The New Policing of Business Crime

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I. INTRODUCTION

The majority of police departments in the United States changed their policing practices in various ways in the 1980s and 1990s in a group of varied reforms often lumped together under the heading of "the new policing."[1] While earlier police reform efforts focused on professionalizing the force,[2] the new policing emphasized a shift away from a model built on reacting to crime—responding to 911 calls and investigating reported crimes—toward a more proactive model designed to stop crimes from occurring in the first place.[3]

Different police departments employ different proactive strategies in the service of deterring crime under this new policing framework. Some have been inspired by the "broken windows" theory made famous in a 1982 article by George L. Kelling and James Q. Wilson. Their central idea is that allowing disorder to exist unchecked facilitates a breakdown of social norms and community controls, which in turn sends a signal to would-be criminals that "no one at the scene of disorder cares," increasing fear in the community, and therefore spawning more disorder

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1. A 1994 study found that 80% of the polled police chiefs reported they were employing some aspect of new policing techniques. BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 47 (2001); Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407 (2000); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997).

2. Livingston, *supra* note 1, at 568.

3. For a discussion of the relationship between social norms and broken windows policing, see, for example, Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805 (1998).

and crime.[4] Inspired by this insight, many departments have employed tactics designed to maintain order. Some departments emphasized a greater police presence to increase the perception of orderliness.[5] In other places, increasing the perception of order 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. For some departments, more police stops and frisks are the key to maintaining order.[6] 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.[7]

Another key approach that has been grouped under the new policing heading has been a turn to community policing. Many departments began to place great weight on improved community interactions and partnerships to figure out the community's priorities and how best to address them.[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 New York Police Department (NYPD), for instance, uses satellite imagery and computerized data analysis 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.[9] For example, the NYPD's Operation Impact takes discrete hot spots—some as small as a single housing development—and "floods" the area with a large police presence.[10] Boston's police force, to

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4. George L. Kelling & James Q. Wilson, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29, *available at* http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/.

5. GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES 38–69 (1996).

6. Heymann, *supra* note 1, at 429. The latter two approaches are often intertwined, as police in some places use "vigorous 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 1, at 590.

7. Meares & Kahan, *supra* note 3, at 812, 819–25.

8. 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. *See* 42 U.S.C. § 3796dd (1994); Livingston, *supra*, note 1, at 575 (describing community policing).

9. KEITH HARRIES, MAPPING CRIME: PRINCIPLE AND PRACTICE 80 (1999).

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). The NYPD employs what is known as CompStat, a data-driven management style that assembles all precinct commanders in one meeting to create social pressures and motivators for

take another example, uses computerized analysis of reports and investigations to identify particularly dangerous individuals in communities so those individuals can be swiftly punished when they transgress.[11]

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.[12] Skeptics of the new policing have further argued that even if it reduces some crimes, the approach involves greater costs than benefits, particularly because the impact of heightened enforcement of misdemeanor and quality-of-life offenses falls disproportionately on minority and economically disadvantaged individuals[13] and because the tactics may undermine the legitimacy of the police, which in turn reduces the cooperation of the community in fighting crime.[14] Scholars have created a rich literature that seeks to iden-

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commanders to promptly respond to adverse changes in crime statistics. Heymann, *supra* note 1, at 431.

11. *Id.* at 414.

12. For a sampling of the debate over the effectiveness of new policing techniques, see, for example, HARCOURT, *supra* note 1; RALPH B. TAYLOR, BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GUNS, FEAR, AND DECLINE 17–23 (2001); Vanessa Barker, *Explaining the Great American Crime Decline: A Review of Blumstein and Wallman, Goldberger and Rosenfeld, and Zimring*, 35 LAW & SOC. INQUIRY 489, 500 (2010) (citing studies); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Experiment*, 73 U. CHI. L. REV. 271, 274–75 (2006); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 606 (1999); George L. Kelling & William H. Sousa, Jr., *Do Police Matter?: An Analysis of the Impact of New York City's Police Reforms*, *in* MANHATTAN INSTITUTE CENTER FOR CIVIC INNOVATION CIVIC REPORT No. 22 (2001), *available at* http://www.manhattan-institute.org/html/cr_22.htm; Ralph B. Taylor, *Crime, Grime, Fear, and Decline: A Longitudinal Look*, *in* NATIONAL INSTITUTE OF JUSTICE RESEARCH IN BRIEF (July 1999), *available at* https://www.ncjrs.gov/pdffiles1/177603.pdf; Carolyn Y. Johnson, *Breakthrough on "Broken Windows,"* BOSTON GLOBE, Feb. 8, 2009, *available at* http://www.dcvb-nc.com/cr/Broken_Windows-%20Lowell02-08-09.pdf.

13. *See* Heymann, *supra* note 1, at 418; *see also* 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 J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795 (1998) (arguing that because racism can also result in under enforcement 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).

14. *See* Aziz Z. Huq et al., *Why Does the Public Cooperate with Law Enforcement?*, 17 PSYCHOL. PUB. POL'Y & L. 419 (2011); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

tify which aspects of the new policing are worth embracing and which aspects require reform.[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 largely began as 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.

Crime, however, is not limited to the streets. Business crime has been a significant problem in the United States.[16] Indeed, by some measures, it is on the rise and an increasing source of concern for 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 II begins by explaining the traditional or "old policing" of business crime. After implementing 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 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 culture, sharing with the broken windows theory a focus on norms. This policy did not, however, stop enormous corporate frauds or the economic meltdown that occurred in 2007 and 2008 that many believe depended on illegal activities.

In response to these failures, Part III argues, the United States is 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.

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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).

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.

One approach relies on intelligence-led methods that use extensive data analysis to target problematic areas and actors. The Securities and Exchange Commission (SEC), 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 the SEC 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. The SEC 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. Additional regulatory approaches include providing new incentives for whistleblowers within the organization.

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 (DOJ)—the United States' chief prosecutor of financial crimes—is taking a more active role for itself inside companies, at least for those companies that have already demonstrated a propensity for wrongdoing. DOJ increasingly allows companies to enter deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) that allow companies to avoid criminal charges if they agree to terms set by prosecutors.[17] 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, through DPAs and NPAs, the government 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 then reacting to it, now the government 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, further placing itself in charge of changing norms.

Another effort to change norms through criminal policing 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, DOJ is currently using it in the spirit of the new policing paradigm. Market partici-

17. Under a DPA, the government charges the company, but the agreement states that prosecution will be deferred for some period of time. If within that period of time the company meets all of the terms of the agreement, the government will dismiss the charges. Under an NPA, no charging document is filed against the company. Instead, the government and company reach an agreement that no charges will be filed as long as the company meets the terms of the agreement.

pants and the general 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, and particularly well-publicized ones, seek to alter that perception by suggesting the government does care—because it is listening.

Thus, both civil and criminal enforcement 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; however, they share in common a shift away from purely reactive methods, where private actors take the lead in reporting crime, to proactive methods where the government takes the initiative in deterring crime.

Finally, Part IV explores how the new policing techniques in the business crime context are likely to play out, given that business crime is different from street crime in fundamental ways. Part IV further explains what those differences mean for the ultimate success of the new policing paradigm. Part V concludes.

II. 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.[18] The disincentives were relatively weak. These crimes were rarely detected,[19] and even when the crime was discovered, identifying the perpetrator within the organization was often difficult.[20] Moreover, the sanctions themselves were relatively light.

