's story is similar. *See* Kurt Eichenwald, *He Blew the Whistle and Health Giants Quaked*, N.Y. TIMES, Oct. 18, 1998, at BU1. When Alderson blew the whistle on his employer's habit of keeping a double set of books, he was fired; his family lost its comfortable lifestyle, moved into a cramped apartment, and began depleting the college savings reserved for his two teenagers. *Id.*

251. Clyde H. Farnsworth, *Survey of Whistle Blowers, Finds Some Retaliation but Few Regrets*, 133 CHI. DAILY BULL., July 27, 1987, at 3 [hereinafter Farnsworth, *Survey*].

252. Refer to notes 264–81 *infra* and accompanying text (discussing the professional difficulties individuals face after blowing the whistle).

253. For example, Linda Bensel-Meyers, while a tenured associate professor at the University of Tennessee, was responsible for hiring and training tutors for Tennessee athletes, primarily male football and basketball players. Robert Lipsyte, *What Happens After the Whistle Blows?, A Tennessee Professor's Allegations of Athletic Abuses Haunts Her Life*, N.Y. TIMES, July 20, 2000, at D1–D2. She noticed grade alterations in these athletes' school records and heard reports from the tutors of sexual harassment and ghost-writing of athletes' term papers. *Id.* at D2. After blowing the whistle, Bensel-Meyers "became a well-known pariah on campus." *Id.* at D1. "Students taunt her, teachers turn away," her office has been broken into, "[h]er children hear remarks about her at school[,] [h]er husband, who thinks she is hurting the family, rarely talks to her." *Id.* at D2.

254. The experience of Leo Kohls exemplifies this. *See* Leo Kohls, *Refusing to Drive Unsafe Vehicles*, *in* WHISTLE-BLOWING, *supra* note 224, at 95–97. Kohls was a United Parcel Service (UPS) driver of tractor-trailers who blew the whistle on UPS's practice of ignoring safety problems with its trucks. *Id.* at 95–97. After Kohls reported his concerns internally, with no success, and then to the Interstate Commerce Commission, he experienced the following:

> [T]wo of my supervisors, Robert Fornof, division manager, and Henry Sherman, feeder manager, began calling me into their offices on a daily basis to discuss my

abilities,[255] and sometimes, threats of physical harm.[256] One whistleblower even saw his employer interfere in private litigation concerning custody over his children.[257]

There are health effects for whistleblowers. In one study, twenty-nine of thirty-five whistleblowers experienced stress-related physical symptoms during their whistleblowing experiences, including difficulty sleeping, anxiety, panic attacks, depression, suicidal thoughts, feelings of guilt and worthlessness, loss of appetite and weight, high blood pressure, heart palpitations, hair loss, nightmares, headaches, weeping, and tremors.[258] Fifteen of the subjects began taking prescribed medications they had not taken before.[259] Seventeen had considered suicide, ten seriously; two had attempted suicide; one attempted it twice.[260] One whistleblower, a mine inspector who blew the whistle on other inspectors who were taking bribes to certify unsafe mines as safe, described: "I'm a sick old man. The stress is killing me. . . . I take 20 pills a day just to function. I'm under constant doctor's care—all because I want to do my job."[261]

> performance. They constantly complained that I took too long to perform my job, that I spent too much time at the automotive shop for what they claimed were unnecessary repairs, that I exceeded my lunch and break time, and that I took too long driving to my destination. One day Fornof would tell me to stop at a certain place for my break; the next day Sherman would change that location for one he preferred. Then Fornof would criticize me because I had not stopped where he had ordered me to stop. The two managers played this game for some time so they could build a record against me for insubordination and failure to follow instructions.

Id. at 97.

255. For example, Grace Pierce, M.D., was demoted from her position as Associate Director of Medical Research at Ortho Pharmaceutical Corp. after she refused to proceed on human trials that both she and her fellow researchers considered carcinogenic. *See* Henry I. Kurtz, *Asserting Professional Ethics Against Dangerous Drug Test*, *in* WHISTLE-BLOWING, *supra* note 224, at 107–08. Although Dr. Pierce's position on the carcinogenic nature of the drug in question was supported by Food and Drug Administration (FDA) guidelines, her supervisor, the Executive Director of Medical Research, "accused her of irresponsibility, lack of judgment, and conduct unbecoming a director." *Id.* at 113.

256. *An Independent Police Probe for D.C.*, WASH. TIMES, Dec. 9, 1997, at A18 (reporting that whistleblowers testified that they were threatened with physical harm if they blew the whistle on a police overtime scam).

257. *See* Gellert, *supra* note 224, at 27 (noting that an Eastern Airlines vice-president testified on behalf of Gellert's ex-wife at a custody hearing).

258. K. Jean Lennane, "*Whistleblowing*": *A Health Issue*, 307 BRITISH MED. J. 667, 668 (1993). *See generally* DEAN B. PESKIN, SACKED! WHAT TO DO WHEN YOU LOSE YOUR JOB 1–23 (1979) (discussing the emotional traumas associated with job loss).

259. Lennane, *supra* note 258, at 668.

260. *Id.*

261. Vicki Smith, *Whistle-blowers Find Help After Taking the Hard Path*, CHI. TRIB., Aug. 7, 1997, at C8 [hereinafter Smith, *Whistle-blowers*] ("Depression and anxiety [among whistleblowers] are common. Ten percent consider suicide.").

Families of whistleblowers suffer also, with forced moves, scaled-back living, marital stress, depletion of savings, and health problems. In one study of seventy-seven children of whistleblowers, sixty had been adversely affected by divorce or the forced separation of their parents brought about by whistleblowing job loss.[262] Whistleblowers' children experience disrupted education, longer-than-usual absences by parents, mothers who had to seek work outside the home because of employers' retaliation against their whistleblower-husbands, anxiety, insecurity, stress, public attacks on their parents' integrity, anger, and loss of faith.[263]

2. Professional Difficulties. Job loss is probably the most consistently identified consequence of blowing the whistle, although whistleblowers may experience informal, job-related repercussions short of job loss or prior to job loss, such as isolation, abuse, forced psychiatric referral, impossible demands by supervisors, threats of defamation or disciplinary actions, demotion, or reassignments.[264] In a study of thirty-five whistleblowers, thirty-four suffered retribution from their employer.[265] The one exception was a whistleblower who worked for a different organization than the one he informed upon.[266] Of the thirty-four whistleblowers who suffered some retribution, ten obtained full time employment after leaving; two obtained part-time employment; two began receiving disability; and ten were

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262. Lennane, *supra* note 258, at 668.

263. *Id.*

264. *Id.* at 668–69; MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATION AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 79–80 (1992); Alan F. Westin, *Conclusion: What Can and Should Be Done to Protect Whistle Blowers in Industry*, *in* WHISTLE-BLOWING, *supra* note 224, at 132–33.

265. Lennane, *supra* note 258, at 668.

266. *Id.* Of the thirty-four whistleblowers studied, eight were dismissed; fifteen were pressured to resign; three saw their positions abolished; five were transferred to another town; one was pressed to "take redundancy." *Id.*; *see also* Farnsworth, *Survey*, *supra* note 251, at 3 ("After exposing misdeeds, [of the whistleblowers surveyed] all those in the private sector reported they were dismissed."); Philip Jos et al., *In Praise of Difficult People: A Portrait of the Committed Whistleblower*, 49 PUB. ADMIN. REV. 552, 553–54 (1989) (reporting 60% of 161 whistleblowers surveyed reported job loss as a consequence of their whistleblowing activities); Government Accountability Project, *Survival Tips for Whistleblowers* [hereinafter *Survival Tips*], *at* http://www.whistleblower.org/www/Tips.htm (last visited Nov. 14, 2002) (advising prospective whistleblowers: "You almost surely will suffer some level of harassment or retribution for living the values of a public servant. Academic studies confirm that over 90 percent of whistleblowers report subsequent retaliation. . . . [Employers] try[] to silence the messenger . . . . Lifetime friends may turn against you, and people with whom you work may treat you as an outcast . . . .").

unemployed at the time of the study.[267] Twenty-five of the thirty-five whistleblowers experienced loss of income; for eleven, the decrease in income was half or less; for fourteen, it was substantial: three-fourths of their prior salary or more.[268] Blackballed after loss of employment, many whistleblowers find it impossible to obtain future employment in their fields.[269]

Examples of employer retribution abound.[270] Consider the case of Peter Faulkner, a nuclear engineer who blew the whistle on industry-wide engineering deficiencies at nuclear power plants.[271] After being fired, Faulkner applied to sixty-seven U.S. corporations for employment.[272] All of his applications were rejected.[273] Faulkner became resigned to his fate: "I have accepted the termination of my engineering career as the price I must pay for bringing [my employer's] documents before the public."[274]

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267. Lennane, *supra* note 258, at 668.

268. *Id*.

269. Westin, *supra* note 264, at 132–33 (noting that seven of the ten whistleblowers discussed in the book had been unable to obtain reinstatement, damages, or vindication of their professional reputations).

