The New Policing of Business Crime
Rachel E. Barkow*
departments have emphasized a greater police presence to increase the perception of orderliness.\textsuperscript{5} Increasing the perception of order in some places has meant aggressive enforcement of so-called quality-of-life crimes, such as prohibitions on aggressive panhandling, unlicensed vending, public drunkenness, turnstile jumping, or graffiti. In an effort to target youth crime, other communities have turned to anti-loitering or anti-gang ordinances, youth curfews, or reward programs for people who turn in gun possessors.\textsuperscript{6} For some departments, more police stops and frisks are the key to order maintenance.\textsuperscript{7}

Another key approach grouped under the new policing heading has been a turn to community policing. Many departments began to place great weight on improved interactions and partnerships with the community to figure out the community’s priorities and how best to address them.\textsuperscript{8} This interaction could take the form of more officers walking a beat, regular community outreach meetings, or more authority vested in the beat cop as opposed to centralized police management.

Still another facet of the new policing emphasizes the use of data and intelligence to identify hot spots or key criminal actors in an effort to improve the deployment of resources. The NYPD, for instance, uses satellite imagery and computerized data analysis, known as CompStat, to identify zones of high crime density, unearth trends and patterns, and then develop a proactive policing strategy that responds to what the data reveals.\textsuperscript{9} For example, the NYPD’s Operation Impact takes discrete hot spots – some as small as a single housing development – and

\begin{itemize}
  \item \textsuperscript{5} George L. Kelling & Catherine M. Coles, Fixing Broken Windows: Restoring Order and Reducing Crime in Our Communities 38-69 (1996).
  \item \textsuperscript{6} Meares and Kahan, Law (and Norms of) Order in the Inner City, supra note XX, at 819-825.
  \item \textsuperscript{7} Heymann, supra note XX, at 429. The latter two approaches are often intertwined, as police in some places use “vigorour enforcement of petty offenses [to permit] them to conduct more weapons searches, and thus to remove guns from the streets and deter people from carrying guns in the first place.” Livingston, supra note XX, at 590.
  \item \textsuperscript{8} Livingston, supra note XX, at 575 (describing community policing). The federal government will provide financial assistance to increase the number of police in a community for departments using community policing, so departments have had a financial incentive to shift strategies. 42 U.S.C. § 3796dd (1994).
  \item \textsuperscript{9} Keith Harries, Mapping Crime: Principle and Practice 80 (1999).
\end{itemize}
“floods” the area with a large police presence. Boston’s police force uses computerized analysis of reports and investigations to identify particularly dangerous individuals in communities so those individuals can be swiftly punished when they transgress.

New policing in the street crime context has not gone without criticism. Some of the tactics associated with the new policing – particularly aggressive stop-and-frisk tactics – have come under fire for their disproportionate impact on communities of color. And although new policing techniques have been associated with reductions in crime, critics have questioned the extent of that relationship. Skeptics of the new policing have further argued that even if it reduces some crimes, the approach involves costs greater than the benefits, particularly because the impact of heightened enforcement of misdemeanor and quality-of-life offenses falls disproportionately on minority and economically disadvantaged individuals and because the tactics may undermine the legitimacy of the police, which in turn reduces the cooperation of the

10 M. Chris Fabricant, War Crimes and Misdemeanors: Understanding “Zero-Tolerance” Policing as a Form of Collective Punishment and Human Rights Violation, 3 Drexel L. Rev. 373, 384 (2011). CompStat is also associated with a management system that assembles all precinct commanders in one meeting to create social pressures and motivators for commanders to promptly respond to adverse changes in crime statistics. Heymann, supra note XX, at 431.

11 Heymann, supra note XX, at 414.


13 Heymann, supra note XX, at 418; Dorothy E. Roberts, Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement, 34 U.C. Davis L. Rev. 1005 (2001); Gary Stewart, Note, Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions, 107 Yale L. J. 2249 (1998). But see William Stuntz, Race, Class, and Drugs, 98 Colum. L. Rev. 1795 (1998) (arguing that because racism can also result in underenforcement of the law, the motivations may be more complicated, perhaps informed by paternalism, and pointing out that poor neighborhoods with high crime are the most cost-effective places to police).
community in fighting crime.\textsuperscript{14} Scholars have created a rich literature that seeks to identify which aspects of the new policing are worth embracing and which aspects require reform.\textsuperscript{15}

But just about all the attention to new policing techniques thus far has focused on street crime. It is not hard to understand why. The new policing is largely an outgrowth of the “broken windows” theory that calls for an aggressive response to signs of disorder; thus it is quite literally the broken window seen from the street and other tangible signs of neglect in a community that prompted the development of these new strategies to tackle order maintenance in communities.

Crime, however, is not limited to the streets. Business crime has been a significant problem in the United States.\textsuperscript{16} Indeed, by some measures, it is on rise and an increasing source of concern for the law enforcement. Just as the spike in street crime in the 1980s prompted new policing strategies, the growth in business crime is beginning to spur a change in policing tactics in this context as well. And some key enforcement actors in the business crime context have turned to the new policing of street crime for inspiration.

The central goal of this article is to describe the burgeoning turn to new policing techniques in the business crime context and to offer some initial thoughts on the promises and limits of the approach. Part I begins by explaining the traditional or “old policing” of business crime. After an initial strategy that focused on pursuing individuals, the government turned its attention to the organizations where those individuals operated. It increased the sanctions for


\textsuperscript{15} See, e.g., Anthony A. Braga & Brenda J. Bond, Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial, 46 CRIMINOLOGY 577, 599 (2008) (noting that while cleaning up a trouble spot has been found to reduce calls to the police, more aggressive misdemeanor arrests did not produce crime-prevention gains).

\textsuperscript{16} Defining white collar crime is not a straightforward task. In this article, I am focusing on crime that (1) occurs in a legitimate occupational context; (2) involves the attempt to acquire or the acquisition of money, property, or business advantage; and (3) is not characterized by physical violence.
violators, and sought to target companies in an effort to prompt them to adopt internal compliance programs. The focus on company compliance programs was designed to change corporate norms, so it shared with the broken windows theory a focus on norms. This policy did not, however, stop enormous corporate frauds or an economic meltdown that many believe depended on illegal activities.

The response, Part II argues, is that we are embarking on a new era in policing business crime that, like the new policing of street crime, aims to be more proactive. And like its street crime counterpart, business crime policing is pursuing different approaches.

One approach relies on intelligence-led methods that use extensive data analysis to target problematic areas and actors. The Securities and Exchange Commission, arguably the most important entity policing financial crime, is the key actor pursuing this strategy. It established the Office of Market Intelligence, a central repository for all complaints and data analysis. And it has dedicated, specialized units to interpret data in particular contexts with the aim of identifying white collar hot spots and actors that merit closer scrutiny. It has also recently passed a rule to make it easier for the agency itself to identify wrongdoing – instead of relying solely on complaints and tips supplied by others – by creating a uniform audit trail.

Another approach to new policing in the business crime context follows a different blueprint and is akin to those street crime methods that aim to change social norms. The Department of Justice, the country’s chief prosecutor of financial crimes, is taking a more active role for itself inside companies, at least those that have already demonstrated a propensity for wrongdoing. Deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) are now pervasive, and the content of these agreements reflects a new, more aggressive approach to policing wrongdoing that goes beyond the compliance programs of the old policing. For
example, the government now routinely installs monitors who report what they see and hear directly to the government. Thus instead of relying on the company to report violations and reacting to it, the government now proactively seeks to identify problems through the use of an agent it has installed in the company. The government has also ordered changes in personnel and company business practices, thus placing itself in charge of changing norms.

Another effort to change norms involves the increasing use of wiretaps to investigate insider trading. Although that particular policing technique is not necessarily proactive and can be used reactively to investigate a reported instance of abuse, the Department of Justice has used it in the spirit of the new policing paradigm. Market participants and the public share the view that insider trading is commonplace, so the absence of prosecutions sends a message that the government does not care. It is thus analogous to the broken window that no one fixes. The message sent is that disorder is prevalent, which in turn erodes the social norms that help constrain criminal conduct. Wiretaps seek to alter that perception by suggesting the government does care – because it is listening.