The enactment of the Federal Sentencing Guidelines (Guidelines) in 1987 marked a shift in the approach to white-collar crime. First, the

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18. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 62, 70 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

19. I. J. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* (Univ. of Chi. Booth School of Bus., Working Paper No. 08-22, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482 (finding that the SEC detected fewer than 6% of corporate frauds committed between 1996 and 2004 and that only 16% of frauds were uncovered by non-financial market regulators).

20. Arlen, *supra* note 18, at 70 ("[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.").

Guidelines increased the penalties for white-collar frauds. Whereas Congress was willing to let the Sentencing Commission set penalties for other offenses based on historical treatment, it singled out white-collar crimes (and drug offenses) to be treated more severely.[21] The Senate Report accompanying 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."[22] Fines thus increased substantially,[23] and thousands of white-collar defendants who previously would have received a sentence of probation were sent to prison.[24] After judges, prosecutors, and probation officers complained that even those increases were inadequate, in 2001 the Commission further raised sentences for business crimes causing losses in excess of $70,000.[25] Today, federal sentences for business crimes are at a historical high, both in terms of the number of prison sentences and the length of those sentences.[26]

Second, the Guidelines also focused on organization liability. Before the 1990s, policing organizations was minimal.[27] Corporate fines were typically negligible, and the government did not insist that an organization cooperate in identifying lawbreakers within the firm or adopt significant changes in operation.[28] The Guidelines fundamentally

21. *E.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1989) (amending scattered sections of Title 21); S. REP. NO. 98-225, at 77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 ("Some major offenders, particularly white-collar offenders . . . , frequently do not receive sentences that reflect the seriousness of their offenses.").

22. S. REP. NO. 98-225, at 76–77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3259.

23. Frank O. Bowman, III, *Are We Really Getting Tough on White Collar Crime?*, 15 FED. SENT'G REP. 237 (2003) (noting that sentences for economic crimes "represent a marked increase over those" that were meted out before the Guidelines).

24. *See id.* at 238; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 21–24 (1988) (observing that the Commission departed from past practice in the case of white-collar crime).

25. Bowman, *supra* note 23, at 238.

26. *Id.*

27. 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. *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 (emphasis in original).

28. Arlen, *supra* note 18, at 69 (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"); Mark A. Cohen, *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

changed the landscape for entity liability prosecutions. Just as sanctions for individual criminal liability increased, so did sanctions for corporate offenders.[29] Under the Guidelines, companies can get sentencing reductions if they promptly report violations and cooperate with the government in the investigation of the wrongdoing.[30] The Guidelines also encourage organizational change by offering reductions for companies that have effective compliance programs[31] and, for those companies that do not already have an effective program, the Guidelines allow for judges to order companies to create one during a period of court-supervised probation.[32]

In the Commission's view, an effective compliance program must "establish standards and procedures to prevent and detect criminal conduct."[33] Specific individuals within an organization shall be delegated day-to-day operational responsibility for the program and must report to high-level personnel within the organization[34] who are responsible for overseeing the compliance and ethics program.[35] A successful program must involve monitoring and auditing to detect unlawful conduct.[36] It must also provide for anonymous or confidential reporting by employees and a way for employees to seek guidance about potential wrongdoing.[37] The program must have incentives for compliance with the standards, and procedures and disciplinary measures for non-compliance.[38] The goal of these requirements is to encourage companies to adopt programs

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).

29. Cindy R. Alexander et al., *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J.L. & ECON. 393, 394 (1999) (noting the increase in fines and sanctions for convicted entities after adoption of the Sentencing Guidelines). These fines were significantly increased again with passage of the Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 805(a)(2).

30. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2006).

31. *Id.* § 8C2.5(f).

32. John R. Steer, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit 6 (Apr. 26, 2001) (unpublished paper) (presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma), *available at* http://www.ussc.gov/Guidelines/Organizational_Guidelines/Selected_Articles/CorpBehavior2.pdf.

33. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(b)(1).

34. *Id.* § 8B2.1(b)(2)(B).

35. *Id.* § 8B2.1(b)(2).

36. *Id.* § 8B2.1(b)(5)(A).

37. *Id.* § 8B2.1(b)(5)(C).

38. *Id.* § 8B2.1(b)(6).

that will help them do a better job policing, deterring wrongdoing,[39] and creating a corporate culture of ethical and lawful behavior.[40]

Other federal government entities share the Guidelines' view that compliance programs are to be encouraged. For example, the Department of Justice takes the existence of compliance programs into account in deciding whether to charge companies in the first place.[41] DOJ urges 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."[42] The goal is to sort "paper program[s]" from those that are "designed and implemented in an effective manner."[43] DOJ also takes into account how companies respond when they uncover wrongdoing, looking for "authentic" corporate cooperation and the prompt reporting of any wrongdoing.[44] Other agencies—including the SEC,[45] the Environmental Protection Agency,[46] and the

39. Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 754 (1997).

40. Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143 (2005); *see, e.g.*, Kathleen M. Boozang & Simone Handler-Hutchinson, *"Monitoring" Corporate Corruption: DOJ's Use of Deferred Prosecution Agreements in Health Care*, 35 AM. J.L. & MED. 89, 93 (2009); John M. Conley & William M. O'Barr, *Crime and Custom in Corporate Society: A Cultural Perspective on Corporate Misconduct*, 60 LAW & CONTEMP. PROBS. 5 (1997).

41. The Department of Justice's principles for charging corporations in 1999 listed eight factors for prosecutors to consider, including "[t]he existence and adequacy of the corporation's compliance program" and "any efforts to implement an effective corporate compliance program or to improve an existing one." Memorandum from Eric Holder, Deputy Att'y Gen. U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys (June 16, 1999), *available at* http://www.justice.gov/criminal/fraud/documents/reports/1999/chargingcorps.PDF. The Department of Justice has continued to list the existence of a compliance program as a factor for prosecutors to consider in deciding whether to charge a company. Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys (Jan. 20, 2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf [hereinafter Thompson Memo]; U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS §§ 9-28.300, -28.800, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

42. Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys 15 (Aug. 28, 2008), *available at* http://www.usdoj.gov/dag/ readingroom/dag-memo-08282008.pdf [hereinafter Filip Memo].

43. *Id.* at 16.

44. Thompson Memo, *supra* note 41, at 1.

45. SEC, Securities Exchange Act of 1934, Release No. 44969 (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm#P16_500 (noting that in deciding whether to bring an enforcement action or to give cooperation credit, the SEC will take into account whether a company "adopt[s] and ensure[s] enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct").

Department of Health and Human Services Office of Inspector General[47]—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.[48]

The basic model, then, largely depends on corporate monitoring and cooperation.[49] The company becomes, in Harry First's words, the "branch office of the prosecutor."[50] 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 in other ways—such as through complaints or whistleblowers—but the approach is still reactive. Proactive policing under this model takes place largely within the corporation itself.

The old policing of business crime thus shares much in common with the old policing of street crime. Both are mainly reactive models, where the police largely wait for reports of wrongdoing and then investigate. While companies may engage in proactive oversight and attempt to change norms, that proactive effort is initiated by corporations and takes place within corporations, not by outside law enforcers.