270. Kohls, *supra* note 254, at 95–102 (discussing the case of Leo Kohls, a UPS driver who was fired and then blackballed after complaining about UPS's refusal to make necessary safety repairs on its tractor-trailers). Kohls described his experience with UPS after he was fired:

> Since my discharge . . . I have not been able to obtain steady employment as a driver or for that matter, anything else. UPS has managed to "blackball" me by refusing to release information about my driving record, a prerequisite to obtaining employment as a driver with other interstate motor carriers. Some companies have turned me down because, as a result of my filing NLRB charges against UPS, they consider me a troublemaker. Other firms give me no reasons during the interview but later when I call back about job possibilities, they claim that they have lost my application.

Id. at 104; *see also* David Kocieniewski, *Officer Says He Was Hurt for Aiding an Inquiry*, N.Y. TIMES, July 27, 1996, at L25–L26 (discussing the case of Jeffrey Baird, a New York City police detective who requested a transfer after suffering harassment when he disclosed corruption within the police department). After Baird's disclosures, his "enemies have scuttled his career, mailed pornographic photographs to his 5-year old son, vandalized his office and threatened to let drug dealers ambush him." *Id*. at L25. He received prank calls on his beeper and pornographic pictures in his mailbox. *Id*. at L26. Cartoon sketches depicting Baird in humiliating poses were circulated around his office, his desk was vandalized, his telephone equipment smashed, and his badge and photographs of his daughter stolen. *Id*. Baird was called "rat" and "cheese-eater." *Id*. Throughout it all, Baird's supervisors insisted that he was imagining things and questioned his sanity. *Id*. According to Baird: "My career is effectively over because I reported the corruption I saw." *Id*. at L25.

271. Peter Faulkner, *Exposing Risks of Nuclear Disaster*, *in* WHISTLE-BLOWING, *supra* note 224, at 39.

272. *Id*. at 48, 50.

273. *Id*. at 50.

274. *Id*.

Robert Elliot's experience is similar.[275] Elliot, a pile-driver foreman for P & Z Construction Co., was fired after complaining about exposed high-voltage electrical cables on the subway construction site where he was foreman.[276] After he was fired, Elliot began looking for another job.[277] Although his skills were in demand and he had received commendations from prior employers, he had difficulty finding work.[278] On the several occasions that he did find work, he was laid off soon thereafter.[279] Elliot reported: "The construction industry is a fairly closed field" and, as he "quickly discovered[,] . . . his reputation as a 'trouble-maker' had become known to almost every contractor in the area."[280] As one employment rights attorney explains:

> When an employee blows the whistle, employers react with a vengeance . . . .
>
> . . . .
>
> Companies will go to great lengths to smear the employee in the industry. . . . They will attack your credentials legally and illegally. Companies could say you're dishonest or a drug addict; human resources could alter your personnel record and write negative things about you that aren't true.[281]

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275. Albert Robbins, *Refusing to Work at Unsafe Construction Sites*, *in* WHISTLE-BLOWING, *supra* note 224, at 75–77.

276. *Id.* at 76. Elliot found a host of safety deficiencies at the work site:

> From the moment he saw Metro D-1, Elliot was appalled by the unsafe conditions at the site. In his six years as a pile driver, Elliot had never encountered such hazardous working conditions. Unguarded 13,000-volt electrical cables ran though the work area. The cables were fully energized and unprotected, except for standard insulation. At other job sites where Elliot had worked, cables such as these either had been disconnected, or they had been sheathed in a protective metal casing so they couldn't be struck accidentally by a pile or burned inadvertently by a welding torch.
>
> The unprotected live cables in the work area, which created a real danger of electrocuting someone, were not the only serious safety hazards at Metro D-1. The work area was littered with large accumulations of combustible trash that could easily have been ignited by a welding torch. The crew was given a mechanically defective crane with which to lift heavy steel beams. And to compound the dangers, both the lighting and the ventilation at the work site were inadequate.

Id.

277. *Id.* at 81.

278. *Id.* at 81–82.

279. *Id.* at 82.

280. *Id.*

281. Katherine Sopranos, *The Risks and Rewards of Whistle-blowing*, CHI. TRIB., July 19, 1998, at C1, C3 (quoting John O'Conner, an employees' rights attorney).

3. Social Ostracism. There are cultural disincentives to providing information about wrongdoing by others. Whistleblowers often face ostracism from long-time friends and colleagues once it becomes known that they have volunteered information of wrongdoing. They are termed "rats,"[282] "snitches,"[283] "tattlers,"[284] "cheese-eaters,"[285] "M & Ms,"[286] and worse.[287] They receive threats, and their children are harassed.[288] They are vilified because they are viewed as disloyal.[289] Alexander Butlerfield, a White House aide to Richard Nixon, summed up this view when speaking of Ernest A. Fitzgerald, a Pentagon staff analyst who, in response to congressional inquiry, admitted there had been a two billion overrun in developing the C5A air transport:

> Fitzgerald is no doubt a top-notch cost expert, but he must be given very low marks in loyalty, and after all loyalty is

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282. Albert D. Clark, *Ethical Implications of Whistle Blowing*, 42 LA. B.J. 364, 365 (1994) ("[W]histleblowers are simply looked upon as disloyal rats who are enemies of business . . . ."); Kocieniewski, *supra* note 270, at L25 (reporting that a police detective who blew the whistle on police corruption was called a "rat" and a "cheese-eater").

283. Clark, *supra* note 282, at 365 ("Most of us were brought up being taught it is wrong to snitch. The tattle tale was the one who got chastised. 'Kill the bearer of bad news,' the emperor would say.").

284. Farnsworth, *Survey*, *supra* note 251, at 3 (commenting that there is so much retaliation against whistleblowers because whistleblowing is "associated with cultural taboos against tattling").

285. Kocieniewski, *supra* note 270, at L25.

286. In this context, "M & M" is shorthand for "misfits and malcontents." Jacqueline P. Taylor, *The World of Whistleblowers: Are They Sinners or Saints?*, WOMEN OF COLORADO.COM para. 15 (Feb. 2, 1998) [hereinafter Taylor, *World of Whistleblowers*], *at* http://www.womenofcolorado.com/Articles/1e020298.asp (last visited Sept. 24, 2002).

287. *See, e.g.*, *Survival Tips*, *supra* note 266 ("Our culture frowns on prying 'busybodies,' . . . . Loyalty to family is as much an instinct as duty: we don't bite the hand that feeds our family by turning on our employers."); Jos et al., *supra* note 266, at 552 ("In addition to challenging several society taboos (don't be a 'stool pigeon,' never air 'dirty laundry' in public), blowing the whistle often pits loyalty to one's clients or colleagues against loyalty to the public . . . ."); Japsen, *Private Ordeal*, *supra* note 214, at N24 (describing how a whistleblower in a Medicare fraud case was told by her supervisors that she would be a "traitor" if she reported the fraud taking place within the company).

288. Lennane, *supra* note 258, at 668 (reporting that the six-year-old daughter of one whistleblower received a personal death threat letter and the teenage son of another had his pets killed); Kocieniewski, *supra* note 270, at 25 (reporting that pornographic photographs were mailed to the five-year-old son of a whistleblower).

289. *Cf.* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 4 (1993). Fletcher has elaborated on a definition of loyalty initially suggested by Albert Hirschman: "The hallmark of loyal behavior is 'the reluctance to exit in spite of disagreement with the organization of which one is a member.'" *Id.* at 5 (quoting ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 98 (1970)); *see also* Myron Glazer, *Ten Whistleblowers and How They Fared*, 13 HASTINGS CTR. RPT. 33, 33 (1983) (discussing the "pulls of loyalty" whistleblowers face).

> the name of the game. Only a basic "nogoodnik" would take his grievances so far from normal channels. We should let him bleed for a while at least.[290]

In fact, by alerting regulators or the public of wrongdoing, whistleblowers almost certainly will betray co-workers, old friends, employers, perhaps an entire industry. They have crossed the line of what is perceived as morally correct behavior.[291] Throughout time, loyalty has been recognized as a fundamental virtue.[292] As George Fletcher has noted, the "worst epithets are reserved for the sin of betrayal."[293]

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290. Glazer, *supra* note 289, at 33, 39; *cf.* WHISTLEBLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY 39–54 (Ralph Nader et al. eds., 1972). Fitzgerald first reported the overruns to his superiors and recommended corrective actions. *Id*. at 42. During this time Fitzgerald was nominated for two Air Force awards. *Id*. Fitzgerald next wrote a letter to Gen. J.W. O'Neil, commander of the Space and Missile Systems Organizations, criticizing the costs of the Minuteman Program. *Id*. Fitzgerald's letter offended many of the top officers of the Air Force. *Id*. Only when his performance ratings fell did Fitzgerald contact Henry Fletcher, Jr., the director of procurement policy in the Office of the Secretary of Defense. *Id*. at 43. It was this letter that led to Fitzgerald's invitation to testify before the Joint Economic Subcommittee. *Id*. at 43–44.