Thus both civil and criminal actors – the “police” of white collar crime – are beginning to see the value in improved government detection methods and a proactive enforcement approach. The strategies differ, just as they have in the street crime context. But they share in common a shift away from purely reactive methods where private actors take the lead in reporting crime and instead place the government in a proactive role to deter crime.

Part III explores how the new policing techniques in the business crime context are likely to play out. Business crime is different from street crime in fundamental ways that matter for the ultimate success of the new policing paradigm.
I. The “Old Policing” of Business Crime

The policing of business crime was not particularly robust prior to the 1990s. Incentives for misbehavior were strong because of the financial rewards, either directly from the proceeds of the crime, or indirectly because the behavior benefitted the company and therefore improved an individual’s standing within it. The disincentives were relatively weak. These crimes were rarely detected, and even when the crime was discovered, identifying the perpetrator within the organization was often difficult. On top of all that, the sanctions themselves were relatively light.

The enactment of the federal Sentencing Guidelines in 1987 marked a shift in the approach to white collar crime. First, the Guidelines increased the penalties for white collar frauds. Whereas Congress was willing to let the Commission set penalties for other offenses based on historical treatment, it singled out white-collar crimes and drug offenses to be treated more severely. The Senate Report that accompanied the Sentencing Reform Act, which created the Sentencing Commission, observed that pre-Guidelines sentencing practices were “creating the impression” that fines in white collar cases “can be written off as a cost of doing business” and that corporate offenders “frequently do not receive sentences that reflect the seriousness of their offenses.” Fines thus increased substantially, and thousands of white-collar crime

19 Arlen, supra note XX (“[C]orporate crimes often involve actions by many people, and often the person who committed the physical act that constitutes the crime is not the person who made the decision to commit it”).
21 Frank O. Bowman, III, Are We Really Getting Tough on White Collar Crime?, 15 Fed. Sent. R. 237 (2003) (noting that sentences for economic crimes “represent a market increase over those” that were meted out before the Guidelines).
defendants who previously would have received a sentence of probation were sent to prison.\textsuperscript{22}

After judges, prosecutors, and probation officers complained that even those increases were inadequate, the Commission in 2001 further raised sentences for economic crimes causing losses in excess of $70,000.\textsuperscript{23} Today, federal sentences for economic crimes are at an historical high, both in terms of the number of prison sentences and the length of those sentences.\textsuperscript{24}

Second, the Guidelines focused more on organization liability. Before the 1990s, policing organizations was minimal.\textsuperscript{25} Corporate fines were typically negligible, and the government did not insist that the organization cooperate in identifying lawbreakers within the firm or adopt significant changes in operation.\textsuperscript{26} The Sentencing Guidelines fundamentally changed the landscape for entity liability prosecutions. Just as sanctions for individual criminal liability increased, so did sanctions for corporate offenders.\textsuperscript{27} Under the Guidelines, companies can get sentencing reductions if they promptly report violations and cooperate with the government in the investigation of the wrongdoing.\textsuperscript{28} The Guidelines also encourage organizational change by offering reductions for companies that have effective compliance programs\textsuperscript{29} and, for those

\begin{footnotesize}
\begin{itemize}
\item[22] Id.
\item[23] Id.
\item[24] Id.
\item[25] Organizations are criminally responsible for employee acts under a theory of respondeat superior liability as long as the employee has the requisite level of intent for the crime, commits the act within the scope of his or her employment, and does so with the intent to benefit the corporation. \textit{Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanction}, 92 HARV. L. REV. 1243, 1247-50 (1979). Corporations can be convicted even if no individual is charged; the prosecution just needs to show that “some agent of the corporation committed the crime.” Id. at 1248.
\item[26] Mark A. Cohen, \textit{Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990}, 71 B.U. L. REV. 247, 254 (1991) (evaluating fines levied upon corporations between 1984 and 1988 and finding that the median fine (given in 63% of cases from 1984 to 1987 and in 53% of cases in 1988) was $10,000); Jennifer Arlen, Removing Prosecutors from the Boardroom, at 69, in Prosecutors in the Boardroom, supra note XX (noting that corporate fines “were established with individuals in mind” and “were quite low relative to both harm caused by corporate crime and most firms’ ability to pay”).
\item[28] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g).
\item[29] U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (2006).
\end{itemize}
\end{footnotesize}
companies that do not already have an effective program, allowing judges to order companies to create one during a period of court-supervised probation.\textsuperscript{30}

In the Commission’s view, an effective compliance program must “establish standards and procedures to prevent and detect criminal conduct.”\textsuperscript{31} “[S]pecific individual(s) within the organization shall be delegated day-to-day operational responsibility for the program,” and they must report to high-level personnel within the organization\textsuperscript{32} who are responsible for overseeing the compliance and ethics program.\textsuperscript{33} A successful program must involve monitoring and auditing to detect unlawful conduct.\textsuperscript{34} It must also provide for anonymous or confidential reporting by employees and a way for employees to seek guidance about potential wrongdoing.\textsuperscript{35} The program must have incentives to comply with the standards and procedures it establishes and disciplinary measures for non-compliance.\textsuperscript{36} The Guidelines goal with these requirements is to encourage companies to adopt programs that will help them do a better job policing and deterring wrongdoing\textsuperscript{37} and to create a corporate culture of ethical and lawful behavior.\textsuperscript{38}

Other federal government entities share the Guidelines’ view that compliance programs are to be encouraged. The Department of Justice takes the existence of compliance programs into account in deciding whether to charge companies in the first place.\textsuperscript{39} The Department urges

\textsuperscript{31}U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b) (2006).
\textsuperscript{32}Id. at § 8B2.1(b)(2)(B).
\textsuperscript{33}Id. at § 8B2.1(b)(2).
\textsuperscript{34}Id. at § 8B2.1(b)(5)(A).
\textsuperscript{35}Id. at § 8B2.1(b)(5)(C).
\textsuperscript{36}Id. at § 8B2.1(b)(6).
\textsuperscript{39}The Department of Justice’s principles for charging corporations in 1999 listed eight factors for prosecutors to
prosecutors to evaluate the comprehensiveness of the program and scrutinize it closely to make sure “corporate management is enforcing the program” and not “tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives.”40 The goal is to sort “paper program[s]” from those that are “designed and implemented in an effective manner.”41 The Department also takes into account how companies respond when they uncover wrongdoing, looking for “authentic[ ]”corporate cooperation and the prompt reporting of any wrongdoing.42 Other agencies – including the SEC,43 the Environmental Protection Agency,44 and the Department of Health and Human Services Office of Inspector General45 – similarly consider compliance programs in deciding whether to pursue regulatory actions. And many of these compliance regimes are buttressed by expanded statutory duties to report.46


41 Id.
42 Thompson Memo, supra note XX.
46 For example, the Sarbanes-Oxley Act and the SEC regulations promulgated thereunder “now permit lawyers to disclose a client’s ‘material violation’ to the Commission, and failure to do so may carry significant sanctions.” Orly Lobel, Lawyering Loyalties: Speech Rights and Duties Within Twenty-First Century New Governance, 77 Fordham L. Rev. 1245, 1265 (2009).
The basic model, then, largely depends on corporate monitoring and cooperation.47 The company becomes, in Harry First’s words, the “branch office of the prosecutor.”48 Under this policing model, the organization is a key part of the policing strategy, and the hope is that a vibrant compliance program will change the company’s culture. So, like the broken windows theory, the goal is to shift social norms by having companies change from within. But unlike other new policing strategies, the government largely sits in a reactionary position to respond to what the company reports and finds. To be sure, crimes can come to the government’s attention other ways. But even then, a complaint or whistleblower is likely to report a problem or abuse, and the government then reacts to the report. Proactive policing under this model takes place largely within the corporation itself.

The old policing of business crimes thus shares much in common with the old policing of street crime. It is a reactive model where the police largely wait for reports of wrongdoing and then investigate. Any proactive oversight and attempt to change norms takes place by the corporation within the corporation.