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46. Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 FED. REG. 66, 706 (Dec. 22, 1995) (policy statement designed to encourage self-regulation and reporting of environmental violations); Steer, *supra* note 32, at 14 (noting that EPA also adopted a criminal enforcement policy that takes into account compliance programs).

47. Steer, *supra* note 32, at 14 (describing the HHS OIG compliance program guides for providers in the health care industry); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 500 (2003) (noting that HHS modeled its approach after the Organizational Sentencing Guidelines).

48. 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).

49. 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.").

50. Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crimes Prosecution*, 89 N.C. L. REV. 23 (2010).

III. THE NEW POLICING OF BUSINESS CRIME

Despite increasing sanctions and the spread of corporate compliance programs to the point of being ubiquitous,[51] business crime remains a pressing problem.[52] In its most recent *Financial Crimes Report to the Public*, the Federal Bureau of Investigation (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.[53] And serious offenses have occurred at

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51. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2104 (2010).

52. Quantification of white-collar crime remains difficult as a result of its broad scope, evolving character, and limits on data collection. *See* Sally S. Simpson, *Making Sense of White-Collar Crime: Theory and Research*, 8 OHIO ST. J. CRIM. L. 481, 482–83 (2011) ("It is difficult to measure white-collar crime because all of the typical sources of crime data . . . are limited in scope, not collected in a systematic manner, or have unique problems that discourage operationalization and generalization."); RODNEY HUFF, CHRISTIAN DESLIETS & JOHN KANE, NAT'L WHITE COLLAR CRIME CTR., THE 2010 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. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES (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/nibrs/nibrs_wcc.pdf (describing the competing approaches to defining white-collar crime and pointing out the limitations of using National Incident-Based Reporting System data to understand business crime). But the measures we do have suggest it is on the rise. *E.g*, Pricewaterhouse Coopers, *Global Economic Crime Survey, Cybercrime: Protecting Against the Growing Threat*, PCW, 16 (Nov. 2011), http://www.pwc.com/en_GX/gx/economic-crime-survey/assets/GECS_GLOBAL_REPORT.pdf (U.K.); HUFF, DESLIETS & KANE, *supra*, at 12.

53. *See* FED. BUREAU OF INVESTIGATIONS, FINANCIAL CRIMES REPORT TO THE PUBLIC: FISCAL YEARS 2010–2011 (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* INTERNET COMPLAINT CRIME CTR., INTERNET CRIME REPORT 3 (2012), *available at* http://www.ic3.gov/media/annualreport/2012_IC3Report.pdf (reporting an increase in web-crime); 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); Press Release, U.S. Dep't of Justice, Departments of Justice and Health and Human Services Announce Record-Breaking Recoveries Resulting from Joint Efforts to Combat Health Care Fraud (Feb. 11, 2013), *available at* http://www.justice.gov/opa/pr/2013/February/13-ag-180.html (quoting Attorney General Holder that 2012 was a record year for health care fraud prosecutions); Press Release, Fin. Crimes Enforcement Network, SARs Regarding Foreclosure Rescue Scams Increase (Oct. 9, 2012), *available at* http://www.fincen.gov/news_room/nr/pdf/Q22012/20121009.pdf (stating that fiscal year 2012 is set to far outpace 2011 for reporting of foreclosure scams).

institutions with compliance programs, casting doubt on self-policing as the primary policing strategy.[54]

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 corporate wrongdoing. A 2010 survey found that a majority of respondents believed financial crime contributed to the current economic crisis, and nearly half agreed that the government is not devoting enough resources to combat business crime.[55] Many lament that more individuals and corporations, particularly at the largest financial institutions, have not been charged.[56] This environment set the stage for a new approach to policing business crime.

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, so 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. Officials from federal banking regulators to state-level insurance commissioners are part of the mix as well. It is beyond the scope of this Article 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 policing just as they have always done, without changes. Instead, this Article looks closely at two key federal actors that bear primary responsibility

54. "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 (July 23, 2012, 11:06 PM), http://www.cnbc.com/id/48286908.

55. HUFF, DESLIETS & KANE, *supra* note 52, at 9. A study of fluctuations in public opinion of banks and financial institutions over the 40-year period from 1971 to 2011 shows an all-time low in 2011; only 11% of those surveys expressed "a great deal" of confidence in the people who are running banks and financial institutions in the United States. Lindsay A. Owens, *Confidence in Banks, Financial Institutions, and Wall Street, 1971–2011*, 76 PUB. OPINION Q. 142, 145 (2011).

56. *See, e.g.*, Peter Schweizer, Op-Ed., *Obama's DOJ and Wall Street: Too Big for Jail?*, FORBES (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); Edward Wyatt, *Promises Made, and Remade, by Firms in S.E.C. Fraud Cases*, N.Y. TIMES (Nov. 7, 2011), http://www.nytimes.com/2011/11/08/business/in-sec-fraud-cases-banks-make-and-breakpromises.html?pagewanted=all&_r=0 (describing the S.E.C. practice of requiring violators to promise in settlement agreements to not break the law again, and the frequency with which firms do just that); *Frontline: The Untouchables* (PBS television broadcast Jan. 22, 2013), *available at* http://www.pbs.org/wgbh/pages/frontline/untouchables/ (investigating DOJ's decision not to prosecute Wall Street executives for fraud in the mortgage market that contributed to the financial crisis of 2008).

for policing the biggest frauds: the SEC on the civil side and DOJ on the criminal side. This section first explores changes in the civil sphere and then turns 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 investors from business crimes.[57] The SEC is also well suited for study because it has been the subject of so much criticism. The SEC suffered stinging rebukes for failing to detect the jaw-dropping Ponzi schemes perpetrated by Bernie Madoff and R. Allen Stanford.[58] The SEC's Inspector General (IG) issued a 457-page report documenting the agency's missteps and inadequacies in investigating Madoff's $65 billion scheme.[59] The agency received complaints about Madoff going as far back as 1992 that, as 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."[60] Instead, however, the SEC "never took the necessary and basic steps to determine if Madoff was misrepresenting his trading."[61] The result, the *New York Times* stated, is that "[n]ot since the 1950s, when budget cuts and deregulation defanged the commission, have [the SEC's] stature and influence sunk so low"[62] as it did in the wake of the

57. Although some state attorney generals, particularly Eliot Spitzer in New York, 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. Rachel E. Barkow, *The Prosecutor As Regulatory Agency*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 177, 192–93. The FBI also investigates financial crimes, but it devotes few agents to this area, and the numbers have been decreasing since 9/11. Lisa Kern Griffin, *Inside-out Enforcement*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 110, 111.

58. *See* Zachary A. Goldfarb, *The Madoff Files: A Chronicle of SEC Failure*, WASH. POST (Sept. 3, 2009), http://articles.washingtonpost.com/2009-09-03/business/36909577_1_david-kotz-madoff-probe-bernard-l-madoff; Alain Sherterm, *Did the SEC Whiff on R. Allen Stanford?*, CBS NEWS (Mar. 6, 2012), http://www.cbsnews.com/8301-505123_162-57391651/did-the-sec-whiff-on-r-allen-stanford/.

59. *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme*, U.S. SEC. & EXCH. COMM'N OFFICE INVESTIGATIONS (Aug. 31, 2009), http://www.sec.gov/news/studies/2009/oig-509.pdf [hereinafter *Investigation of Failure of the SEC*].