291. The response Don Rosendale received is typical. *See* Don Rosendale, *A Whistle Blower*, N.Y. TIMES MAG., June 7, 1987, at 56. Rosendale was a whistleblower who lost his job as a corporate officer weeks after showing the corporate president evidence that $1 million was missing from corporate coffers. *Id*. After making his disclosure, Rosendale was chastised by a former co-worker: "You should have *known* better. You should have known you can't blow the whistle in a major corporation and survive." *Id*. Rosendale reflected:

> Corporations, most of them anyway, are male-bonding fraternities made up of team players, men who blend in, men who don't rock the boat. I had been the antithesis of all those things. The term "whistleblower" has no gender, but to snitch is not considered manly; "one of the boys" is never a tattletale.

Id.

According to one clinical psychologist familiar with the airline industry: "There is an unspoken rule among airline pilots about not turning in troubled colleagues except in the most extreme cases. No one wants to be perceived as a whistleblower responsible for ending someone's career." Ana L. Laguzzi, *Psychology in the Cockpit*, N.Y. TIMES, Nov. 23, 1999, at A26.

Other experts agree. According to one: "[Whistleblowers] break the unwritten law of social relationships . . . . They break a norm—the norm of loyalty." N.R. Kleinfield, *Whistle Blowers Find Satisfaction but Lose Professional Friends*, DAILY J., Nov. 11, 1986, at 6 (quoting Myron Peretz Glazer, a sociologist at Smith College who has interviewed fifty-five whistleblowers). According to another: "Whistle-blowing is a damaging act that disrupts the employee's network of trust within the organization." Sopranos, *supra* note 281, at C1 (quoting Vivian Wiel, Director of the Center for the Study of Ethics in the Professions at the Illinois Institute of Technology). Advice given by the Government Accountability Project is dismal: "Lifetime friends may turn against you, and people with whom you work may treat you as an outcast." *Survival Tips*, *supra* note 266.

292. FLETCHER, *supra* note 289, at 26–31, 152–55 (exploring classical examples of betrayal and loyalty).

293. *Id*. at 41 ("Worse than murder, worse than incest, betrayal of country invites universal scorn. Betrayal of a lover is regarded by many as an irremediable breach. For

Linda Tripp comes to mind as an example of the low regard in which whistleblowers are held in contemporary American culture. Tripp, a middle-aged federal employee, befriended a young White House intern, Monica Lewinsky, who had become intimately involved with President William Jefferson Clinton during President Clinton's second term in office.[294] Lewinsky confided in Tripp about many personal matters, as friends do, including some of the details of her relationship with President Clinton.[295] Unknown to Lewinsky, Tripp was taping many of their conversations with a RadioShack recorder, and reported many of Lewinsky's shared confidences, first to the plaintiff's lawyers handling a sexual harassment case against President Clinton, then to the FBI.[296] Because President Clinton had publicly, and under oath, misrepresented his relationship with Lewinsky,[297] Tripp's gathered evidence, which included twenty hours of taped conversations, became prominent in a variety of sexual harassment, criminal, impeachment, and bar-licensing investigations of President Clinton.[298]

Tripp became the butt of jokes on talk shows and comedy shows,[299] and was almost uniformly described in derogatory terms such as "treacherous,"[300] "a false friend,"[301] "tattletale,"[302]

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the religious, betrayal of God is the supreme vice. The specific forms of betrayal—adultery, treason, and idolatry—all reek with evil."); *cf. id*. at 8, 10 ("Dante reserves a special place in hell for those who betray trust . . . .").

294. *See* Evan Thomas et al., *What Made Linda Do It?*, NEWSWEEK, Mar. 23, 1998, at 23 (disclosing how Tripp learned of Lewinsky's sexual involvement with President Clinton).

295. *Id*. at 26.

296. *Id.* at 24–26; Susan B. Glasser, *Tangled in Tape: Presidential Scandal Rewinds with Tapper Linda Tripp in Trouble*, WASH. POST, July 31, 1999, at C1, C3 (noting that Tripp, as the secret informer, was engaging in backstabbing); Jane Mayer, *Portrait of a Whistleblower; The Family History Behind Linda Tripp's Anger*, NEW YORKER, Mar. 23, 1998, at 34 (noting that Tripp acted as the informer for the Paula Jones sexual harassment case and for independent counsel Kenneth Starr).

297. Alison Mitchell, *Clinton Impeached: He Faces a Senate Trial, 2d in History; Vows to Do Job till Term's 'Last Hour': Speaker-Elect Is Resigning*, N.Y. TIMES, Dec. 20, 1998, § 1, at 1, 30 (describing President Clinton's denials of the Lewinsky affair in public and in a deposition for the Paula Jones sexual harassment suit and, after physical evidence of the affair was discovered, his admission that he lied).

298. *Id*. at 30; Phil Kuntz, *Clinton Should Be Disbarred for Conduct in Jones Case: Arkansas Panel Says*, WALL ST. J., May 23, 2000, at A17; Michael E. Ruane & Fredrick Kunkle, *Md. Drops Linda Tripp Prosecution: Judge Had Left State with "Nowhere to Go,"* WASH. POST, May 25, 2000, at A1.

299. Ruane & Kunkle, *supra* note 298, at A17 ("Tripp became the butt of talk show jokes and 'Saturday Night Live' skits . . . .").

300. *Id.*

301. Glasser, *supra* note 296, at C3.

302. *Id.*

"meddler,"[303] "gossip,"[304] "snoop,"[305] and "venal betrayer of a friend."[306] She was indicted on felony charges for illegal wiretapping in violation of Maryland law, but the charges were dismissed on technical grounds.[307] Tripp's indictment raised questions about society's views as much as Tripp's behavior. According to one commentator: "What the indictment of Mrs. Tripp reflects is our conflicted moral response to whistleblowers."[308] Judith Shapiro, the President of Barnard College, wrote: "Negative responses to Ms. Tripp's actions reflect widespread moral revulsion against someone who violated the norms of an intimate friendship and divulged the kind of personal information that is one of the hallmarks of such a friendship."[309]

Even when whistleblowers reveal significant information that affects public safety, rather than tawdry details about sexual peccadillos, they are viewed almost consistently by those in their circle as traitors.[310] Becoming a whistleblower requires that one revise one's notions of loyalty and duty and view whistleblowing not as an act of betrayal, but as a courageous act of loyalty toward a larger community.[311]

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303. Mayer, *supra* note 296, at 3.

304. *Id.*

305. *Id.*

306. Saundra Torry & Raja Mishra, *Tripp Indicted on Charges of Wiretapping: Maryland Law Prohibits Taping Without Consent*, WASH. POST, July 31, 1999, at A1.

307. Ruane & Kunkle, *supra* note 298, at A1, A17 (revealing that prosecutors dropped the charges because the major evidence against Tripp—testimony from Lewinsky—was ruled inadmissible as tainted by information Tripp had provided to Congress under a grant of immunity); Torry & Mishra, *supra* note 306, at A1, A11 (describing the charges).

308. Ian Ayers, *Why Prosecute Linda Tripp?*, N.Y. TIMES, Aug. 10, 1999, at A17.

309. Judith Shapiro, *Should Recording Calls Be Illegal?*, N.Y. TIMES, Aug. 14, 1999, at A12.

310. *See* Westin, *supra* note 264, at 132–33 (compiling ten cases of whistleblowers who were ostracized by their employers for reporting violations to outside sources).

311. As George Fletcher notes, switching loyalties from those near at hand to the larger community is so difficult that few may be able to do it. FLETCHER, *supra* note 289, at 26–31, 152–55. Fletcher provides an excellent discussion of this point using examples from history, including Robert E. Lee's choice in siding with the Confederacy during the Civil War, *id*. at 153–54; movies such as *Music Box* and *East of Eden*, *id*. at 152–54; plays such as Shakespeare's *Hamlet* and Sophocles's *Antigone*, *id*. at 26–33; and theology like the story of Abraham's willingness to sacrifice Isaac, *id*. at 154. However, a transition may be taking place. Support networks for whistleblowers are sprouting up. Refer to notes 368–72 *infra* and accompanying text.

B. Compensation Needed to Overcome the Costs

Who are the whistleblowers that a regulatory world needs to attract? Studies of whistleblowers indicate that such individuals tend to be white, male,[312] relatively well-educated,[313] and hold managerial positions.[314] Before they became whistleblowers, they were typically described by their employers as "top performers and model employees."[315]

Whistleblowers tend to be good problem solvers with good cognitive skills.[316] They are people who have a strong sense of right and wrong,[317] who possess a "strong sense of individual responsibility,"[318] and who are "socially responsible."[319] Whistleblowers tend to be intense, committed, and uncompromising people, often to the point of being rather rigid.[320] Because blowing

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312. Jos et al., *supra* note 266, at 556 (indicating that 78% of all whistleblowers are male and 90% are white). Many of the surveys of whistleblowers were conducted before the impact of the 1986 amendments to the FCA had been realized and fail to take into account the major changes in whistleblowing that these amendments have caused. *Cf.* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.04, at 1-19 to 1-20 (2d ed. 2001). Because of the support system that the FCA now provides for whistleblowers through the U.S. Department of Justice, and because of the large monetary rewards the FCA makes available for whistleblowers, the FCA substantially empowers the individual whistleblower. *Id.* This changed landscape makes it likely that the demographics of who becomes a whistleblower are changing. For example, it is more likely that lower-level employees and other typically marginalized workers, such as women, become whistleblowers today than prior to the amended FCA. *Id.* It is also likely that current whistleblowers are motivated less by duty and a sense of what is right, and more by the possibility of a lucrative award. *Id.* Given the complexity of the conduct at issue in FCA cases, it is likely to remain true that whistleblowers are individuals with excellent problem-solving skills, significant cognitive abilities.