II. The New Policing of Business Crime

Despite increasing sanctions and the spread of corporate compliance programs so that they are now ubiquitous,49 business crime has remained a pressing problem.50 In its most recent

47 Orly Lobel, Linking Prevention, Detection, and Whistleblowing: Principles for Designing Effective Reporting Systems, 54 S. Tex. L. Rev. 37, 41-42 (2012) (“As legal regimes have shifted more toward internal forms of self-regulation compliance, administrative agencies have become increasingly reliant on insider reporting.”).
49 Rachel E. Barkow, Organizational Guidelines for the Prosecutor’s Office, 31 Cardozo L. Rev. 2089, 2104 (2010).
50 Quantification of white collar crime remains difficult as a result of its broad scope, evolving character, and nature of enforcement. See RODNEY HUFF, CHRISTIAN DESLIETS, & JOHN KANE, NAT’L WHITE COLLAR CRIME CTR., NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME (2010) (describing challenges to measurement of white collar crime, including the evolution of crime in response to changing technology and markets, and surveys that focus narrowly on a segment of the larger category of crimes); CYNTHIA BARNETT, U.S. DEPT. OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVS. (CJIS) DIV., THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA, (2000), available at http://www.fbi.gov/about-us/cjis/ucr/nibs/nibr_wcc.pdf (describing the competing approaches to defining white collar crime and pointing out
Financial Crimes Report to the Public, the FBI points to steadily increasing financial crime caseloads between 2007 and 2011, and cites insider trading, corporate fraud, and securities and commodities fraud as being on the rise, particularly in the wake of the financial crisis and continuing economic instability.\textsuperscript{51} And serious offenses have occurred at institutions with compliance programs, casting doubt on self-policing as the primary policing strategy.\textsuperscript{52} In addition to the economic crime cases that have come to light, there is a widespread view among the public that the fiscal crisis of 2008 was fueled in part by wrongdoing. A 2010 survey found that a majority of respondents believed financial crime has contributed to the current economic crisis, and nearly half agreed that government is not devoting enough resources to combat business crime.\textsuperscript{53} Many lament that more individuals and corporations, particularly at the largest financial institutions, have not been charged.\textsuperscript{54} This environment set the stage for a new approach to policing business crime.

\textsuperscript{51} See FBI Financial Crimes Report to the Public, Fiscal Years 2010-2011, available at http://www.fbi.gov/stats-services/publications/financial-crimes-report-2010-2011. The report calls insider trading a “widespread problem” that has “plagued the fair and orderly operation of the securities markets.” It notes that Ponzi schemes are being perpetrated on a national level by executives of companies regarded as legitimate, whereas previously such schemes largely affected individual communities. Securities and commodities fraud investigations increased 52\% from 2008 to 2011, a trend the FBI attributes to investors’ attempts to seek alternative investment opportunities in the wake of the continually volatile market. See also Robert Hendin, FBI Cites Spike in Mortgage Fraud, CBSNEWS.COM (Oct. 25, 2010, 6:09 PM), http://www.cbsnews.com/2100-500690_162-4093545.html (citing a 31\% increase in suspicious activity reports (SARs) filed with the FBI in 2007).

\textsuperscript{52} “What might be most astonishing (and disappointing) is that some of the most egregious securities frauds have occurred at institutions with seemingly robust compliance programs – at least on paper.” Preet Bharara, Why Corporate Fraud Is So Rampant: Wall Street’s Cop, CNBC.com, July 23, 2012.


\textsuperscript{54} See, e.g., Peter Schweizer, Op-Ed, Obama’s DOJ and Wall Street: Too Big for Jail?, FORBES.COM (May 7, 2012, 5:36 PM), http://www.forbes.com/sites/realspin/2012/05/07/obamas-doj-and-wall-street-too-big-for-jail/ (criticizing what the author perceives as a double standard at DOJ between small-scale financial fraud, which is frequently prosecuted, and the behavior of the large banks, which has not been); FRONTLINE: The Untouchables (PBS television broadcast Jan. 22, 2013), available at http://www.pbs.org/wgbh/pages/frontline/untouchables/
Both civil and criminal law enforcement officers have started shifting approaches and embracing new policing tactics to combat business crime. Business crime is of course a wide and varied field, thus its police force is similarly wide and varied. It includes substantive area specialists, like the Commodity Futures Trading Commission, and generalist prosecutors responsible for policing frauds and schemes. Everyone from federal banking regulators to state-level insurance commissioners are part of the mix. It is far beyond the scope of this paper to offer a comprehensive list of shifting policing techniques among all possible actors responsible for policing business crimes – or, for that matter, to catalog those pockets (of which there are undoubtedly many) that are pursuing business as usual. Instead, this paper looks closely at two key federal actors that bear primary responsibility for policing the biggest frauds: the SEC on the civil side and the Department of Justice on the criminal. This section first explores changes in the civil sphere before turning to new developments by criminal prosecutors.

A. Regulatory Policing

As Wall Street’s chief regulator, the SEC is arguably the most important cop on the beat looking to protect the interests of investors from business crimes.\(^{55}\) The SEC is also well suited for study because it has been the subject of so much criticism for how it has performed that role. The SEC has suffered stinging rebukes for failing to detect the jaw-dropping Ponzi schemes perpetrated by Bernie Madoff and R. Allen Stanford.\(^{56}\) The SEC’s Inspector General issued a

---

\(^{55}\) Although some state attorneys general, particularly Eliot Spitzer when he was the AG in NY, have pursued large-scale frauds, that depends a great deal on the person holding the office, whereas the SEC is institutionally committed to focus on these issues. Barkow, supra note XX. The FBI also investigates financial crimes, but it devotes few agents to this area, and the numbers have been decreasing since 9/11. Griffin, supra note XX.

457-page report documenting the agency’s missteps and inadequacies in investigating Madoff’s $65 billion scheme. The agency received complaints about Madoff going back as far as 1992 and the IG noted “raised significant red flags concerning Madoff’s hedge fund operations and should have led to questions about whether Madoff was actually engaged in trading and should have led to a thorough examination and/or investigation of the possibility that Madoff was operating a Ponzi scheme.” Instead, however, the SEC “never took the necessary and basic steps to determine if Madoff was misrepresenting his trading.” The result, the NY Times stated, is that “[n]ot since the 1950s, when budget cuts and deregulation defanged the commission, have its stature and influence sunk so low” as it did in the wake of the Madoff scandal. And of course this is on top of the criticisms heaped on the agency for failing to stop or stem the tide of the financial crisis. Critics of the agency are “legion,” with one reader survey from Kiplinger’s reporting that less than a quarter of its respondents believe “the SEC is effective in policing the stock market.”

The SEC took note of the widespread criticism and crisis of confidence in its effectiveness, and it has responded with significant structural shifts in policing “to restore its credibility.” The SEC altered both its institutional design and the manner in which it collects information, all in an effort to improve policing. It remains to be seen whether the new policing

---

58 Id. at 456.
mechanisms at the agency will ultimately pay off – particularly as the agency fights for resources and faces the daunting task of promulgating all the substantive regulations called for under Dodd-Frank. But there is no denying the agency’s approach to policing is fundamentally changing.

1. The Office of Market Intelligence and Specialized Units

The SEC’s Enforcement Division proclaimed that it responded to the Madoff scandal with “its most significant reorganization since its establishment in 1972.” The centerpiece of this reorganization was the creation of a central database for all the tips, complaints, and referrals the agency receives and a new office to analyze the database called the Office of Market Intelligence. OMI has been described as a “point guard” for the agency. Its task is to sift through the data to make the necessary connections between information, conduct preliminary investigations and then assign cases to enforcement lawyers where appropriate. In the phrasing of the initial director of OMI, “it’s the central intelligence office for the whole agency.” It even puts its out a daily “intelligence report” with the hottest tips it receives each day and has installed Federal Bureau of Investigation (FBI) agents within the agency to help sort through the information.