60. Jim Hamilton, *SEC Inspector General Finds Madoff Enforcement Failures, Particularly Failure to Verify Through Independent Third Parties*, JIM HAMILTON BLOG (Sept. 3, 2009) http://jimhamiltonblog.blogspot.com/2009/09/sec-inspector-general-finds-madoff.html.

61. *Investigation of Failure of the SEC*, *supra* note 59, at 456.

62. Jenny Anderson & Zachery Kouwe, *S.E.C. Enforcers Focus on Avoiding Madoff Repeat*, N.Y. TIMES (Feb. 8, 2010), http://www.nytimes.com/2010/02/09/business/09sec.html?page wanted=all.

Madoff scandal. This is on top of the criticisms heaped on the agency for failing to stop or stem the tide of the financial crisis.[63] 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."[64]

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."[65] 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 mechanisms at the agency will ultimately pay off—particularly as the agency fights for resources[66] and faces the daunting task of promulgating all the substantive regulations called for under the Dodd–Frank Act.[67] But there is no denying that the agency's approach to policing is fundamentally changing. This section looks at changes in intelligence-led policing, consolidated audit trails, and the treatment of whistleblowers within corporations.

1. Intelligence-Led Policing at the SEC

The SEC's Enforcement Division proclaimed that it responded to the Madoff scandal with "its most significant reorganization since its establishment in 1972."[68] 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 Of-

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63. *See, e.g.*, Theo Francis, *SEC's Cox Catches Blame for Financial Crisis*, BUSINESSWEEK (Sept. 19, 2008), http://www.businessweek.com/stories/2008-09-19/secs-cox-catches-blame-for-financial-crisisbusinessweek-business-news-stock-market-and-financial-advice.

64. Anne Kates Smith, *Does the SEC Have Your Back?*, KIPLINGER (May 2012), http://www.kiplinger.com/article/investing/T038-C000-S002-does-the-sec-have-your-back.html.

65. Ben Protess & Azam Ahmed, *With New Firepower, S.E.C. Tracks Bigger Game*, N.Y. TIMES DEALBOOK (May 21, 2012), http://dealbook.nytimes.com/2012/05/21/with-new-firepower-s-e-c-tracks-bigger-game/.

66. James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. TIMES (July 15, 2011), http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html?pagewanted=all (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").

67. 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. *Dodd–Frank Progress Report*, DAVIS POLK (Apr. 1, 2013), http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/.

68. Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-5.htm.

fice of Market Intelligence (OMI). OMI has been described as a "point guard" for the agency.[69] Its tasks are to sift through the data to make the necessary connections between information, conduct preliminary investigations, and then assign cases to enforcement lawyers where appropriate.[70] In the phrasing of the initial director of OMI, "it's the central intelligence office for the whole agency." It even puts out a daily "intelligence report" with the hottest tips it receives each day and has placed FBI agents within the agency to help sort through the information.[71]

This strategy is thus in the very heartland of the intelligence-led policing model that relies on analyzing information to make the best use of limited resources to prevent crime.[72] Having a central clearinghouse means the agency can 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 stop loss 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 fell 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 to quickly identify this problem for the Chairman of the SEC to address.[73]

In addition, the new office structure is valuable for identifying off market schemes[74] because no exchange polices those transactions, leaving it up to the SEC to fill the gap.[75] It is also useful for frauds associated

69. Protess & Ahmed, *supra* note 65.

70. *Id.*

71. *Id.*

72. *See* U.S. DEP'T OF JUSTICE, INTELLIGENCE-LED POLICING: THE NEW INTELLIGENCE ARCHITECTURE (2005), *available at* https://www.ncjrs.gov/pdffiles1/bja/210681.pdf.

73. Interview with Tom Sporkin, Partner, Buckley & Sandler LLP (Apr. 4, 2013) (on file with author).

74. *Id.*

75. 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. W.J. Howey Co., 328 U.S. 293, 298–99 (1946).

with microcap securities, an area that did not previously receive as much attention from the SEC because scam cases of that nature "did not build careers" and could get overlooked.[76] OMI is now well positioned to identify these cases because they come into the central clearinghouse and patterns emerge more readily.

In a similar vein, in 2009, the SEC created the Division of Risk, Strategy, and Financial Innovation (RSFI). The SEC refers to this part of the agency as its "think tank": a place to "integrate financial economics and rigorous data analytics into the core mission of the SEC" and across all of the SEC's activities, from rulemaking to enforcement and examination.[77] In late 2012, this Division introduced the Accounting Quality Model (AQM), which uses quantitative analysis to monitor corporations for accounting fraud.[78] Craig Lewis, the SEC Chief Economist and Director of RSFI, noted that the AQM "aligns closely with our underlying approach to data-driven analytics."[79] The model seeks to identify firms that have "outlier discretionary accruals," that is, a meaningfully different amount of discretionary accruals compared to other similarly situated firms, because this could be indicative of fraud.[80] Those companies, in turn, can be subject to a closer look. In other words, the data helps the agency be more proactive in identifying potential targets for closer investigation.

A similar strategy is being employed in the Office of Compliance Inspections and Examinations (OCIE). OCIE is responsible for examining "investment advisers, investment companies, broker–dealers, municipal securities dealers, transfer agents, clearing agencies, self regulatory organizations (SROs), municipal advisors, and others" to ensure they are in compliance with SEC protocols, to prevent fraud, to provide data for policy, and to monitor risk.[81] To address its lack of sufficient resources

76. Interview with Tom Sporkin, *supra* note 73.

77. *Division of Economic and Risk Analysis Overview*, U.S. SEC. & EXCH. COMM'N (June 18, 2013), http://www.sec.gov/divisions/riskfin.shtml.

78. Craig M. Lewis, SEC Chief Economist & Dir., Div. of Risk, Strategy, & Fin. Innovation, Speech at the Financial Executives International Committee on Finance and Information Technology (Dec. 13, 2012), *available at* http://www.sec.gov/news/speech/2012/spch121312cml.htm.

79. *Id.*

80. *Q&A with an Expert: The SEC Is Developing Tools That Use XBRL Data to Discover Accounting Anomalies and Improve Financial Disclosures*, MERRILL DISCLOSURE SOLUTIONS (Apr. 9, 2013), http://merrillcompliancesolutions.wordpress.com/2013/04/09/qa-with-an-expert-the-sec-is-developing-tools-that-use-xbrl-data-to-discover-accounting-anomalies-and-improve-financial-disclosures/ [hereinafter *Q&A with an Expert*].