313. Jos et al., *supra* note 266, at 556 (reporting that 62% of whistleblowers received at least a bachelor's degree); *cf.* MICELI & NEAR, *supra* note 264, at 134 (finding that a higher education positively correlates to whistleblowing).

314. Jos et al., *supra* note 266, at 556 (recounting that 48% of whistleblowers held a managerial position and that a majority of the group exercised significant discretion and occupied positions that gave them knowledge of significant policy decisions); MICELI & NEAR, *supra* note 264, at 134–35, 174 (suggesting that supervisory status is associated with whistleblowing).

315. Taylor, *World of Whistleblowers*, *supra* note 286, at para. 17.

316. MICELI & NEAR, *supra* note 264, at 103–04 (concluding that the cognitive skills arise from a high tolerance for ambiguity, which creates the ability to recognize wrong doing).

317. Jos et al., *supra* note 266, at 558 (describing whistleblowers as having absolute moral standards, a strong sense of individual responsibility, and a fierce commitment to upholding moral principles); Taylor, *World of Whistleblowers*, *supra* note 286, at paras. 16–17 (observing that a consistent denominator among whistleblowers is their ethic-driven reason for going public, despite the retaliation, for the pursuit of a greater good).

318. Jos et al., *supra* note 266, at 558.

319. *Id.* at 556 (defining social responsibility as finishing tasks started and doing the best job possible).

320. *Id.*; Smith, *Whistle-blowers*, *supra* note 261, at C8 ("[Whistleblowers] believe in

the whistle defies social norms, whistleblowers tend to be less responsive to social cues than most people.[321] They also tend to score somewhat below the norm in self-esteem.[322] They generally are loyal to their employers and have faith that their employers will remedy problems brought to their attention.[323] Persons who become whistleblowers feel betrayed when their employer does not respond appropriately to the problem.[324]

The whistleblowers a public regulatory system needs are insiders in every way: professionally, emotionally, and psychologically. They are loyal to their company and profession, not to government regulators.[325] Because they tend to be highly skilled and well-placed in their organization, whistleblowers incur greater risks and take more convincing to cooperate with regulators than do employees whose skill and corporate position are more fungible.[326]

Professors Marcia Miceli and Janet Near have developed a theory of "power-dependence" regarding whistleblowers.[327] They

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universal moral values and won't budge. That means they're kind of rigid. They won't make up rules as they go along. They are not good politicians. They don't compromise.").

321. Jos et al., *supra* note 266, at 557. Whistleblowers overwhelmingly—91% of the 161 surveyed—scored low on Mark Snyder's scale of self-monitoring, which measures responsiveness to social cues. *Id*. at 557 n.8. A low score indicates little behavior differences in different situations, indicating an unwillingness or inability to be "flexible in . . . presentation of self, and in different social settings [to] act like very different people." *Id*. at 557; Mark Snyder & Steven Gangestad, *On the Nature of Self-Monitoring: Matters of Assessment, Matters of Validity*, 51 J. OF PERSONALITY & SOC. PSYCHOL. 125, 125 (1986).

322. *Compare* Jos et al., *supra* note 266, at 557 (noting that the whistleblowers studied "scored somewhat lower than the norm on Rosenberg's . . . measure of self-esteem"), *with* Janet P. Near & Marcia P. Miceli, *Organizational Dissidence: The Case of Whistle-Blowing*, 4 J. BUS. ETHICS 1, 8–9 (1985) (observing that people with low self-esteem might be less likely to be whistleblowers than people with adequate self-esteem).

323. *See* Near & Miceli, *supra* note 322, at 10. As Professors Near and Miceli explain:

> The great majority of corporate whistle-blowers considered themselves to be very loyal employees who tried to use "direct voice" (internal whistle-blowing), were rebuffed and punished for this, and then used "indirect voice" (external whistle-blowing). They believed initially that they were behaving in a loyal manner, helping their employers by calling top management's attention to practices that could eventually get the firm in trouble.

Id.

324. *Id*.; *cf.* James S. Bowman, *Whistle Blowing: Literature and Resource Materials*, 43 PUB. ADMIN. REV. 271, 271 (1983) (suggesting that society's erosion of large institutions has weakened employees' unquestioning loyalty to employers).

325. *See, e.g.*, Near & Miceli, *supra* note 322, at 10.

326. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.74).

327. MICELI & NEAR, *supra* note 264, at 66–71; *see also* Jose C. Casal & Sheldon S. Zalkind, *Consequences of Whistle-blowing: A Study of the Experiences of Management Accountants*, 77 PSYCHOL. REP. 795, 795–98 (1995) ("Employees who occupy high levels in the organization and those whose roles require the reporting of wrongdoing are relatively powerful because they have been granted authority by the organization and also because

argue that individuals who feel that they have power within an organization are more likely to become whistleblowers.[328] Professors Near and Miceli note the following factors as empowering individuals within an organization, thus making it more likely that an individual will become a whistleblower: position in an organization; chances for alternative employment; support from superiors;[329] and special expertise or charisma.[330] Most whistleblowers receive support, both social and financial, from family and friends or tend to believe they have employment options.[331]

Most whistleblowers say they would blow the whistle again despite the hardships they encountered. In a study of thirty-five whistleblowers, twenty-three said they would do so again; six said they would not; six were unsure.[332] In another study of 161 whistleblowers, 81% reported that they would blow the whistle again if given the chance.[333]

The characteristic that appears to dominate in the "whistleblower personality profile" is a strong sense of right and wrong.[334] To whistleblowers, doing the right thing is important. This is affirmed over and over as whistleblowers speak:

- "[It] was not just a legal issue; it was an ethical one as well. That money should have been spent protecting soldiers."[335]

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their status offers them greater credibility.").

328. MICELI & NEAR, *supra* note 264, at 71 ("[O]rganization members who are uninfluential and independent . . . are probably unlikely to blow the whistle—why should they do so? They are unlikely to bring about change and if conditions are distressing they can leave . . . .").

329. *Id.* at 66–71.

330. *Id.* at 70.

331. Casal & Zalkind, *supra* note 327, at 796 (theorizing that possessing alternative job opportunities decreases the employee's dependence on their employer and increases the employee's power relative to the employer, thus making it more likely the employee will blow the whistle); Near & Miceli, *supra* note 322, at 10 (finding workers with social or financial support from family or friends more likely to blow the whistle, and citing one report that found virtually every whistleblower received support from family or friends).

332. Lennane, *supra* note 258, at 669.

333. Jos et al., *supra* note 266, at 554–55 (reporting one survey of whistleblowers in which 81% of those surveyed would have done what they did again, and 87% "indicated that they would blow the whistle again if presented with a similar situation in the future").

334. *Id.* at 556–57.

335. Vincent J. Schodelski, *Whistle-blowing Hits Chord*: *Former FMC Corp. Employee to Receive $2.86 Million in Settlement*, CHI. TRIB., Oct. 23, 1996, at N3 (quoting Robert Neargardler, a defense contractor manager, who explained why he blew the whistle on his employer who was overcharging the government).

- "I don't want to see people die."[336]
- "It bothered me even if only one person should die or be disfigured because of something that I was responsible for."[337]

Several points become clear from this personality profile. First, the insiders who have truly helpful information are insiders in the truest sense. This means that the enticement needed to come forward and reveal information of wrongdoing to government regulators should be greater, much greater, than that typically provided to the individuals with whom law enforcement is accustomed to dealing for inside information, namely, those who are complicit in the wrongdoing and are willing to provide information in exchange for favorable treatment regarding their liability. The second point is that whistleblowers come forward, in part, because doing the "right" thing is important to them.[338] This means that the "package" of compensation to insiders should include approval and respect for the whistleblowing role they have undertaken. The third point made clear from this personality profile is that insiders must feel empowered before they will come forward.[339] One could surmise this simply from the costs a whistleblower is likely to incur; it only stands to reason such persons would need to feel that they have the ability to withstand hardships that may come their way. But there is another reason for this feeling of empowerment. Whistleblowers, especially those who have the knowledge, position, stature, and ability to perceive complex wrongdoing that is hidden and concealed within an organization, are take-charge people.[340] It is important to them, because of the kind of people they are, to feel empowered. In summary, the lesson for the regulatory world that seeks to entice whistleblowers, is that the package of compensation needed to attract whistleblowers needs to include the following tangible and intangible components if the regulatory world wishes to purchase inside information: societal approval of whistleblowers, support from regulators and from private sources, public access to information, and financial remuneration.

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336. Smith, *Whistle-blowers*, *supra* note 261, at C8 (quoting Charlie Coffield, a federal mine inspector explaining why he blew the whistle on payoffs to other inspectors who were certifying unsafe coal mines).