---

63 James B. Stewart, As a Watchdog Starves, Wall Street is Tossed a Bone, N.Y. Times, July 15, 2011, available at http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html (noting that the House Appropriations Committee cut the SEC’s 2012 budget request by $222.5 million so that it equaled the prior year’s budget, “even though the S.E.C.’s responsibilities were vastly expanded under the Dodd-Frank Wall Street Reform and Consumer Protection Act”).

64 As of April 1, 2013, the agency had finalized only 148 of the 398 rulemakings required under the act, with a full 129 of the rulemakings not even yet proposed. Davis Polk, Dodd-Frank Progress Report, April 1, 2013, available at http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/.


68 Id.
This strategy is thus in the very heartland of the intelligence-led policing model.\textsuperscript{69} Having a central clearinghouse means the agency can look for and identify patterns of trouble. For example, during the flash crash of 2010, OMI was able to identify a common issue that came to its attention. Many people who had placed stop loss orders directing their broker to sell when a stock dropped to a certain price thought those orders would act as a sort of insurance policy and would cap their losses based on the “stop” price. While the orders may work that way when the market is functioning normally, that was not possible during the flash crash. The order to sell is computer-activated after the predetermined stop price is reached, and the ultimate price is determined by when the stock actually sells. During the flash crash, prices were falling rapidly and the stop-loss trades could not be made quickly enough, so many investors saw their shares sold at prices well below the stop price. Because OMI was able to trace hundreds of messages with this kind of complaint from its database during the crash, it was able quickly to identify this problem for the Chairman to address.\textsuperscript{70}

The new office structure is also valuable for identifying off market schemes\textsuperscript{71} because no exchange is policing those transactions, leaving it up to the SEC to fill the gap.\textsuperscript{72} It is also useful for frauds associated with microcap securities, an area that did not receive as much attention from the Office previously because scam cases of that nature “did not build careers” and could

\textsuperscript{70} Interview with XY, April 4, 2013.
\textsuperscript{71} Interview with XY, April 4, 2013.
\textsuperscript{72} The SEC has jurisdiction over investment contracts under the Securities Act of 1933, and the Supreme Court has clarified that these contracts are defined broadly as “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.” SEC v. Howey Co., 328 U.S. 293, 298-99 (1946).
get overlooked. OMI is well positioned to identify these cases because they come into the central clearinghouse and patterns emerge more readily.

The SEC also established specialized units in five areas it deemed as “priority” and that involve particularly complex areas of security laws. These units are also dedicated to ferreting out suspicious activities and patterns using their expertise and sophisticated data analysis. One unit will focus on asset management investigations involving investment advisors, hedge funds, and private equity funds. This unit’s Aberrational Performance Inquiry uses risk-based analytics “to analyze performance data of thousands of hedge fund advisers and identify candidates appropriate for examination or investigation.” A second unit targets “large-scale market abuses and complex manipulation schemes.” Using statistical tools like “cluster analysis” and “fuzzy matching,” this unit identifies “suspicious trading patterns and relationships and connections among multiple traders and across multiple securities.” The unit’s methodology has already borne fruit, as enforcement actions have been brought as a result of this research that otherwise would have gone undetected. A third unit sets its sights on structured and new products, such as complex derivatives, credit default swaps, and collateralized debt obligations – the kind of products at the root of the financial crisis. A fourth unit deals with foreign corrupt practices, and a fifth deals with “misconduct in the large municipal securities market and in connection with public pension funds.” Robert Khuzami, the Director of the Division of Enforcement who established these units, explained their creation as responding to the challenge posed by “the

---

73 Interview with XY, April 4, 2013.
76 Protess and Ahmed, supra note __; Khuzami Letter, supra note XX, at 3.
77 Khuzami Letter, supra note XX, at 3 (“Enforcement’s new data analytic approaches already have led to significant insider trading enforcement actions that did not originate from an SRP referral, informant tip, investor complaint, media report, or other external source.”).
complexity and high-velocity pace of innovation in financial products, transactions, and markets” by deploying experts who possess an understanding of these markets and products that will allow them “to adopt a more proactive approach to identifying conduct and practices ripe for investigation.”

Khuzami thus employed the language of the new policing in explaining the SEC’s structural changes, emphasizing the need for proactive engagement. With street crime, it means deeper knowledge of and interaction with communities, coupled with data analysis, either along the lines of CompStat or newer intelligence-led policing models. With financial crime, it means deeper knowledge of the complicated financial products and markets that are used to perpetrate frauds, coupled with the data analysis of OMI. The SEC is thus pursuing a data-based proactive strategy.

2. The Consolidated Audit Trail

The SEC has also sought to improve its policing abilities by prompting the industry to create a consolidated audit trail. Under the current regulatory landscape, the SEC cannot trace trades in one location. Instead

regulators today must attempt to cobble together disparate data from a variety of existing information systems lacking in completely, accuracy, accessibility, and/or timeliness – a model that neither supports the efficient aggregation of data from multiple trading venues nor yields the type of complete and accurate market activity data needed for robust market oversight.78

So, for instance, under this system, if the SEC were to receive a tip about insider trading, they cannot cross-reference all the relevant trades in one database. They have to contact each relevant market center, which may be an exchange, an alternative trading system, or over-the-counter broker-dealers.79 And when something like a flash crash occurs, the SEC cannot rapidly

78 Securities and Exchange Commission, Final Rule, Consolidated Audit Trail
investigate to figure out the triggers. Indeed, audit trails and other sources of market data are the key to most of the SEC’s investigative work and its regulatory agenda.80 “[T]he Commission relies on market data to improve its understanding of how markets operate and evolve, including with respect to the development of new trading practices, the reconstruction of atypical or novel market events, and the implications of new markets or market rules.”81 The lack of a comprehensive audit trail is thus a significant impediment to proactive policing by the agency and hinders its regulatory mission as well.

In the absence of its own comprehensive audit trail, the SEC currently relies largely on the exchanges and national securities associations (“self-regulatory organizations” or SROs) to do market surveillance for insider trading and other abuses.82 Thus, the existing regime puts the SEC in the position of reacting to whatever issues are raised by the SROs or other complainants, and the SEC is thereby limited in setting its own policing agenda. Observers have cast doubt on how effective those organizations are at policing,83 putting pressure on the SEC to assume a greater role.

These concerns prompted the SEC to adopt Rule 613, which creates a comprehensive consolidated audit trail, to put itself in a position to engage in more proactive oversight. The comprehensive consolidated audit trail proposed is “a system capable of capturing a complete record of all transactions relating to an order, from origination to execution or cancellation, and

80 Id. at 22 (noting that audit trails and other sources of market data inform the agency’s priorities for examinations, help the agency “identify patterns of trading and order activity that pose risks to the securities markets and to inform regulatory initiatives, as well as market reconstructions”).
81 Id. at 22.
82 The SROs, in turn, “generally use market data in the form of audit trails to identify potential misconduct in the markets they oversee, including attempts to manipulate market quotations, inflate trading or order volume artificially, or profit from non-public information.” Id. at 21.
83 Lisa Kern Griffin, Inside-Out Enforcement, at 116 in Prosecutors in the Boardroom, supra note XX (noting these organizations have “atrophied” in recent years and become weak players in the policing landscape).
the complete record for an order generated by such a system,”84 including the identity of
customers.85 To pursue the analogy to street crime policing, the consolidated audit trail is a way
for the SEC to gain access to more streets, so its own cops can directly observe the activity there
and analyze the information in a CompStat-like manner to make better use of its resources.

B. Criminal Policing

While business crime can be prosecuted at the local, state, or federal level, “prosecution
of significant white-collar offenses has become the nearly exclusive province of the federal
government.”86 The federal government’s approach to policing those crimes has shifted. It has
used its leverage to bring criminal charges to extract concessions from companies that both make
future policing easier and that amount to substantive regulations. In the Southern District of
New York, the most important prosecutor’s office for business crime because it encompasses
Wall Street, law enforcement is increasingly borrowing from the playbook of traditional police
investigations. The office has extensively used wiretaps to successfully prosecute some of the
biggest insider trading cases in history. And Preet Bharara, the U.S. Attorney for the Southern
District, is also aiming to do his part to change industry norms by engaging in a targeted outreach
to the Wall Street community.