81. *Examinations by the Securities and Exchange Commission's Office of Compliance Inspections and Examinations*, U.S. SEC. & EXCH. COMM'N, 1 (Feb. 2012), http://www.sec.gov/about/offices/ocie/ocieoverview.pdf [hereinafter *Examinations by the SEC*].

and understaffing, OCIE has moved away from cyclical examinations to more quantitative and risk-based models that allow it to make more of its limited resources and focus on the most problematic areas.[82] Thus, just as police departments have turned to improved intelligence models to compensate for understaffing so, too, has the SEC.[83] The SEC added an Office of Risk Analysis and Surveillance (ORAS) to crunch numbers in order to determine which firms most needed examination. The SEC also hired several experts in highly specialized financial fields.[84] These new quantitative strategies are used to target specific areas of concern, including the creation of complex entities, the sale of new or risky products, and cybersecurity.[85] The SEC has also created a Large Firm Monitoring program to further aid in monitoring the complexities of large corporations and a Quantitative Analytics Unit to monitor high-frequency traders.[86] And the former director of OCIE has explained that the SEC has signaled in advance the areas it will focus on, via Risk Alerts, to improve compliance.[87]

These are not the only structural changes at the agency designed to assist with proactive policing and greater use of data. The SEC also established specialized units in five areas it deemed as "priority" that involve particularly complex areas of security laws.[88] These units are also dedicated to ferreting out suspicious activities and patterns using their expertise and sophisticated data analysis. One unit focuses on asset man-

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82. Luke T. Cadigan, *The SEC's Aggressive New Approach to Exams and Investigations of Investment Advisers and Investment Companies*, INVESTMENT LAW., May 2008, at 1, 8, *available at* http://www.klgates.com/files/Publication/4d0a67ec-ca98-4356-b4bc-74d527af9f30/Presentation/PublicationAttachment/83514d58-1cde-4b02-9466-78671d147892/Investment_Lawyer_Cadigan.pdf.

83. Kevin Johnson, *Police Tap Technology to Compensate for Fewer Officers*, USA TODAY (Apr. 25, 2011) http://usatoday30.usatoday.com/news/nation/2011-04-24-police-crime-technology-facebook.htm.

84. Carlo V. di Florio, SEC Dir., Office of Compliance Inspections and Examinations, Remarks at the *CCOutreach* National Seminar (Feb. 8, 2011), *available at* http://www.sec.gov/news/speech/2011/spch020811cvd.htm ("The initial specialized groups are focused in the following areas: New and structured products, Valuation, Equity market structure and trading practices, Fixed income securities, including municipal securities, Microcap fraud, Marketing and sales practices." (original formatting omitted)); *Examinations by the SEC*, note 81 ("ORAS now plays a central role in determining which registrants to examine as well as the scope of examinations.").

85. *Examinations by the SEC*, *supra* note 81, at 30–39 (section III.A.1–6 also naming the creation of an Office of Credit Ratings, new risk examinations based on SRO assessments, trading risks, and unregistered activities).

86. *Id.*

87. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces 2013 Examination Priorities (Feb. 21, 2013), *available at* http://www.sec.gov/news/press/2013/2013-26.htm (quoting Carlo V. di Florio, former Director of the SEC's Office of Compliance Inspections and Examinations).

88. Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), http://www.sec.gov/news/press/2010/2010-5.htm.

agement investigations involving investment advisors, hedge funds, and private equity funds. This unit's Aberrational Performance Inquiry—developed with help from RSFI's Office of Quantitative Research and OCIE[89]—uses risk-based analytics "to analyze performance data of thousands of hedge fund advisers and identify candidates appropriate for examination or investigation."[90] 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."[91] 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.[92] 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 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 when he emphasized 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.[93] 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. As Anne Milgram, the former Attorney

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89. Lewis, *supra* note 78.

90. Letter from Robert S. Khuzami, Dir., U.S. Sec. & Exch. Comm'n, Div. of Enforcement, to the Honorable Charles E. Grassley, Ranking Member, Comm. on the Judiciary 3 (June 9, 2011), *available at* http://www.grassley.senate.gov/about/upload/RM-Grassley-Reply-6-9-11.pdf.

91. Protess & Ahmed, *supra* note 65; Letter from Robert S. Khuzami to Honerable Charles E. Grassley, *supra* note 90.

92. Letter from Robert S. Khuzami to Honerable Charles E. Grassley, *supra* note 90 ("Enforcement's new data-analytic approaches already have led to significant insider trading enforcement actions that did not originate from an SRO referral, informant tip, investor complaint, media report, or other external source.").

93. *See* Heymann, *supra* note 1, at 431, and note 10.

General of New Jersey, notes, these strategies are analogous to the data-driven statistical analysis used to transform baseball strategy that was described in Michael Lewis's book, *Moneyball*.[94] "Moneyballing criminal justice" with data-driven statistical analysis has the same aim of improving results with fewer resources.

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 completeness, 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.[95]

So, for instance, under this system, if the SEC were to receive a tip about insider trading, it cannot cross-reference all the relevant trades in one database. It has to contact each relevant market center, which may be an exchange, alternative trading system, or over-the-counter broker–dealers.[96] Or, to take another example, when something like a flash crash occurs, the SEC cannot rapidly 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.[97] "[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."[98] 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.

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94. Anne Milgram, *Moneyballing Criminal Justice*, ATLANTIC (June 20, 2012), http://www.theatlantic.com/national/archive/2012/06/moneyballing-criminal-justice/258703/.

95. *Final Rule, Consolidated Audit Trail, Exchange Act Release No. 34-67457*, U.S. SEC. & EXCH. COMM'N, 6 (July 18, 2012), http://www.sec.gov/rules/final/2012/34-67457.pdf [hereinafter *SEC Final Rule*].

96. *Id.* at 4.

97. *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").

98. *Id.*

In the absence of its own comprehensive audit trail, the SEC currently relies largely on exchanges and national securities associations (self-regulatory organizations or SROs) to do market surveillance for insider trading and other abuses.[99] 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 SROs are at policing,[100] putting pressure on the SEC to assume a greater role.

These concerns prompted the SEC to adopt Rule 613, which will create a comprehensive, consolidated audit trail and put the SEC in a position to engage in more proactive oversight. The comprehensive consolidated audit trail will be "a system capable of capturing a complete record of all transactions relating to an order, from origination to execution or cancellation, and the complete record for an order generated by such a system,"[101] including the identity of customers.[102] To pursue the analogy to street crime policing, the consolidated audit trail will be a way for the SEC to gain access to more streets so that its own cops can directly observe the activity there and analyze the information to make better use of its resources.

3. Whistleblowers and Cooperators

Some police departments have sought to cultivate cooperators and informants as part of their new policing regimes in an effort to disrupt behavioral norms. By creating incentives for people to report wrongdoing, they hope to change a culture where law breaking becomes normalized. Or, to use Kelling and Wilson's parlance, the policing regimes are trying to change an environment where no one cares enough about the broken window to say anything to anyone about it.[103] In the absence of reporting, a culture of apathy establishes norms of disorder and law breaking. Thus, the first step in breaking that culture is to get people to care enough to tell the authorities about it.

In the business crime context, that means that whistleblowers need to be encouraged. With the passage of Sarbanes–Oxley in 2002, Congress required companies to create sufficient internal channels for indi-

99. 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.

100. Griffin, *supra* note 57, at 116 (noting these organizations have "atrophied" in recent years and become weak players in the policing landscape).

101. *SEC Final Rule*, *supra* note 95, at 6 n.5.

102. *Id.* at 19.