337. Glazer, *supra* note 289, at 36–37 (quoting Frank Camps, a senior principal design engineer at Ford Motor Co. who helped design the Pinto automobile and who blew the whistle on design defects and on falsified safety testing at Ford).

338. *See* Jos et al., *supra* note 266, at 556–57.

339. *See* MICELI & NEAR, *supra* note 264, at 66–71.

340. Jos et al., *supra* note 266, at 557.

1. Promoting the Social Value of Serving the Larger Community. As Professors Robert Frank and Phillip Cook note, "the recognition and approval of others is a profound source of human satisfaction."[341] For whistleblowing to be socially acceptable, the value of loyalty and service to the larger community must be viewed as paramount to the value of loyalty to one's community close at hand, that is, one's company or industry. There are competing dynamics for these loyalties.[342] On the one hand, for many in today's transient world, one's place of employment is one's community.[343] Increasingly, America is made up of single-person or two-career families who commute long distances and have few, or no, children.[344] This makes it less likely that the neighborhood is one's community.[345] As Professor Robert Putnam has stated:

> Professionals and blue-collar workers alike are putting in long hours together, eating lunch and dinner together, traveling

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341. ROBERT H. FRANK & PHILIP J. COOK, THE WINNER-TAKE-ALL SOCIETY 113 (1995).

342. *See* FLETCHER, *supra* note 289, at 10, 151–75.

> In the United States and indeed in virtually every modern culture, we are members of multiple groups that demand our loyalties. A typical American is a member not only of a family but of an ethnic group, a profession or trade, a particular firm, a church or religious community, the alumni circles of high school and university, and perhaps an amateur athletic team or the fan club of a local hockey or basketball team. Add to this list the special loyalties of veterans and the politically active, and you generate a picture of the typical American caught in the intersection of at least half a dozen circles of loyalty attachment.

Id. at 155.

343. ALAN WOLFE, ONE NATION AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER 250–63 (1998) (suggesting that civic participation has not declined in America in the past few decades but has switched much of its emphasis to the workplace).

344. *See* ROBERT D. PUTNAM, BOWLING ALONE 108, 206–07, 212–13, 277 (2000).

345. *Id.* at 274–75. Professor Putnam's studies suggest that "busyness, economic distress, and the pressures associated with two-career families are a modest part of the explanation for declining social connectedness." *Id.* at 203. Professor Putnam suggests that "suburbanization, commuting and sprawl . . . electronic entertainment—above all television," are also contributing factors. *Id.* at 283. Professor Putnam argues that the largest single factor contributing to the sharp reduction in civil engagement over the past fifty years is the "slow, steady, and ineluctable replacement of the long civic generation by their less involved children and grandchildren." *Id.* at 283. As Professor Alan Wolfe notes:

> Devoid of people during the day, [America's suburban communities] are filled with people sitting in front of television or computer screens in the evenings, too self-preoccupied to live a Tocquevillian life of civic engagement . . . . If there has been an eclipse of community, the cause is the workplace. So great have become the demands of the job that the obligations of the neighborhood have had to give way.

WOLFE, *supra* note 343, at 251.

> together, arriving early, and staying late. What is more, people are divorcing more often, marrying later (if at all), and living alone in unprecedented numbers. Work is where the hearth is, then, for many solitary souls.[346]

Fewer people belong to churches or other community organizations today than two decades ago, making it less likely that these outlets provide a sense of community.[347] As other involvements recede, Americans' commitment to work has increased.[348] Today, American workers spend more hours at work than they did even two decades ago.[349] As Professors Frank and Cook note, "each worker's goal may be to enhance her odds of promotion by working a little longer. . . . People who work reduced hours [relative to co-workers] pay a huge penalty in

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346. PUTNAM, *supra* note 344, at 86.

347. *See id*. at 63.

> Organizational records suggest that for the first two-thirds of the twentieth century Americans' involvement in civic associations of all sorts rose steadily, except for the parenthesis of the Great Depression. In the last third of the century, by contrast, only mailing list membership has continued to expand, with the creation of an entirely new species of "tertiary" association whose members never actually meet. At the same time, active involvement in face-to-face organizations has plummeted, whether we consider organizational records, survey reports, time diaries, or consumer expenditures. We could surely find individual exceptions—specific organizations that successfully sailed against the prevailing winds and tides—but the broad picture is one of declining membership in community organizations. During the last third of the twentieth century formal membership in organizations in general has edged downward by perhaps 10–20 percent. More important, active involvement in clubs and other voluntary associations has collapsed at an astonishing rate, more than halving most indexes of participation within barely a few decades.

Id.

348. *Id*. at 85–87 (noting a transition from "locational communities to vocational communities").

349. *Id*.; FRANK & COOK, *supra* note 341, at 142–43 (estimating that Americans work more in order to improve the chances of promotion or increased income). Professor Wolfe's study of middle-class Americans confirms this sense of pressure and tension:

> Working in this new corporate environment has become so high-pressured, so governed by the ironclad logic of profit-and-loss, that it's hard to know who is better off: those who lose their jobs in the new corporate environment or those who keep them. "The donkeys that are left are carrying two packs instead of one pack," [quoting a retired Chrysler executive]. . . . The competition that was once expected to take place between strongly organized firms now takes place within the firms themselves.

WOLFE, *supra* note 343, at 240; *cf.* FRANCES MOORE LAPPE, REDISCOVERING AMERICA'S VALUES 56 (1989) (noting that the work ethic in America is "alive and well"); Maria T. Poarch, *Ties That Bind: U.S. Suburban Residents on the Social and Civic Dimensions of Work*, 1 COMMUNITY, WORK & FAMILY 125, 127–28 (1998) (suggesting that Americans are overwhelmed by the increased demands of work).

career terms . . . . It's taken as a negative signal about their commitment to their employers."[350]

It is conceivable that on a macro-level, loyalty within the workplace community enhances the health of the national economy. If American workers gain their sense of community from their work environment, confidence in their co-workers' loyalty may be important. A work environment of "I'll-watch-out-for-myself-and-to-hell-with-anyone-else" would be a barren place to be. Such an environment would likely leave its workers unwilling to stick with their employer through rough times, unwilling to perform their best, and generally unhappy about going to work.[351] Absenteeism, depression, and related physical ailments by workers could result.

With America's work-driven lifestyle, it is easy to see why the work environment has become the community for many American workers,[352] and why it may be difficult to re-direct workers' loyalty from work to the larger, anonymous community. Yet, a number of factors can combine to overcome this sense of loyalty to one's work-world. First, modern life is evolving into a global village.[353] Through media and technology, everyone in today's world, especially those in developed countries, are increasingly connected to a global community.[354]

Second, there may be a greater cynicism toward institutions and a greater expectation of participation by workers in the workplace than in prior generations.[355] As one scholar of

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350. FRANK & COOK, *supra* note 341, at 143 (quoting economists Lotte Bailyn and Juliet Schor) (quotation marks omitted); *cf.* PUTNAM, *supra* note 344, at 91–92 (noting factors such as job insecurity and competition among workers that generally prevent one's workplace from providing a rewarding sense of community).

351. Stephen R. Marks, *Intimacy in the Public Realm: The Case of Co-workers*, 72 SOC. FORCES 843, 850 (1994) ("For millions of American workers—approximately half—close friendships are formed among co-workers, 'important matters' are discussed with them, and such discussions are associated with greater job satisfaction."); *cf.* FLETCHER, *supra* note 289, at 6 (discussing the importance of relationships to human happiness).

352. Alan Wolfe, *Developing Civil Society: Can the Workplace Replace Bowling?*, 8 RESPONSIVE COMMUNITY 41, 43–47 (1998) (theorizing that people develop work relationships because they are instrumental in advancing career and business interests); Brenton R. Schlender, *The Values We Will Need*, FORTUNE, Jan. 27, 1992, at 75–77 (noting that the workplace is the primary location for meeting people, spending time, and forming opinions).

353. FRIEDMAN, *supra* note 2, at 7–13 (describing the modern era of globalization); WRIGHT, *supra* note 1, at 209–28 (predicting an era of global governance by bodies such as the World Trade Organization and the United Nations).

354. FRIEDMAN, *supra* note 2, at 142–45 (identifying an "Electronic Herd" as contributing to increased globalization and knowledge of other cultures).

355. PUTNAM, *supra* note 344, at 80–92 (discussing the increase in professional organizations, rather than social ones, from previous generations).

whistleblowing suggests: "[T]he erosion of faith in institutions which weakens unquestioning loyalty to them . . . will contribute to an increase in whistleblowing."[356] This cynicism may well feed the American notion of individualism, causing employees not to go along with their employers if they believe doing so is wrong.[357]

Third, there is tremendous diversity in the American economy that may make it easier for whistleblowers to re-establish or fund new careers. In his study of whistleblowers, Professor Myron Glazer found that after periods of difficulty, disruption and job loss, all of the whistleblowers he studied were able "to rebuild their careers and belief in their competence and integrity."[358] Professor Glazer attributes this rejuvenation to the "diversity of American economic and social institutions [that] provide[] opportunities to those who have dared defy the authority of the established ones."[359]

Fourth, it is American, if not human, tendency to measure worth by material rewards.[360] Large financial awards to individuals who provide helpful inside information not only increase the attention whistleblowing gets and help overcome hardships endured, they also affirm whistleblowing as a worthy endeavor.