1. Policing through DPAs and NPAs

One of the biggest trends in business crime enforcement in recent years is the use of
DPAs and NPAs in cases against organizations. The agreements grew in popularity after the
collapse of the accounting firm Arthur Andersen in the wake of the government’s decision to

---

84 Securities and Exchange Commission, Final Rule, Consolidated Audit Trail, at 6, n.5.
85 Id. at 19.
86 Bowman, supra note XX. As Bowman notes, local prosecutors focus on crimes that have the greatest direct
impact in their particular communities, so crimes against persons and local property crimes. White-collar offenses
are a lower priority. Many of these white collar cases are also extremely complicated, so allowing federal
prosecutors to focus on these cases takes advantage of the intellectual capital and experience they have developed
with these cases. And finally, these cases often have multi-state effects and victims, further arguing for the federal
government as the primary enforcer of these laws.
charge the company with obstruction of justice. Andersen’s demise made plain that an indictment can have tremendous collateral consequences on employees and shareholders; in Andersen’s case, 75,000 jobs were lost.\(^{87}\) So the government has opted for a different course to expand its options from charging or not charging. It has been pursuing a third way, which is entering agreements with companies that allow them to avoid criminal charges if they agree to terms set by prosecutors. The Department of Justice has reached 233 such agreements since 2003,\(^{88}\) making DPAs and NPAs, in the words of the head of the criminal division at DOJ, “a mainstay of white collar criminal law enforcement.”\(^{89}\) The SEC has started to follow course, adopting the use of such agreements in 2010.

Most of these agreements insist on fines and compliance programs, thus following the blueprint of the Organizational Sentencing Guidelines. But these agreements also contain terms that follow the new policing paradigm and place the government in a more proactive role. Thus, it is noteworthy that in roughly half of these agreements, the government requires the defendant company to install a monitor – often a former prosecutor – to oversee its compliance efforts.\(^{90}\) The monitor then acts as a police officer within the company, reporting what they see and hear directly to the government. Instead of relying on the company itself to report violations – the old policing paradigm – installing a monitor gives a government agent access to the inner workings of the company. It is analogous to the beat cop leaving his patrol car to interact with citizens directly on the street. That vantage point allows for greater surveillance, and makes it easier for

\(^{89}\) Lanny A. Breuer, Speech to the NY City Bar Ass’n (Sept. 13, 2012).
\(^{90}\) Prosecutors in the Boardroom, supra note XX, at 4.
people to report violations.91 In that same vein, some DPAs and NPAs impose greater reporting requirements on companies to make it easier for the government to keep tabs on their behavior.92

Other terms that signify a new approach to policing are requirements that particular individuals in the company be replaced or that specific lines of business or business practices be rejected.93 These kinds of requirements are fundamentally different than a fine or a pledge not to engage in further criminal conduct. These terms go directly to a strategy of changing norms within the organization, either by removing bad apples or eliminating temptations for wrongdoing. Thus, just as an anti-loitering ordinance seeks to take certain actors away from an area, these agreement terms seek to remove certain actors from the company or take actors away from circumstances that may prompt criminal conduct (known in policing circles as situational prevention).94

DOJ explicitly states that it uses DPAs and NPAs as “a force for positive change in corporate culture.”95 Prosecutors are acting as “‘norm entrepreneurs,’ not only setting standards, but also communicating values,”96 precisely the style of the new policing framework.

As noted above, there is a vigorous debate over the effectiveness of broken windows policing strategies in changing social norms so that crime is less prevalent. It is reasonable to question whether this strategy is likely to be any more successful in the business crime sphere.

91 Even some critics of DPAs and NPAs, such as Richard Epstein, concede that monitoring conditions aimed at facilitating continued compliance with the law are appropriate terms for these agreements. Richard A. Epstein, Deferred Prosecution Agreements on Trial at 52, in Prosecutors in the Boardroom, supra note XX.
92 Barkow, supra note XX, at 180 (citing Bristol-Myers DPA that required financial disclosure requirements that exceeded existing legal requirements).
93 See, e.g., HSBC Bank USA, N.A. and HSBC Holdings plc DPA (“HSBC DPA”) ¶ 5h, 5k (Dec. 11, 2012) (terminating certain business relationships and lines of business); Griffin, supra note XX, at 119 (describing other agreements that require CEOs to be removed); Barkow, supra note XX, at 180 (summarizing agreements that regulated the relationship between medical device manufacturers and medical consultants).
94 Heymann, supra note XX, at 423.
95 Filip Memo.
96 Griffin, supra note XX, at 122-123.
Prosecutors, even when they consult with expert agencies like the SEC,⁹⁷ may lack the expertise to know what structural reforms will work at creating greater law-abiding behavior within complicated businesses and industries.⁹⁸ And critics have charged that prosecutors should not be dictating personnel decisions within a company.⁹⁹ Moreover, even if norms within the particular company with the DPA or NPA change, that still leaves the rest of the industry. It is open to question whether changes in one company will have a larger influence on the business community.

But there is no mistaking the theory behind these efforts. They are designed to place the government in a more proactive policing role once a company has shown it is prone to wrongdoing. Instead of leaving the company to fix the problems through a compliance program – a strategy that has proven to be ineffectual at many companies – law enforcement wants a greater role in changing the corporate culture and also identifying future crimes. This model thus shares a common motivating strategy with tactics police officers use to keep close tabs on key gang members, threatening to charge them with even minor infractions. If the companies that have already committed crimes are, in fact, the key actors to watch, the terms of DPAs and NPAs allow the government to watch them more closely.

2. New Tactics in Insider Trading Cases

In the past three years, the business pages have been overflowing with stories about major insider trading cases. There have been 180 civil actions¹⁰⁰ and 71 insider trading

---

⁹⁷ See Garrett, supra note XX; Barkow, supra note XX.
⁹⁸ Jennifer Arlen, Removing Prosecutors from the Boardroom at 63-64, 76 in Prosecutors in the Boardroom, supra note XX. These concerns may be mitigated by the role of expert agencies such as the SEC in helping to establish the relevant terms. See Barkow, supra note XX, at 192-193.
⁹⁹ Cite Epstein, Arlen.
convictions.101 An investigation into Galleon Management is at the center of much of the action. Its founder, Raj Rajaratnam, was convicted after a two-month trial and found by a jury to be the hub of a $63 million insider trading ring.102 Rajat Gupta, the Managing Director of McKinsey, was convicted for feeding inside information to Rajaratnam. But the investigation into Galleon sweeps far broader than even these high-profile cases. The SEC and SDNY prosecutors turned more broadly to “expert network” firms, which “pair hedge funds and industry consultants who, in some cases, offered material, nonpublic information for expensive fees.”103 This inquiry – dubbed “Operation Perfect Hedge” – resulted in 57 criminal convictions since August 2009, and 57 enforcement actions at the SEC in 2011 alone.104

Of course insider trading cases are not new, but a couple policing techniques set these recent cases apart, aside from the sheer number of them. Previously, the typical insider trading case came about because one of the enforcement arms of the New York Stock Exchange or the National Association of Securities Dealers (today consolidated as the Financial Industry Regulatory Authority, or FINRA), noticed suspicious activity around a particular event. Specifically, FINRA would run a computerized program after a spike in trading volume or a significant change in the market price of a stock to identify any suspicious trades. FINRA would then follow up with the companies involved to get a chronology of events leading up to the announcement or event that caused the change in trading, and it would obtain the names of people or companies with access to that information before it was publicly released.