103. Meares & Kahan, *supra* note 3, at 825.

viduals to report wrongdoing.[104] The Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010 went further. That law required the SEC to create the Office of the Whistleblower that disburses funds to whistleblowers whose tips lead to findings of corporate fraud.[105] And the funds themselves are significant; if a whistleblower voluntarily provides original information that significantly contributes to a successful SEC enforcement action, and that information results in sanctions greater than one million dollars, the whistleblower would then receive 10%–30% of the monetary sanctions collected by the SEC.[106]

In promulgating rules under Dodd–Frank, the Commission similarly put a special emphasis on reporting, or in Chairman Mary Schapiro's words, "break[ing] the silence of those who see a wrong."[107] To that end, the Commission sought to create a streamlined procedure for reporting by requiring the submission of only one form. It refused calls to require employees first to report wrongdoing internally before going to the SEC,[108] instead creating financial incentives for reporting and explaining that

> [t]he most likely difference between a mandatory regime and the significant financial incentives approach is with respect to the category of whistleblowers who, prior to the whistleblower award program, were not predisposed to report either internally or to the Commission, but who are now willing to come forward in response to a financial inducement. Within this category of whistleblowers, we believe there is some subset who would respond to the financial incentive offered by our final rules by reporting only to us, but who would not come forward either to us or to the entity if the financial

104. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 § 404 (codified at 15 U.S.C. § 7201).

105. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD–FRANK WHISTLEBLOWER PROGRAM: FISCAL YEAR 2012, at 1 (2012), *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf.

106. 15 U.S.C. § 78u-6 (2010); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34309 (2011).

107. Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/ speech/2011/spch052511mls-item2.htm.

108. The question of how to incentivize employees to report internally whenever possible was a subject of heated debate among those commenting in the agency's rulemaking proceeding, and a point of contention among the Commissioners themselves. *Compare* Shapiro, *supra* note 107, *with* Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Statement at Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 (May 25, 2011), *available at* http://www.sec.gov/news/speech/2011/spch052511tap-item2.htm.

incentive were coupled with a mandatory internal reporting requirement.[109]

The Commission also sought to create greater incentives for people to come forward with information even if they had engaged in wrongdoing themselves. In 2001, it issued what is known as the Seaboard Report, in which it explained how the Commission would evaluate company cooperation by outlining "some of the criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation."[110] But it was not until 2010 that it sought to provide guidance on when it would give credit to individual cooperators. Calling it a "potential game-changer for the Division of Enforcement," Khuzami announced initiatives to enlist cooperators. Following the model of the Department of Justice, the SEC adopted the use of cooperation agreements—"[f]ormal written agreements in which the Enforcement Division agrees to recommend to the Commission that a cooperator receive credit for cooperating in investigations or related enforcement actions if the cooperator provides substantial assistance such as full and truthful information and testimony."[111] The Commission also explained how it would "evaluate whether, how much, and in what manner to credit cooperation by individuals to ensure that potential cooperation arrangements maximize the Commission's law enforcement interests."[112] In particular, the SEC identified four general considerations it will take into account:

1. The assistance provided by the cooperating individual;
2. The importance of the underlying matter in which the individual cooperated;
3. The societal interest in ensuring the individual is held accountable for his or her misconduct; and

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109. Securities Whistleblowers Incentives and Protections, Release No. 64545, 101 SEC DOCKET 630, 2011 WL 2045838, 106 (May 25, 2011).

110. *Securities Exchange Act of 1934, Release No. 44969*, U.S. SEC. & EXCH. COMM'N (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm#P16_500. The report is essentially the SEC counterpart to the Thompson Memo issued by the Department of Justice. Thompson Memo, *supra* note 41.

111. Press Release, U.S. Sec. & Exch. Comm'n, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-6.htm [hereinafter SEC Initiative Announcement]. The SEC also set out to "streamline[] the process for submitting witness immunity requests to the Justice Department for witnesses who have the capacity to assist in its investigations and related enforcement actions." *Id.*

112. *Id.*

4. The appropriateness of cooperation credit based upon the risk profile of the cooperating individual.[113]

Both the whistleblower and cooperation initiatives share the goal of creating as many incentives as possible to break up any norms of silence that allow wrongdoing to become normalized. Both initiatives are thus in line with new policing models that seek to change the culture of wrongdoing.

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."[114] 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 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 police investigations of violent crime organizations. 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 of New York, also strives 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 charge the company with obstruction of justice. Andersen's demise made plain that

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113. *Id.* For an example of how these factors have been applied, see *Litigation Release No.* 22298: *SEC Credits Former AXA Rosenberg Executive for Substantial Cooperation during Investigation*, U.S. SEC. & EXCH. COMM'N (Mar. 19, 2012), http://www.sec.gov/litigation/litreleases/2012/lr22298.htm.

114. Bowman, *supra* note 23. 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.

an indictment can have tremendous collateral consequences on employees and shareholders; in Andersen's case 75,000 jobs were lost.[115] So the government has opted for an approach that gives prosecutors greater flexibility with charging. The use of DPAs and NPAs allows the government to set terms of company behavior in exchange for a promise that charges will not be filed or will be dismissed. The Department of Justice has reached 233 such agreements since 2003,[116] making DPAs and NPAs, in the words of the head of the criminal division at DOJ, "a mainstay of white-collar criminal law enforcement."[117] The SEC has started to follow course, adopting the use of such agreements in 2010 as part of its initiative to foster greater cooperation in investigations.[118]

While these agreements contain traditional compliance and policing methods such as fines, they are replete with some key elements of the new and more proactive policing paradigm. 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.[119] The monitor then acts as a police officer within the company, reporting what he or she sees and hears directly to the government. Instead of relying on the company to report violations (the old policing paradigm), installing a monitor gives a government agent access to the inner workings of the company. This is analogous to the beat cop leaving his or her patrol car to interact with citizens directly on the street. The monitor's vantage point allows for greater surveillance and makes it easier for people to report violations.[120] 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.[121]

Other terms also signify a new approach to policing. These include requirements that the company replace particular individuals or abandon

115. *Introduction*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 2.

116. *2012 Year-End Update on Corporate Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPAs)*, GIBSON DUNN (Jan. 3, 2013), http://www.gibsondunn.com/publications/Documents/2012YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf.

117. Lanny A. Breuer, Assistant Att'y Gen., Speech at the New York City Bar Association (Sept. 13, 2012), *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html.

118. SEC Initiative Announcement, *supra* note 111.

119. *Introduction*, *supra* note 114, at 4.

120. 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*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 38, 52.

121. Barkow, *supra* note 57, at 180 (citing Bristol–Myers DPA that required financial disclosure requirements that exceeded existing legal requirements).

specific lines of business or business practices.[122] These kinds of requirements are fundamentally different than a fine or a pledge not to engage in further criminal conduct. These terms support 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).[123] DOJ explicitly states that it uses DPAs and NPAs as "a force for positive change in corporate culture."[124] Prosecutors are acting as "'norm entrepreneurs,' not only setting standards, but also communicating values"[125]—precisely the style of the new policing framework.

As noted in Part I, there is a vigorous debate over the effectiveness of broken windows policing strategies in decreasing urban crime. Therefore, it is reasonable to question whether this strategy is likely to be any more successful in policing business crime. Prosecutors, even when they consult with expert agencies like the SEC,[126] may lack the expertise to know what structural reforms will result in greater law-abiding behavior within complicated businesses and industries.[127] And critics have charged that prosecutors should not be dictating personnel decisions within a company.[128] Moreover, even if norms within the particular company with the DPA or NPA change, that still leaves the rest of the industry. It remains open to question whether changes in one company will have a larger influence on the business community.