Lastly, the harm that an employer could cause the larger community, whether transporting passengers in unsafe commercial carriers, spilling toxins into rivers, or defrauding governments and taxpayers, may be becoming so serious that its very severity renders whistleblowing more morally imperative.

Together, these five factors make it more likely that one's frame of reference and loyalty would be to a larger community beyond one's day-to-day work existence.

2. Responsive Regulatory Response. Regulators must be able to support insiders in several ways: first, by verifying and corroborating the information they provide. While many insiders provide invaluable, accurate information of wrongdoing that focuses exactly on the malfeasance taking place, other whistleblowers are off-base about whether illegality is occurring and who may be involved. Other whistleblowers who may appear to be credible and who are able to offer tantalizingly insightful

356. Bowman, *supra* note 324, at 271.

357. Farnsworth, *Survey*, *supra* note 251, at 3 (quoting Myron P. Glazer).

358. Glazer, *supra* note 289, at 40.

359. *Id.*

360. FRANK & COOK, *supra* note 341, at 113 (noting that people's concerns about status influence income); WRIGHT, *supra* note 1, at 53, 69, 83 (noting that, in general, people are competitive and seek the highest possible status for themselves).

information of egregious wrongdoing are, in fact, paranoid, vindictive, untruthful, or disgruntled employees, former employees, or competitors. Some whistleblowers will be some of all of the above.[361] The point is that a whistleblower's information must be carefully scrutinized. Records will need to be located, financial transactions traced, and cooperation of corroborating witnesses obtained, sometimes by conferring immunity on wrongdoers. In addition, some whistleblowers will need physical protection because they, and their families, will be placed in danger. All of this takes significant resources that are uniquely available to public regulators.

It may be enlightening when thinking about the value of a responsive regulatory response for whistleblowers to consider what happens when there is no such support, which is the experience in many developing countries where there is relatively little whistleblowing. The regulatory system in developing countries is often characterized by low wages paid to law enforcement officials,[362] bribes and payoffs to public officials for participating in illegal activity,[363] nepotism in private and public leadership positions,[364] and danger to public servants who

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361. *The Informant* is a first-rate, gripping story as well as a lesson on how complex and difficult some insiders can be to work with. *See generally* Kurt Eichenwald, THE INFORMANT (2000). This book traces the sequence of events set in place when Mark Whiteacre, a top-level executive at Archer Daniel Midland (ADM), one of America's most powerful companies, blew the whistle on the history of ADM's illegal price fixing and violation of campaign finance laws. *Id*. at 66–68, 135. Whiteacre worked tirelessly with FBI agents, producing valuable information and secretly recording crucial conversations and meetings. *Id*. at 131–40, 239–41. However, as the FBI agents were to learn, during the entire time Whiteacre was cooperating with the government, he was lying and manipulating so as to conceal the fact that he had stolen $10 million from ADM in the past and was still stealing. *Id*. at 62, 102, 111–13, 309–10, 332, 536–38, 543. Whiteacre's lies jeopardized the government's case and resulted in his indictment on forty-five felony counts of wire fraud, tax evasion, and money laundering. *Id*. at 534. Whiteacre received a sentence of nine years' imprisonment and restitution to ADM of $11 million, which was the amount he stole plus interest. *Id*. at 548.

One lesson from this sad tale is that some insiders can be complex and difficult for people to work with.

362. *See* WORLD BANK, HELPING COUNTRIES, *supra* note 131, at 40 (indicating that poorly paid public officials in developing countries contribute to widespread corruption in administrations); *see also* Little & Herrera, *supra* note 151, at 281 (noting that low salaries contribute to judicial corruption); Nickson, *supra* note 133, at 253 (discussing corruption in Paraguay, where three-fourths of public officials are paid less than minimum wage).

363. ROSE-ACKERMAN, *supra* note 130, at 15–17 (suggesting that the system of bribery in developing countries contributes to widespread corruption).

364. ANATOMY OF CORRUPTION, *supra* note 131, at 134, 199 (describing nepotism in the Kenyan government); Nickson, *supra* note 133, at 252–53 (exposing former administrations in Paraguay as awarding public employment based on personal and family connections).

take on corrupt government officials.[365] It is little wonder that prosecutors prefer to ignore insiders' information about corruption.[366] Even if willing to support insiders, however, law enforcement officials in developing countries may not have the resources, expertise, or statutory tools[367] to combat corruption.

A public regulatory system cannot provide all of the support whistleblowers may need however, and this is where the public-private partnership that pervades whistleblowing becomes especially helpful. A public regulatory system will not be able to help much when whistleblowers lose their jobs, suffer financial hardships, or endure personal, family, and physical stresses, if only because it cannot compromise a potential witness with what may appear to be "pay-offs." However, private public interest groups devoted to supporting whistleblowers can provide this kind of support. There are growing numbers of such groups, many started by former whistleblowers, that provide counseling and moral support,[368] legal assistance,[369] practical advice,[370] and

365. *See, e.g.*, Nickson, *supra* note 133, at 257–58. The experience of Colonel Luís Catalino Gonzalez Rojas, the first whistleblower in the Paraguayan armed forces, demonstrates this. *See id.* at 257. Gonzalez publicly accused four generals of taking bribes from smugglers. *Id.* As a result, Gonzalez was arrested on charges of insubordination. *Id.* A civilian judge then ordered Gonzalez released and indicted the four generals. *Id.* After a flurry of media-forced interest in corruption, political in-fighting prevailed, media interest in corruption waned, and Gonzalez was re-arrested on charges of indiscipline, imprisoned in solitary confinement for one hundred days, and forcibly retired. *Id.* at 257–58.

366. ROSE-ACKERMAN, *supra* note 130, at 159. "Although . . . keenly aware of the magnitude of corruption, 22.2% (out of 537 respondents), will not report incidents of corruption to the police. Out of 553 respondents, 78.8% believed the government is not committed to solving the problem of corruption." ANATOMY OF CORRUPTION, *supra* note 131, at 84. "97.6% thought the police are corrupt while 93.5% thought magistrates and judges are corrupt." *Id.* at 164.

367. For example, few countries have adequate laws dealing with computer crimes. In May 2000, much of the computer-literate world was brought to a halt by an e-mail virus containing the subject line, "ILOVEYOU." Lev Grossman, *Attack of the Love Bug*, TIME, May 15, 2000, at 49. The virus "raced around the world at light speed, clogging communications and bringing both commerce and politics to a halt," and caused an estimated $15 billion in damage. *Id.*; Adam Cohen, *School for Hackers*, TIME, May 22, 2000, at 49, 59. Within a week of the virus, a suspect, Onel de Guzman, had been apprehended and admitted that it was "possible" that he had released the virus. Cohen, *supra*, at 59. The suspect was a twenty-three-year-old student in Manila. *Id.* At the time, Manila had no statute covering such computer malfeasance. *Philippine Law on Computer Crimes*, N.Y. TIMES, June 15, 2000, at C4. Within one month, the government passed such a statute. *Id.* Under this law, anyone found guilty of spreading computer viruses can be imprisoned up to three years and fined at least $2,350 or as much as an amount "commensurate with the damage caused." *Id.* (quotation marks omitted).

368. Smith, *Whistle-blowers*, *supra* note 261, at C8 (discussing The Whistle Stop, a safe house of sorts for whistleblowers); Clyde H. Farnsworth, *The Bureaucracy: Aid and Comfort for Whistleblowers*, N.Y. TIMES, Dec. 4, 1985, at A28 [hereinafter Farnsworth, *Aid and Comfort*] (reporting on the growing support network for whistleblowers).

369. Farnsworth, *Aid and Comfort*, *supra* note 368, at A28.

370. *See, e.g.*, *Survival Tips*, *supra* note 266.

financial assistance.[371] A staffer of one such public interest group explained: "There's a definite whistleblower's community out there—and it's growing . . . . We know where to find each other . . . . We know where to go for help. There's a safety net."[372]

3. Public Access to Information. Public access to information is essential if whistleblowing is to succeed. It is necessary for whistleblowers to verify whether their suspicions are well-founded and for others—counsel, support groups, the press—to corroborate the whistleblower's suspicions. The attorney a whistleblower consults must not only verify the whistleblower's allegations, but must also prepare a case based upon the whistleblower's information. Public access to a wide range of information facilitates this. Perhaps most importantly, public access to information is necessary for the press, which can provide critical support and protection for whistleblowers. As one seasoned whistleblower's attorney states, "I believe that media coverage is the single most effective way to blow the whistle."[373] On a broader scale, the press can help publicize the opportunities for and virtues of serving as a whistleblower.[374] Such publicity is critical to nurturing the value of loyalty to the larger community.

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371. *See, e.g.*, Taxpayers Against Fraud (TAF), *at* http://www.taf.org (last visited Sept. 14, 2002). TAF is a nonprofit public interest organization that provides a number of services, primarily educational. *Id*. TAF also seeks to protect the FCA from amendments to weaken it, refers inquiries from potential relators to relators' counsel, and assists relators' counsel in research and strategic preparation. *Id*. In some instances, when the relator is represented by qualified counsel, TAF will provide financial assistance for investigation of false claims. *Id*.