104 Id.
The SEC’s new approach, as noted above, is to do its own data analysis, and its methodology is trader-driven instead of solely event-driven; now the SEC looks for investors who get abnormal returns and “patterns in related trades by a single trader or connected group of traders.”\footnote{Kenneth Herzinger & Mark Mermelstein, On Tap, Los Angeles Lawyer 30, 32 (Apr. 2012).} Khuzami told Congress that the agency is “doing things like canvassing all hedge funds for aberrational performance. Anybody who is beating the market indexes by three percent and doing it on a steady basis, we are going to look for them.”\footnote{Oversight of the U.S. Securities and Exchange Commission’s Operations, Activities, Challenges, and FY 2012 Budget Request, Hearing Before the Subcommittee on Capital Markets and Government Sponsored Enterprises of the Committee on Financial Services, U.S. House of Representatives, 122nd Congress, Serial No. 112-14 (March 10, 2011), at 32.} Whereas prior insider trading cases largely fell in the category of opportunistic insider trading – someone happened to be at the right place at the right time to gain information – the current crop of cases involve firms pursuing a business model of collecting information from corporate insiders.\footnote{Robert Khuzami, Remarks at Press Conference (Oct. 16, 2009) available at http://www.sec.gov/news/speech/2009/spch101609rk.htm.} Given the incentives of that business model, it is not hard to see why the government began a targeted policing operation to look more closely at expert network firms and hedge funds. The results have been impressive so far, with the number of insider cases brought at the SEC up 43 percent, with many of the cases against hedge funds.\footnote{Khuzami Letter, supra note XX, at 4.}

In addition to this shift in focus, there is a second change in technique that varies from the prior insider trading model. The evidence of insider trading under the old model was largely circumstantial and based on inferences. In contrast, many of these recent cases have been built on evidence obtained through wiretaps, a novel approach to business crime investigations.\footnote{Id. ("[T]he government’s use of electronic eavesdropping techniques when investigating this conduct is novel.").} Although that particular policing technique is not part of the new policing paradigm, its use in
the business crime context fits within the theory of the new policing model because it allows prosecutors to go after the broken windows of Wall Street.

To be sure, insider trading is in some sense the opposite of a broken window. Whereas a broken window is problematic because it is a visible “signal that no one cares,” insider trading by definition takes place in the shadows with non-public information. Market participants, however, suspect insider trading is commonplace, so the absence of prosecutions is an analogous sign of neglect to the broken window in plain view. The failure of law enforcement to take action sends the same message that disorder is prevalent, which in turn erodes the social norms that help constrain criminal conduct. Wiretaps seek to alter that perception by suggesting the government does care – because it is listening. Indeed, at Rajaratnam’s arrest, Bharara made this plain, stating that “privileged Wall Street insiders who are considering breaking the law will have to ask themselves one important question: Is law enforcement listening?” The onslaught of cases being brought in recent years is designed to make market

---

10 Wilson & Kelling, supra note XX, at 31.
11 Neal Kumar Katyal has argued that broken windows policing is of limited value in cyberspace because crimes are invisible and no tangible signs of disorder are present.
12 A recent survey of 500 senior finance professionals conducted by the Wall Street Journal found that “39% of respondents believe their competitors are likely to have engaged in illegal or unethical activity to be successful” and 16% “admit they would commit a crime such as insider trading if they thought they could get away with it.” Michael Kinsman, Survey Reveals the Prevalence of Illegal Practices Among Finance Pros, San Diego Reader, Aug. 5, 2012, available at http://www.sandiegoreader.com/news/2012/aug/05/survey-reveals-prevalence-illegal-practices-among/.
13 In a blog post shortly after James Q. Wilson’s death, William K. Black pointed out that applying a broken windows theory to corporate crime requires prosecutions because, in their absence, “businesses or CEOs that cheat gain a competitive advantage and bad ethics drives good ethics out of the markets. These offenses degrade ethics and erode peer restraints on misconduct.” William K. Black, Wall Street’s Broken Windows, New Econ. Persp. (Mar. 4, 2012), http://neweconomicperspectives.org/2012/03/wall-streets-broken-windows.html.
14 Neal Kumar Katyal made a similar observation with respect to the application of broken windows policing to cybercrime, another context where crimes are largely invisible. Neal Kumar Katyal, Criminal Law in Cyberspace, 149 U. Pa. L. Rev. 1003 (2001).
participants – particularly expert network firms – answer the question in affirmative.\textsuperscript{116} If industry participants start to worry that calls may be recorded, or individuals with whom they are speaking could be wearing a wire, they be less likely to seek out inside information. Thus, just as communities that offer rewards for crime tips and the reporting of individuals unlawfully possessing guns hope to encourage snitching and thereby disrupt behavioral norms,\textsuperscript{117} wiretaps aim to do the same thing.\textsuperscript{118} “Part of our job,” Bharara explains, “in exposing these cases is to bring people back to a level of confidence in the market.”\textsuperscript{119}

Bharara has sought to buttress social norms of ethical behavior using another strategy as well. It is obviously not possible for the business crime police force to physically walk a beat to interact more with the relevant community or to erase tangible signs of neglect. Financial crime is too broad and amorphous to lend itself to a targeted approach that mimics the tactics of community policing. And the police force itself is tiny compared to the mammoth industry that requires oversight. By one count, “[t]here are roughly three special agents assigned to white collar crime investigations per industry in the U.S.”\textsuperscript{120} But having the symbolic chief of that force – or the sheriff, as the press seems to prefer\textsuperscript{121} – speak directly to the community is

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{116} Cheryl A. Krause, Defense Strategies and Compliance Issues in the New Insider Trading Environment, Champion 46 (September/October 2012) (noting that “the sheer number of cases brought by regulators,” among other factors, signal[s] a new era in white collar prosecutions”).
\item \textsuperscript{117} Meares and Kahan, supra note XX, at 825.
\item \textsuperscript{118} Whistleblower rewards seek to accomplish the same ends, and the SEC has also adopted a new whistleblower program pursuant to Dodd-Frank’s amendment of the Securities and Exchange Act of 1934 to create Securities Whistleblower Incentives and Protection. See 15 U.S.C. § 78u-6 (directing the Commission to provide monetary awards of 10-30\% of the monetary sanctions collected by the SEC to people who voluntarily provide original information that leads to a successful SEC enforcement action that results in sanctions greater than one million dollars).
\item \textsuperscript{120} William K. Black, Wall Street’s Broken Windows, New Econ. Persp. (Mar. 4, 2012), http://neweconomicperspectives.org/2012/03/wall-streets-broken-windows.html.
\end{itemize}
\end{footnotesize}
designed to achieve some of the same norm-changing ends. Bharara has embarked on an outreach program to Wall Street, speaking about the need to create an ethical corporate culture to Fortune 500 company directors, business groups, compliance officers, securities lawyers, hedge fund associations, and business schools. And he has explicitly drawn a parallel between his talks and “the meetings that cops and prosecutors tasked with addressing the scourge of drug trafficking and violence hold in communities where such crimes persist.” Bharara’s approach has some support in empirical evidence showing that social norms have a greater deterrent effect than formal criminal interventions in deterring corporate misconduct. So if the speeches resonate and help change social norms – admittedly, a big if – they could matter more than the prosecutions.

III. The Politics of the New Policing on Wall Street

Although the broad goals of the new policing approach are the same in street crime and business cases – improving deterrence and detection of crime through proactive policing – there are important differences. While some techniques, such as data generation to locate patterns and “hot spots” of criminality are comparable, others simply do not translate. Law enforcement cannot literally walk a beat or become part of the fabric of the community in the business crime context. Law enforcement has thus sought substitutes, either by seeking virtual access to information in the form of consolidated audit trials or by using surrogates such as monitors to report back what they see and hear within a company.

The biggest challenge is how to change the relevant norms in a corporate environment. This has been far from easy in the street crime context – and criticisms of existing approaches

---

abound; but it may be even harder to identify the right tact for business crimes. While law enforcement seeks to change corporate cultures through compliance programs, whistleblowing, insider trading policing, and other strategies, it is hard to know just how effective these mechanisms are.

In addition to the methodological differences, there are key differences in the nature of the police themselves in each context. And these differences point toward both additional promises and pitfalls with using these proactive strategies in business crime cases.

At the outset, consider the different consequences that flow from the fact that the key front-line police in the context of business crime cases are regulators such as the SEC.