But regardless of its effects, the theory behind these actions is 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

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122. *See, e.g.*, HSBC Bank USA, N.A. and HSBC Holdings PLC DPA ¶¶ 5h, 5k (Dec. 11, 2012) (terminating certain business relationships and lines of business); Barkow, *supra* note 57, at 180 (summarizing agreements that regulated the relationship between medical device manufacturers and medical consultants); Griffin, *supra* note 57, at 119 (describing other agreements that require CEOs to be removed).

123. Heymann, *supra* note 1, at 423.

124. Filip Memo, *supra* note 42.

125. Griffin, *supra* note 57, at 122–23.

126. *See* Barkow, *supra* note 57; Brandon L. Garrett, *Collaborative Organizational Prosecution*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 154.

127. Arlen, *supra* note 18, at 79. 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 57, at 192–93.

128. *See* Arlen, *supra* note 18; Epstein, *supra* note 120.

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, in which they threaten 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 few years, the business pages have been overflowing with stories about major insider trading cases. There have been 180 civil actions[129] and under the current U.S. Attorney for the Southern District of New York, Bharara, there have been seventy-three insider trading convictions or guilty pleas.[130] 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.[131] 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."[132] This inquiry—dubbed "Operation Perfect Hedge"—resulted in fifty-seven criminal convictions since August 2009, and fifty-seven enforcement actions at the SEC in 2011 alone.[133] And the

129. Peter Lattman, *SAC Capital to Pay $616 Million in Insider Trading Cases*, N.Y. TIMES DEALBOOK (March 15, 2013, 10:58 PM), http://dealbook.nytimes.com/2013/03/15/sac-settles-insider-trading-cases-for-616-million/.

130. Julie Creswell, *A Relentless Prosecutor's Crowning Case*, N.Y. TIMES (July 25, 2013, 8:24 PM), http://dealbook.nytimes.com/2013/07/25/a-relentless-prosecutors-crowning-case/.

131. Kenneth M. Breen & Sean T. Haran, *The Rise of Wiretaps and Government Eavesdropping in Securities Fraud Cases*, CHAMPION, May 2011, at 43, *available at* http://www.nacdl.org/Champion.aspx?id=20605.

132. Cheryl A. Krause, *Defense Strategies and Compliance Issues in the New Insider Trading Environment*, CHAMPION, Sept./Oct. 2012, at 46, *available at* http://www.dechert.com/files/Publication/3f3d2d22-e0bc-4fc3-8205-7142a398a589/Presentation/PublicationAttachment/0f787d1d-3857-4a8c-a783-74541df1c98a/Krause_WCSL_TheChampion.pdf.

133. *Id.*

recent indictment of SAC Capital expands the focus to corporate-level liability instead of just individual traders.[134]

Insider trading cases are not new, but a couple policing techniques set these recent cases apart. 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.

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."[135] 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 3 percent and doing it on a steady basis, we are going to look for them."[136] 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.[137] 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: the number of

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134. Indictment, United States v. S.A.C. Capital Advisors, L.P., No. 13-cr-541 (S.D.N.Y. 2013), *available at* http://www.justice.gov/usao/nys/pressreleases/July13/SACChargingAndSupportingDocuments/SAC%20Indictment%20(Stamped).pdf.

135. Kenneth Herzinger & Mark Mermelstein, *On Tap: The Government's Use of Wiretaps in Insider Trading Prosecutions Shows a Willingness to Use Nontraditional Methods of Investigation*, L.A. LAWYER, Apr. 2012, at 30, 32, *available at* http://www.lacba.org/Files/LAL/Vol35No2/2915.pdf.

136. *Oversight of the U.S. Securities and Exchange Commission's Operations, Activities, Challenges, and FY 2012 Budget Request: Hearing Before the Subcomm. on Capital Markets and Government Sponsored Enterprises of the Comm. on Financial Services*, 112th Cong. 32 (2011).

137. Robert Khuzami, Dir., Sec. & Exch. Comm'n, Div. of Enforcement, Remarks at Press Conference at the U.S. Attorney's Office for the Southern District of New York (Oct. 16, 2009), *available at* http://www.sec.gov/news/speech/2009/spch101609rk.htm.

insider cases brought at the SEC is up 43%, with many of the cases against hedge funds.[138]

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 recent cases have been built on evidence obtained through wiretaps, a novel approach to business crime investigations.[139] Although wiretapping 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.

In one sense, insider trading is the opposite of a broken window. Whereas a broken window is problematic because it is a visible "signal that no one cares,"[140] insider trading by definition takes place in the shadows with nonpublic information.[141] Market participants, however, suspect insider trading is commonplace,[142] so the absence of prosecutions is an analogous sign of neglect to the broken window in plain view.[143] 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.[144] Wiretaps seek to alter that perception by suggesting the government does care—because it is listening. Indeed, Bharara made this plain at Rajaratnam's arrest, stating that "privileged Wall Street insiders who are considering breaking the law will have to

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138. Letter from Robert S. Khuzami to Honerable Charles E. Grassley, *supra* note 90, at 4.

139. Herzinger & Mermelstein, *supra* note 135, at 32.

140. Kelling & Wilson, *supra* note 4, at 31.

141. 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.

142. 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-/.

143. In a blog post shortly after James Q. Wilson's death, William K. Black pointed out that applying the 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.

144. 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).

ask themselves one important question: Is law enforcement listening?"[145] The onslaught of cases being brought in recent years is designed to make market participants—particularly expert network firms—answer that question affirmatively.[146] If industry participants are worried that their calls are being recorded or that individuals with whom they are speaking could be wearing a wire, they will 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,[147] wiretaps aim to do the same thing.[148] "Part of our job," Bharara explains, "in exposing these cases is to bring people back to a level of confidence in the market."[149]

Bharara has sought to buttress social norms of ethical behavior using another proactive 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 mimic the tactics of community policing in this regard. And the economic-crime 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."[150] But having the symbolic chief of that force—or, as the press seems to prefer, the sheriff[151]—speak directly to the community is designed to achieve some of the same norm-changing ends. Bharara has embarked on an outreach program to Wall Street that emphasizes the need to create an ethical corporate culture to Fortune 500 company directors, business groups, compliance officers,

145. *See* Zachary Goldfarb, *Insider Trading Ensnares Six: Prosecutors Accuse Hedge Fund Manager, Others of Raking in $20 Million*, WASH. POST, Oct 17, 2009, at A8.

146. Krause, *supra* note 132, at 46 (noting that "the sheer number of cases brought by regulators," among other factors, "signal[s] a new era in white-collar prosecutions").

147. Meares & Kahan, *supra* note 3, at 825.

148. 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 $1 million).

149. Steve Schaefer, *Wall Street Sheriff Preet Bharara Talks Insider Trading*, FORBES (July 18, 2012), http://www.forbes.com/sites/steveschaefer/2012/07/18/wall-street-sheriff-preet-bharara-talks-insider-trading/.

150. Black, *supra* note 143.

151. *See, e.g.*, Schaefer, *supra* note 149; Andrew Tangel, *New Sheriff of Wall Street Is Racking up Insider Trading Convictions*, L.A. TIMES (Mar. 29, 2013), http://articles.latimes.com/2013/mar/29/business/la-fi-sac-arrest-20130330.

securities lawyers, hedge fund associations, and business schools.[152] And he has explicitly drawn a parallel between his talks and similar efforts by law enforcement related to drug trafficking, likening his talks to "the meetings that cops and prosecutors tasked with addressing the scourge of drug trafficking and violence hold in communities where such crimes persist."[153] Bharara's approach has some support in empirical evidence, which shows that social norms have a greater deterrent effect than formal criminal interventions in deterring corporate misconduct.[154] So *if* the speeches resonate and help change social norms—admittedly, a big if—they could have a larger deterrent effect than the prosecutions.