372. Farnsworth, *Aid and Comfort*, *supra* note 368, at A28 (quotation marks omitted); *see, e.g.*, Taylor, *World of Whistleblowers*, *supra* note 286. Taylor, an attorney who blew the whistle on illegality, indiscretion, and mismanagement at the Resolution Trust Corp. (RTC), started a law firm to represent other whistleblowers with the other RTC attorney who blew the whistle over events at RTC. *Id*. paras. 4–5; Aimee L. Stern, *When You Hear That Whistle Blowing: How Trustees Can Reduce the Threat of "Qui Tam" Lawsuits*, 52 TRUSTEE 6, 9 (1999) ("[W]histleblowers themselves are encouraging others to come forward. A leader in this area is Andrew Hendricks, a dermatologist in North Carolina . . . and the relator in a case about fraudulent lab billing that settled for $187 million. Hendricks has launched an antifraud hotline to encourage other health care workers to come forward.").

373. Taylor, *World of Whistleblowers*, *supra* note 286, at para. 28; *see also* Glazer, *supra* note 289, at 39 (asserting that support from the press was instrumental in convincing two Senate staffers to blow the whistle on Senator Thomas Dodd's theft of campaign funds).

374. *See, e.g.*, Stern, *supra* note 372, at 6 ("Awareness of these lawsuits [by potential whistleblowers] has increased dramatically, and the likelihood that an employee will file one is much higher than it was five years ago."). For example, one former whistleblower sees a changing public perception toward whistleblowing, which she attributes to publicity about the service whistleblowers provide. Taylor, *World of Whistleblowers*, *supra* note 286, at paras. 8–9.

Again, the comparison to societies where public access to information is limited helps to see the value of information in encouraging and supporting whistleblowers. As Professor Rose-Ackerman notes: "[C]itizen activists need . . . comprehensive information. [The] [g]overnment must tell them what it is doing by publishing consolidated budgets, revenue collections, statutes and rules, and the proceedings of legislative bodies. Such practices are standard in developed countries, but many developing countries are seriously deficient."[375] American statutes such as financial disclosure laws for elected officials,[376] and the Freedom of Information Act,[377] which makes available information about government policies and procedures, can be helpful in empowering citizens and mobilizing the press.

4. Money. Money, lots of it, is necessary to attract knowledgeable insiders with helpful inside information of complex wrongdoing. It is necessary for three reasons. The first is the impact that significant financial remuneration has on whistleblowers. The possibility of a large financial recovery may help persuade insiders to risk what they must to reveal information needed by public regulators. Perhaps more significantly, because of our status-conscious society, large financial awards help validate that whistleblowing is worthy. Monetary rewards for whistleblowers who "do the right thing" by coming forward enhance the societal value of loyalty to the larger community.[378] Money is not the only thing that will encourage insiders to come forward, of course. Quick regulatory response, easy public access to information, and supportive social values are all part of the mix. In fact, many whistleblowers state that the prospect of a large recovery is not what led them to become whistleblowers.[379] This assertion is quite credible, given the uncertainty of prevailing in any one court case and the hardship a whistleblower will experience before any

375. ROSE-ACKERMAN, *supra* note 130, at 163; *see also* WORLD BANK, HELPING COUNTRIES, *supra* note 131, at 45–46 (encouraging an open and accountable government, stating that "corruption thrives in the dark"); *see also* Roberto Pablo Saba & Luigi Manzetti, *Privatization in Argentina: The Implications for Corruption*, 25 CRIME, L. & SOC. CHANGE 353, 366 (1997) (recognizing the need for transparency in legislative and judicial business to "best safeguard against arbitrary and administrative abuses").

376. *See, e.g.*, 5 U.S.C. § 101 (2000); ALASKA STAT. § 39.50.010 (Michie 2000); CONN. GEN. STAT. ANN. § 1-83 (West 2000 & Supp. 2001); GA. CODE ANN. § 45-10-26 (2002).

377. 5 U.S.C. § 551.

378. Refer to note 260 *supra* and accompanying text.

379. *See* Taylor, *World of Whistleblowers*, *supra* note 286, at paras. 18–19 (arguing that most whistleblowers are motivated by a desire to halt wrongdoing and protect others).

recovery may be realized.[380] Even so, we would be naive to ignore the fact that large monetary rewards get the attention of most human beings. To take one example, in their book *The Winner-Take-All Society*, Professors Frank and Cook trace how America's talented elite historically have been drawn to whatever profession provides the greatest financial remuneration.[381] In short, for better or worse, most of us will follow the money.

The second reason a significant financial remuneration is important in attracting the type of whistleblower the regulatory world needs is that such remuneration gets the attention of the media, which is a major factor in molding our social values.[382] Publicity about honorable employees who blew the whistle on bosses who were lying, stealing, and cheating is gripping copy. Such publicity helps make heroes out of whistleblowers, portrays as honorable those who "team up" with public regulators, and spreads the word to other potential whistleblowers the avenues available for them.

Lastly, significant monetary rewards get the attention of the private bar. Private counsel for whistleblowers can and should play a major role in a private justice regulatory scheme, as shown by the experience under the qui tam provisions of the FCA. The FCA's structure rewards careful, sophisticated, extensive preparation on the part of whistleblowers' attorneys.[383] Such use of private resources, rather than government resources, at an early stage in a complex case presents several advantages for a regulatory system. Private counsel can weed out frivolous allegations as well as corroborate, buttress, and organize credible allegations. This can be a huge job given the complexity of many of the cases brought under the FCA. Private counsel's organization of a case not only saves public resources, but also points public regulators in fruitful directions, saving them even more time, manpower, and distraction from other cases.

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380. *Id.* at paras. 7–8 (noting that whistleblowing poses risks and may result in retaliation, but that the legal system is not yet fully consistent, or equipped, to protect the whistleblower).

381. FRANK & COOK, *supra* note 341, at 7 ("[T]he recent wave of multimillion-dollar salaries. . . . have attracted our best and brightest people."); *id.* at 11 (recognizing that when large salaries earned by Wall Street lawyers "are conspicuously reported in the media, bright and ambitious young people naturally ask themselves, 'How can I get a job as a Wall Street lawyer?'").

382. Taylor, *World of Whistleblowers*, *supra* note 286, at paras. 31–32 (describing the media as the most effective means of providing information to large populations in short periods of time).

383. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.56–.58).

But this type of high-quality legal investigation and preparation is expensive, not only in up-front time and costs, but in opportunities lost—the other cases private counsel cannot pursue because she is preparing a whistleblower's case. Private counsel must be willing to take the financial risk that her up-front costs and time will be recouped later. The prospect of a significant financial recovery will encourage private counsel to undertake such a risk. There is another consideration: the kind of information private justice can produce, and the kind of information the public regulatory world most needs it to produce, is of complex, concealed wrongdoing affecting many markets, companies, and individuals. Organizing and corroborating this type of information requires sophisticated legal talent. This talent must be lured away from other lucrative, challenging types of practice. There is competition for the kind of private legal assistance private justice actions seek to attract. The prospect of a significant financial recovery can help direct such talent to representation of whistleblowers.

C. Summary

The words of Joseph Rose, the attorney-turned-whistleblower, are an apt ending to a discussion of the costs, and payment needed, for serving as a whistleblower:

> Gandhi said that noncooperation with evil is as much a duty as cooperation with good; Burke said the only thing necessary for the triumph of evil is for good men to do nothing. Both concepts are . . . expensive.[384]

VI. HOW TO MAKE PRIVATE JUSTICE WORK: A PUBLIC-PRIVATE PARTNERSHIP

Thus far, this Article has argued that wrongdoing committed for economic gain is bad; that the only way to combat such wrongdoing is with information from insiders about it; that the price for such information is high because it is valuable and because the cost is so high for those producing it; and that compensation for such inside information must consist of tangible and intangible components. One might think that this argument leads to the conclusion that a "bounty" system is needed. Under such a system, the regulatory world would pay handsomely for inside information,

384. Glazer, *supra* note 289, at 41.

take the information, and pursue it with standard investigative strategies. Not so. For private justice to be successful, it must provide more. It must provide a continuing public-private partnership whereby regulators and the individuals who provide the inside information work together to fully investigate the wrongdoing. With such a partnership, the whistleblower can continue to provide regulators with information that can focus the investigation and with resources that can supplement those of public regulators.[385]

The following hypothetical helps demonstrate why private justice must do more than attract inside information; it should also foster a public-private partnership where the private individual plays a continuing role with oversight by both the executive and judicial branches of government.

A. The Hypothetical

Assume company *A* is a large, publicly-traded company that has pursued risky and aggressive expansions. The expansions do not work out well and company *A* goes into debt. Company *A*'s executives decide that company *A* cannot afford for the public, or the company's creditors, to know about its debt. These executives fear that if word got out about the debt, creditors would terminate credit-lines, and company *A*'s stock price would drop, making future borrowing almost impossible.