Let’s start with the benefit side of the ledger. A central criticism associated with new policing of street crime is that it gives too much unchecked discretion to police that, in turn, results in discriminatory enforcement. Thus, some scholars have proposed ways to guide and manage that discretion. Debra Livingston, for instance, has advocated for the adoption of internal departmental guidelines and a collaborative process for generating those guidelines to manage exercise of the beat officer’s discretion.125 Although that advice appears to have been largely ignored as it applies to street crime, this kind of oversight is already built into the structure of the administrative state. Indeed, the administrative state was the model for Livingston’s suggestion.

The SEC’s development of the consolidated audit trail provides an illustration of how that difference matters. The audit trail is being developed as part of a notice-and-comment rulemaking process. Thus the SEC asked the industry for feedback on what would be feasible, and that process has already resulted in changes to the Commission’s proposed approach based

125 Livingston, supra note XX, at 659-670.
on comments from the relevant community.\textsuperscript{126} In addition, the Commission is poised to make additional modifications as the process unfolds, depending on how the regulated community responds. Because regulatory police operate within a legal framework that is dedicated to policing the arbitrary exercise of discretion, many of the most pressing dangers associated with new policing techniques in the street crime context are mitigated or absent when it comes to business crime.

There is a second difference between street police and regulators that is harder to characterize as a benefit or a burden: the politics of oversight. In her discussion of mechanisms to control police discretion, Livingston highlighted the role that political oversight could play in the process because the police chief is accountable, either through direct election or because he or she needs to answer to an elected official.\textsuperscript{127} But, Livingston also conceded that the political oversight of police departments has serious limits. Neighborhoods are not homogenous, and different groups may possess different levels of political power. This is particularly true in large urban departments with a wide geographic reach. In these environments, the politicians may pay less attention to the interests of particular subgroups, particularly young people of color who may lack the resources and organization to wield much political power and yet bear the brunt of the order maintenance policing and stops.\textsuperscript{128} So politics is at best an uncertain source of boundaries, and at worst a prompt for overly aggressive policing because the voters with the greatest sway may be willing to accept the curtailment of liberty because their fears of crime are palpable and overwhelming. As Philip Heymann notes, “[t]here is every reason to believe that the great

\textsuperscript{126} For instance, although the Commission initially proposed real-time reporting of data, it shifted to a deadline of 8:00 AM the next trading day. The Commission also provided for more flexibility in the format of how data gets reported to it, and extended the compliance deadline for small broker-dealers. SEC Final Rule Order, at 10-11.

\textsuperscript{127} Livingston, supra note XX, at 654.

\textsuperscript{128} The politics surrounding Chicago’s anti-loitering ordinance in Chicago v. Morales is illustrative of this dynamic. Cite Schulhofer amicus brief.
majority of people in almost every city and the clear majority of those in the neighborhoods most threatened by both insecurity and the risks to civil liberties would, if forced to choose, prefer the new forms of policing” because “[t]he advantages of personal security are that great.” 129 In some cases, the voters are not just relying on others to be the targets of aggressive policing tactics but are willing to be targets themselves. Heymann offers an example where residents of a Chicago housing project were willing to relinquish their right to refuse a search of their apartments without probable cause to gain what they saw as the benefits of that police tactic.130

The political dynamic is different when it comes to business crime. For starters, the fear of disorder in this context is not the fear of an invasion of one’s bodily integrity or physical well-being. Indeed, in most cases, it is not even a fear that one’s own property will be taken away. The driving concern with disorder from inadequately policed business crime is that others gain an unfair advantage and profit as a result. To be sure, it is possible that fears will become greater and more personal, with the public and market participants starting to worry about another financial meltdown prompted by wrongdoing. But that kind of diffuse fear of economic consequences is far removed from the more primal concern about one’s physical safety.

Moreover, it is also important to note who will be the target of more aggressive policing. In street crime policing, community residents are the target population, so they are the ones who decide whether it is worth the tradeoff (whether perceived or real) between liberty and security. In business crime policing, more proactive government policing – or regulation, as the case may be – affects corporate America. And there is no sign that any significant segment of corporate America is eager to have greater enforcement in the name of making the market operate more

129 Heymann, supra note XX, at 454.
130 Id.
fairly. On the contrary, greater regulation and oversight has been resisted by just about all the major players.

And those players are politically well-situated to resist greater enforcement efforts. Whereas the new policing on the street targets largely poor and disadvantaged individuals (particularly young ones) who may have a hard time opposing the practice because of a lack of organization and resources, the targets of the new policing of business crime are powerful enough to place limits on its exercise. The SEC is checked by an organized, well-financed community if it goes too far with new policing techniques. This is particularly true with any approach that relies on new substantive limits in an effort to change industry norms. During his tenure as chair of the SEC from 1993 to 2001, Arthur Levitt claims congressional overseers constantly threatened him with budget cuts if he pursued regulations deemed too aggressive. Indeed, the dominant criticism of the SEC has been that it is too responsive to the industry it is charged with regulating, and that it is captured by it. Critics of the SEC claim that the SEC therefore does not go far enough in policing and regulating the industry.

The politics are somewhat different with respect to the Department of Justice and criminal prosecutors. Criminal prosecutors wield tremendous power, regardless of whether the defendant is charged with a street crime or a financial crime. Several factors give rise to this power. First, because many criminal laws are written broadly and more than one law can be charged in a given case, prosecutors can choose from a menu of options. Second, because these laws often have different sentencing ranges, the prosecutor’s choice of which crime to

---

charge affects the defendant’s sentencing exposure. And because many laws have mandatory sentencing provisions, the prosecutor can often dictate the particular sentence that will apply upon conviction. So when prosecutors bargain with defendants, they can offer to select a law with a more lenient punishment if the defendant pleads guilty and threaten to charge a defendant with a crime that carries a harsher punishment if the defendant opts to go to trial. The only limit on the exercise of this power is that the charge needs to be supported by evidence. The Supreme Court has refused to reject the threat of charging crimes with far more serious punishments as placing an unconstitutional condition on the exercise of the jury trial right.\textsuperscript{135} Third, federal prosecutors gain additional leverage because they can offer sentencing discounts for cooperating with the government and accepting responsibility.\textsuperscript{136} This dynamic applies whether a defendant has committed a business crime or a street crime, and it vests the prosecutor with substantial leverage.

It also applies to corporate defendants. Because the federal standard for corporate liability is itself so broad – companies are liable for any employee crime that is committed within the scope of employment and with the intent to benefit the company – they can easily be charged for employee misconduct. And the threat of punishment is often severe, with some companies facing the loss of a critical license upon conviction or a huge hit in the market if they are publicly traded. Here, too, the result is significant leverage over companies.

This dynamic explains why companies are quick to agree to the terms of DPAs and NPAs, and individual defendants in 95% of cases – whether business or street crime – plead

\textsuperscript{135} Bordenkircher.

\textsuperscript{136} Rachel E. Barkow, The Prosecutor as Regulatory Agency at 178, in Prosecutors in the Boardroom, supra note XX (“Prosecutors typically control downward departures for cooperation, and acceptance of responsibility reductions are usually disallowed when defendants exercise their trial rights or are discounted when defendants wait until too close to the eve of trial before pleading guilty.”)
guilty. Moreover, unlike the SEC, U.S. Attorneys are not part of a regulatory structure that depends on notice and comment rulemaking or judicial review. As a result of lesser oversight, their discretion is greater.

But although they face fewer limits on their discretion than the SEC and have significant bargaining leverage, prosecutors nonetheless operate within a more bounded space than traditional police in the street crime context. For starters, those companies that are particularly significant to the economy — those entities that are “too big to fail” — are shielded to some extent from this dynamic. Prosecutors may not credibly threaten a criminal prosecution of these companies because they are also “too big to jail.” Attorney General Eric Holder recently admitted as much to the Senate Judiciary Committee in a hearing following the government’s decision not to bring an indictment of HSBC despite overwhelming evidence that the company funneled cash to Mexican drug cartels and assisted Saudi banks with ties to terrorists. Holder confessed a general concern that “the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if you do prosecute, if you do bring a criminal charge, it will have a negative impact on the national economy, perhaps even the world economy.”