IV. 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 also important differences. While some techniques are comparable, such as data generation to locate patterns and "hot spots" of criminality, 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 trails or by using surrogates, such as monitors to report back what they see and hear within a company.

The biggest challenge in policing business crime is determining 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.[155] But it may be even harder to identify the right approach 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 additional promises and pitfalls with using these proactive strategies in business crime cases.

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152. Bharara, *supra* note 54.

153. *Id.*

154. Cindy R. Alexander & Mark A. Cohen, *The Causes of Corporate Crime: An Economic Perspective*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 18, at 11, 27–28.

155. Heymann, *supra* note 1; Roberts, *supra* note 13; Stewart, *supra* note 13.

First, consider what different consequences follow from the fact that regulators like the SEC are the front-line police in the context of business crime cases. A central criticism associated with the 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 the beat officer's exercise of discretion.[156] Although that advice appears to have been largely ignored as it applies to street crime, this kind of oversight is already built in to the structure of the administrative state. Indeed, the administrative state was the model for Livingston's suggestion. So a regulatory actor like the SEC is already checked by this kind of process.

The SEC's development of the consolidated audit trail provides an illustration of how this process influences policing practices in the case of economic crime. 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 on comments from the relevant community.[157] 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.[158] But Livingston also conceded that the political oversight of police departments has serious limits. Neighborhoods are not homogenous, and dif-

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156. *See* Livingston, *supra* note 1, at 659–70.

157. 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*, *supra* note 95, at 10–11.

158. Livingston, *supra* note 1, at 654.

ferent 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, specifically 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.[159] So politics is at best an uncertain source of boundaries and at worst a prompt for overly aggressive policing tactics because voters with the greatest sway may be willing to accept the curtailment of others' liberty to assuage their own fears of crime. As Philip Heymann notes, "There is every reason to believe that the great 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."[160] 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.[161]

The political dynamic is different when it comes to business crime. For starters, the fear 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 will profit from an unfair advantage. 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 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 regula-

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159. The politics surrounding Chicago's anti-loitering ordinance in *Chicago v. Morales* is illustrative of this dynamic. Brief of Chicago Alliance for Neighborhood Safety, et al. as Amici Curiae Supporting Respondents, City of Chicago v. Morales, 527 U.S. 41 (1999) (No. 97-1121), 1998 WL 642555.

160. Heymann, *supra* note 1, at 454.

161. *Id.*

tion, 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 fairly. On the contrary, greater regulation and oversight have been resisted by just about all the major players within corporate America.[162]

And those players are politically well-situated to resist greater enforcement efforts. Whereas the new policing on the street largely targets 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.[163] 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.[164] 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.[165] Critics of the SEC claim that the SEC does not go far enough in policing and regulating the industry.

The politics are somewhat different with respect to DOJ 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 crime can be charged in a given case, prosecutors can choose from a menu of options.[166] 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,

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162. *See, e.g.*, Gretchen Morgenson, *Market Place; Wall St. Push to Water Down Securities Laws*, N.Y. TIMES (June 18, 2002), http://www.nytimes.com/2002/06/18/business/market-place-wall-st-push-to-water-down-securities-laws.html.

163. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 22–23 (2010).

164. *See* ARTHUR LEVITT WITH PAULA DWYER, TAKE ON THE STREET: WHAT WALL STREET AND CORPORATE AMERICA DON'T WANT YOU TO KNOW 132–33 (2002).

165. For a list of studies of SEC capture, see Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2209 n.88 (2010).

166. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001).

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 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.[167] The only limit on the exercise of this power is that the charge needs to be supported by evidence. Third, federal prosecutors gain additional leverage because they can offer sentencing discounts for cooperating with the government and accepting responsibility.[168] 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 leverage 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 guilty.[169] Moreover, unlike the SEC, U.S. Attorneys are not part of a regulatory structure that relies on notice and comment rulemaking or judicial review. As a result of less oversight, prosecuting attorneys' discretion is greater.

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

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167. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

168. Barkow, *supra* note 57, at 178. ("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.").

169. *Id.* at 178–79.

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.[170]

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

> [i]n 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 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.[171]

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 are absent in the street crime arena.

There is another reason to believe that 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 in the legislature to take on the cause. Federal investigative techniques have already shifted in the

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170. *Transcript of Holder's Admission on Too-Big-to-Fail Banks*, MARKET WATCH (Mar. 6, 2013), http://stream.marketwatch.com/story/markets/SS-4-4/SS-4-25100/ (testimony to the Sen. Judiciary Committee).

171. Breuer, *supra* note 117.

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,[172] DOJ changed its position. Cooperation credit no longer depends on whether a corporation waives its attorney–client privilege or produces protected material, but instead rests on the company's disclosure of facts.[173]

But even if prosecutors may not police as aggressively in business crime cases as in traditional police in street crime cases, that does not mean there is no danger of prosecutorial overreaching. For starters, there is no evidence that collateral concerns are at issue in cases against individual, as opposed to corporate, business crime defendants. And even in cases against corporations, the greatest fears of negative effects on third parties 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 sufficiently serious to avoid having defendants call their bluff and refusing 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 those who are 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."[174] And, in fact, some of the recent insider trading cases have seen this potential realized.

172. Attorney–Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); Attorney–Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

173. Filip Memo, *supra* note 42.

174. Berger v. New York, 388 U.S. 41, 65 (1967) (Douglas, J., concurring).

In *United States v. Goffer*,[175] 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.[176] This action led Judge Richard Sullivan to label the FBI's conduct "nothing short of disgraceful."[177] 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.[178]

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 on 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. What is clear is that the proactive model is here to stay, thus bringing all of the good and the bad that comes along with it.

V. 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.[179] 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 spurned 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 proac-

175. United States v. Goffer, 756 F. Supp. 2d 588 (S.D.N.Y. 2011).

176. The government is required to "minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5) (1998).

177. Herzinger & Mermelstein, *supra* note 135, at 36.

178. *See* 18 U.S.C. §2516(1) (2012).

179. JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 251 (1993).

tive 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 to assess priorities. The context is far more amorphous. 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,[180] 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.[181]

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 that exceed 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.[182] There are strong reasons to believe this will be successful in the business crime arena as well, which the insider trading cases appear to demonstrate. These cases are not simply the result of wiretaps, but are part of a

180. Doubts have been raised. *See, e.g.*, Griffin, *supra* note 57, 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).

181. 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).

182. 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 (2006) (doubting the effectiveness of broken windows policing but acknowledging that targeting hot spots can reduce crime); Heymann, *supra* note 1, at 417 (citing studies that show "focusing patrol resources on places and times that have the most crime" causes a reduction in crime); Barker, *supra* note 12, at 501 (citing studies).

sophisticated data analysis that now focuses on particular traders with abnormal returns. Data-based analysis is precisely the kind of smart policing technique 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. 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, new business crime policing is a method designed to foster uniformity and rationality in ways that new policing approaches in street crime do not automatically lend themselves.[183]

183. 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 1, at 650–72.