The executives devise a way to hide company *A*'s debt. They create hundreds of partnerships that appear to be doing business with company *A*. Through financial sleight-of-hand, company debt is transferred to the books of these partnerships. Because many of the partnerships are based offshore, where financial records remain confidential, regulators cannot learn about the funneling of company *A*'s debt. Further, company *A*'s financial records will get a clean bill of health from company *A*'s outside accounting firm, which is motivated by lucrative consulting contracts with company *A*, not to examine the financial books carefully. Thus, company *A*'s financial picture appears rosy to creditors, regulators, and the investing public.

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385. The qui tam provisions of the civil FCA, with slight modifications, present an optimal private justice model not only because they encourage knowledgeable insiders with helpful information to come forward, but because they create an ongoing public-private partnership between public regulators and the insider. Bucy, *Private Justice*, *supra* note 4 (manuscript at 1.58–.60).

1. Scenario One. Two of company *A*'s executives have protested all along about company *A*'s practice of hiding the company's true financial state on partnership books. They protest internally, to people who can stop the practice—the CEO, the CFO, and the outside law firm that advises the company. However, their protests fall on deaf ears. These executives decide they must do more. They debate their course of action. Will they be perceived as company traitors if they go to the Securities and Exchange Commission (SEC) or other public regulators? Will the regulators do anything? The executives worry that regulators will not do anything because, they suspect, many other companies are probably engaging in similar financial shenanigans. They worry about what will happen if their "tattling" to regulators becomes public? They worry about getting friends at company *A* in trouble. They worry about getting fired. Because of their concerns, the executives decide not to go to regulators and commit to working harder within company *A* to convince the CEO and others that the company needs to change its financial recording methods. They try harder, but without success. Nothing changes.

With almost no warning, company *A* goes bankrupt with millions of dollars of debt. Its stock price plummets, and the company lets thousands of employees go. Because most employees have filled their company-sponsored retirement funds with company stock, the employees watch their retirement savings vanish along with their jobs.

2. Scenario Two. Assume the same facts about company *A* except that the two company *A* executives who are concerned about company *A*'s accounting practices hear about a federal statute that gives them a cause of action to sue company *A* for financial and securities fraud, not because they have been damaged (and they have not, yet), but because what company *A* is doing hurts the general public. Assume that this statute gives the executives a large percentage of any judgment recovered.

The two company *A* executives get the name of an attorney who handles whistleblower cases under this statute. They meet with the attorney, who explains how the statute works and what risks there are in suing under it. The attorney is a former federal prosecutor and has many years of experience in prosecuting financial fraud. She is familiar with all of the SEC rules and regulations the executives know about, and more. The executives express some of their concerns. What if they are found out? What if they get fired? What if everyone they know and have worked with

for years views them as traitors? The attorney acknowledges their fears and confirms that those things may happen. She gives the executives the names and addresses of similarly-placed executives who have blown the whistle on wrongdoing. These individuals are available to talk about the executives' concerns. After they leave the attorney's office, the executives contact the whistleblowers the attorney told them about. They talk a long time. The experienced whistleblowers tell the company *A* executives of financial and other support available for them as whistleblowers through private groups, such as public interest law firms.

The company *A* executives decide to work with the attorney to prepare a lawsuit. They meet often and tell her everything they know. The attorney and her firm investigate the case and are able to corroborate much of what the executives say. The attorney prepares a lengthy, comprehensive report of all information and presents it to the DOJ. The DOJ, working with the SEC, decides to join the executives, as plaintiffs, in bringing the case. The DOJ lawyers and investigators are able to move their investigation quickly because of the detailed information the executives have provided and continue to provide information to the DOJ about the partnerships to examine and company *A* personnel involved. The company *A* executives, whose identity as whistleblowers remains confidential during the investigation, remain employed at company *A*. As such they are privy to developing information that impacts on the investigation. For example, one of the executives learns that several deals are in the works to jump-start the company. These deals involve removal of major sums of the money remaining in company *A* accounts. The executives relay this information to the DOJ, and the DOJ moves immediately to obtain court orders freezing company accounts, thereby protecting what is left. Soon thereafter, the whistleblower lawsuit is publicly filed by the company *A* executives and the DOJ. Company *A*'s stock drops, but not as much as it did under Scenario One. Company *A* still declares bankruptcy, but it is able to reorganize, pay many of its creditors most of what is due, stabilize its stock price, and preserve much of the investment in its employees' 401(k) retirement funds.

3. Scenario Three. Assume the same facts about company *A* as in Scenario One. Assume also that the company *A* executives have decided to file the lawsuit and have worked with a private lawyer to prepare the comprehensive report. With their attorney, they present their report to the DOJ and the SEC. After meeting with DOJ and SEC lawyers, nothing happens. Apparently, there is concern within the Administration that certain events that have

transpired must be looked into before the DOJ can move forward in any investigation of company *A*. One such event is that a highly-placed person in the current Administration apparently assisted company *A* by applying considerable pressure on a foreign government to pay company *A* for a project the company recently worked on in that country. Company *A* has expressed its gratitude by making large campaign contributions to the current Administration and by promising to make more contributions.

Time passes, the DOJ and the SEC investigations are put on hold, and these events are considered by various Administration officials. The company *A* executives and their attorney become concerned as they watch company *A* engaging in risky ventures as it tries to recoup its losses. Company *A* continues to hide its ever-increasing losses on partnership books. The executives become even more alarmed when they learn that the CEO and other highly-placed company *A* executives are selling off their personal holdings of company *A* stock.

The executives and their lawyer decide to go to the press. Because the attorney is not willing to reveal the names of the whistleblowing executives at this time, the newspaper must corroborate the information the attorney has provided. With mountains of information publicly available, the newspaper is able to quickly obtain the corroboration it needs. It publishes the story. Because of company *A*'s size, the story generates significant publicity. Suddenly, the DOJ is moving again on the case. The DOJ obtains a court order and freezes company *A*'s bank accounts. There are assets in the accounts, more than was left when company *A* declared bankruptcy in Scenario One, but less than when the DOJ seized the assets in Scenario Two. Company *A* still declares bankruptcy and reorganizes, but there are fewer assets available to pay creditors or stabilize stock prices than in Scenario Two.

B. Lessons About Private Justice from the Hypothetical

The lessons from this hypothetical are simple. First, for private justice to work, people need to know about it as a regulatory tool. Information about the whistleblowing options will not be in the company handbook. Rather, the press and social networking likely will be the key way the public learns of such options. Second, pursuing a private justice remedy as a whistleblower needs to be personally palatable and socially acceptable. People who know or read about others who have blown the whistle, and have been treated well for doing so, will be more likely to do it themselves. Again, the press will play a

large role in this culturalization. Third, whistleblowers need incentives to undertake the risks of coming forward. The prospect of a significant financial reward can help persuade insiders to come forward, as can encouragement and public and private support if job loss or social and professional ostracism results. Fourth, whistleblowers need their own, experienced counsel. In Scenarios Two and Three, private counsel played an important role—connecting the executives to support avenues, preparing their case, and counseling them when cover-up occurred. Counsel knew what to do with the executives' information—how to complete it, corroborate it, package it, and who to take it to. Fifth, the executives' information was invaluable to public regulators. In Scenario Two, the executives not only alerted regulators to wrongdoing of which they were unaware but were also able to provide direction to regulators as they investigated the situation and decided on strategy. Information about the partnerships, the significant players, and the dissipation of company assets likely would not be available without insiders. Sixth, continued involvement by insiders and knowledgeable counsel is necessary when, and if, public regulatory efforts stagnate, for whatever reason.

VII. CONCLUSION

To function effectively, a regulatory system needs certain essential components: a set of commonly accepted values or rules; personnel and methods of persuasion for enforcing these rules when necessary; and information about wrongdoing that has taken place. If public regulators have no information about wrongdoing and no way of getting such information, a regulatory system cannot operate. It will not have anything to regulate, and self-help will replace public regulation.

There is nothing new about the need for these three components. These essential ingredients of a regulatory system are as old as society itself. What has changed in recent years is the nature of the wrongdoing the regulatory world seeks to control. Because of the information revolution created by computerization and the interconnectedness resulting from globalization, massive fraud, and corruption and graft of every kind are easier to commit and harder, if not impossible, to detect. More ominously, the impact of such wrongdoing is more pervasive and more cataclysmic than ever before. In short, the stakes are higher.

This new world requires a more effective regulatory response. An indispensable component of such a response is information from

knowledgeable persons about the wrongdoing committed by others for economic gain. Without such information, public regulation is doomed to too little, too late, and too expensive in public resources. The regulatory world must recognize that such information is an essential commodity and must be willing to pay adequately for it. The compensation package needed to "purchase" inside information consists of four components: a responsive regulatory system that is able to work with insiders; public access to information; supportive cultural values; and a significant monetary reward.

An effective regulatory system recognizes the need for such inside information and the value of an appropriately designed private justice mechanism in producing inside information. Private justice is expensive, but there is no choice. Because the scarce, but essential, commodity of inside information about complex, hidden wrongdoing can be delivered by private justice, failing to incorporate it into a public regulatory system is even more expensive. It is time to embrace private justice.