Even when a target is not critical to the overall economy, it may be the provider of hundreds of jobs and its fate may also affect thousands of shareholders. Lanny Breuer, the former head of the Department’s Criminal Division, was explicit about the relevance of this factor in the government’s charging decisions. In a recent speech he explained that:

In reaching every charging decision, we must take into account the effect of an indictment on innocent employees and shareholders, just as we must take into account the

137 Id. at 178-179.
138 Testimony Mar. 6, 2013.
nature of the crimes committed and the pervasiveness of the misconduct. I personally feel that it’s my duty to consider whether individual employees with no responsibility for, or knowledge of, misconduct committed by others in the same company are going to lose their livelihood if we indict the corporation. In large multi-national companies, the jobs of tens of thousands of employees can be at stake. And, in some cases, the health of an industry or the markets are a real factor. Those are the kinds of considerations in white collar crime cases that literally keep me up at night, and which must play a role in responsible enforcement. "139

There is no similar discussion of collateral consequences to communities when new policing strategies are used in street crime cases. These third-party effects thus play a restraining role in business crime cases that is absent in the street crime arena.

There is another reason to believe prosecutors will not be as proactive at policing business crime as street crime. The business community has greater political power and if it views particular tactics as overly aggressive, it can get powerful overseers to take on the cause. Federal investigative techniques have already shifted in the face of political pressure. Business interests successfully lobbied Congress to put pressure on DOJ to prevent it from requiring companies to turn over attorney-client work product and communications in order to get credit for cooperating with the government. To preempt looming legislation,140 DOJ changed its position. Cooperation credit no longer depends on whether a corporation waive's its attorney-client privilege or produces protected material, but instead rests on the company’s disclosure of facts.141

To say that prosecutors may not police as aggressively as traditional police in street crime cases is not to say that the former will not go too far. For starters, there is no evidence that collateral concerns are at issue in cases against individual, as opposed to corporate, defendants. And even in cases against corporations, the greatest fears of negative effects on third-party

139 Breuer speech, supra note XX
140 Cite The Attorney-Client Privilege Protection Act.
141 Filip Memo.
effects arise from the consequences that flow from a criminal indictment. DPAs and NPAs do not produce the same effects, thus prosecutors can be aggressive in demanding concessions in that context, as long as their threat to bring criminal charges is not completely ephemeral such that defendants call their bluff and refuse to agree to the terms of the DPA or NPA.

In cases involving individuals, there is also reason to doubt that new policing techniques in business crime cases will be sufficiently checked by the political power of the would-be and actual defendants. The experience of new policing with street crimes is obviously controversial. The most pointed criticism is based on the racial and income disparities associated with who is affected by the approach. While that concern is unlikely to materialize in the investigation of business crime cases, where the policing does not target a particular community with a concentrated population of a particular socioeconomic or racial background, there are other critiques of new policing. Many believe new policing techniques are too intrusive to civil liberties even in the absence of racial disparities in enforcement. Those concerns have analogs in the business crime context. The use of wiretaps, for example, is a relatively intrusive technique because of its potential to intercept “the most intimate of conversations.” And, in fact, some of the recent insider trading cases have seen this potential realized. In United States v. Goffer, the FBI recorded “deeply personal and intimate discussion[s]” between a target and his wife about their marriage. The FBI had used the defendant’s cell phone as a “roving bug” that picked up the conversations from the defendant’s bedroom, and they failed to stop recording when the calls became personal, which the law requires, leading Judge Richard Sullivan to label the

144 The government is required to “minimize the interception of communications not otherwise subject to interception.” 18 U.S.C. 2518(5).
FBI’s conduct “nothing short of disgraceful.” Wiretaps are an investigative technique of last resort precisely because of their potential for this kind of abuse; before they are allowed, the government is required to prove that other investigative procedures have either been tried and did not work or reasonably appear to be unlikely to succeed.

It is thus not easy to reach a bottom line on the use of new policing techniques in business crime cases. One’s position is likely to depend on whether one worries more about agency capture and an enforcement regime that is too lax on white collar abuses, or whether one’s primary concern is that policing in this context may go too far to infringe on liberty and autonomy and the operation of the market. Thus, while at least some of the differences between enforcement of business crime and street crime are clear, the implications are not.

Conclusion

Jerome Skolnick and James Fyfe observed that the new policing for street crime gained widespread popularity “not because it has been proved to work,” but because the approach that came before it proved not to work. It is certainly not hard to see the parallels with business crime in that statement. The old policing of business crime failed to stop the widespread criminality we see today and a financial meltdown spurred on at least in part by fraudulent conduct. And whatever the actual rate of business crime, the perceived prevalence of it is palpable. Indeed, that perception helped spark an entire movement to Occupy Wall Street.

The impetus for a new policing strategy for business crime is therefore evident. But it is far more difficult to give content to what a proactive approach will ultimately mean in the business context. There are no visible broken windows to patch or graffiti to paint over. There is no fixed community to gather with to assess priorities. The context is far more amorphous.

145 Herzinger & Mermelstein, supra note XX, at 36.
146 18 U.S.C. 2516(1).
Every person involved in commerce is part of the relevant community, and the frauds and abuses are not obvious to anyone. Indeed, the low number of prosecutions associated with the financial meltdown stems in part from an inability to determine who had the requisite criminal intent. So in this context, the police – the regulators – operate at a distinct disadvantage. They cannot point to a patched window or a clean park to show their techniques are making a difference. The public will not readily observe the SEC’s consolidated audit trail in action. Neither, for that matter, will the market participants.

Thus it remains an open question not only whether the new policing will ultimately prove successful in shifting norms and reducing crime,148 but also whether it will achieve even the more modest goal of creating the impression among the public that illegality does not reign on Wall Street.149

But despite the uncertainty and difficulty of measurement, there is reason for some optimism about the emerging new policing on Wall Street. It is, at a minimum, a recognition among the police themselves that the prior approach was not working, and that admission is an important first step. Moreover, many of the methods chosen thus far seem to have benefits in excess of their costs. Sophisticated data analysis can only help the regulators in identifying trouble spots and areas in need of reform. Of all the new policing techniques in the street crime context, the ones relying on targeted enforcement based on data showing hot spots or key offenders appear to be the most successful at reducing crime.150 There are strong reasons to

148 Doubts have been raised. See, e.g., Griffin, supra note XX, at 123 (questioning whether DPAs and NPAs lead companies to internalize new norms, in part because they are piecemeal and also because they appear to be a small price to pay so that companies still have incentives to take risks and engage in unlawful conduct); but see id. at 125 (offering a more positive assessment of greater SEC involvement in policing corporations).
149 For an argument that maintaining a perception of order is intrinsically valuable, even if it does not have an effect on crime, see David Thatcher, Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning, 94 J. CRIM. L. & CRIMINOLOGY 381 (2004).
150 Bernard E. Harcourt & Jens Ludwig, Broken Windows: New Evidence from New York City and a Five-City Experiment, 73 U. CHI. L. REV. 271, 314 (doubting the effectiveness of broken windows policing but acknowledging
believe this will be successful in the business crime arena as well, which the insider trading cases appear to be demonstrating. These cases are not simply the result of wiretaps, but are part of a sophisticated data analysis that now focuses on particular traders with abnormal returns, as opposed to looking only at certain market events and the trades surrounding them. It appears to be precisely the kind of smart policing at the core of new policing models.

And unlike the new policing techniques that raise concerns with arbitrary and discriminatory application, particularly racially disparate enforcement, this emphasis on data is designed to make the enforcement process more rigorous and less arbitrary. Indeed, it is likely to prove useful to the SEC in its rulemaking process, leading to generally applicable rules that would apply to all industry players. Thus, it is by design a method that fosters uniformity and rationality in a way that new policing approaches in street crime do not automatically lend themselves.\textsuperscript{151}

\textsuperscript{151} That is not inevitable in the case of street crime policing. Debra Livingston, for instance, has offered proposals for controlling abuses associated with new policing. Livingston, supra note XX, at 650-672.