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The Spear and Shield: Governmental Intervention in White-Collar Crimes and Defendants' Privileges

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From the 2022 Enablers Act - should we make changes to the current criminal justice system?

"You cannot make an omelet without breaking eggs."

– Robert Louis Stevenson, 1897.

I. The phenomenon about white-collar crimes

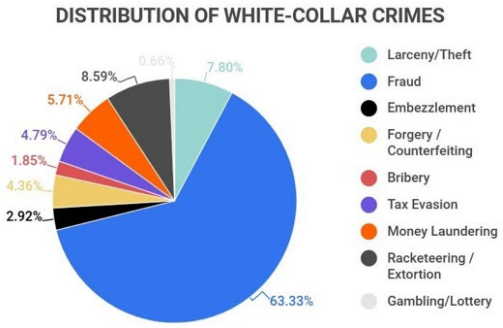
The term "white-collar crime" was allegedly coined in 1939[1]. But the origin of it can be traced back to the formation of human society because of the intrinsic incentives from white-collar crime, triggered by money, power, and the manifestation of human nature to tend to help familiar people. It refers to a wide range of fraudulent crimes "characterized by deceit or concealment to obtain or avoid losing money or property, or to gain a personal or business advantage."[2]

Moreover, the definition of white-collar crime is still expanding. With the development of technology, the idea theft in intellectual property is a rising concern and it costs U.S. businesses billions per year. Meanwhile, with the expanding forms, white-collar crimes are becoming more covert and more sophisticated than ever.

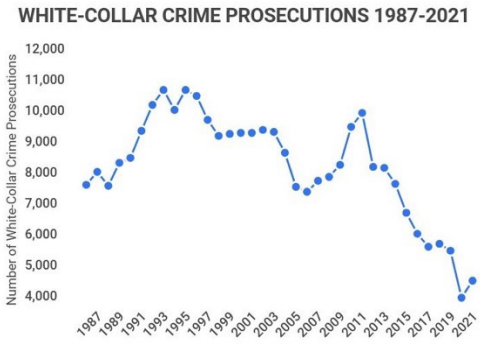
[1] "What is white-collar crime, and how is the FBI combating it?" FBI, https://www.fbi.gov/about/faqs/what-is-white-collar-crime-and-how-is-the-fbi-combating-it#:~:text=The%20term%20%E2%80%9Cwhite%2Dcollar%20crime,by%20business%20and%20government%20professionals (Accessed March 16, 2023.)
[2] "White-Collar Crime," FBI, https://www.fbi.gov/investigate/white-collar-crime (Accessed March 16, 2023.)

A. An alarming situation: The thriving non-violent crime

Statistic data shows an estimated number of 75% of all employees had stolen from their employer at least once[3], and another half of that percentage is repeatedly stealing. At least 24% of U.S. households are victims of a white-collar crime, fraud takes 63.33% of them and along with identity theft, over 17 million Americans have been affected. In 2021, the annual losses from white-collar crimes were up to $1.7 trillion[4].



Unfortunately, 88% of the victims chose not to file a formal complaint[5]. To make matters worse, the prosecution rate keeps dropping. In 2022, there were only 4,180 white-collar prosecutions[6]. Compared with the number 10,162 in 2011, the white-collar prosecution rate has dropped 53.5%. With such drastic drop in the number, the U.S. justice system and Department of Justice (DOJ) has been facing with fierce criticisms, and Senator Bernie Sanders called out DOJ to focus on white-collar crimes more than cannabis.[7]" The trend



[3] Jack Flynn, "The State Of White Collar Crime In The U.S.," Zippia, February 21, 2023, https://www.zippia.com/advice/white-collar-crime-statistics/#:~:text=As%20of%202021%2C%20annual%20losses,white%2Dcollar%20crimes%20go%20unreported (Accessed March 16, 2023.)
[4] Id.
[5] Id.
[6] "White-Collar Crime Prosecutions for 2021 Continue Long Term Decline," TRAC Reports, https://trac.syr.edu/tracreports/crim/655/ (Accessed March 16, 2023.)
[7] Lukas Barfield, "Bernie Sanders Urges Justice Dept. to Prosecute White Collar Crimes More Than Cannabis," Ganjapreneur, June 7, 2022, https://www.ganjapreneur.com/bernie-sanders-urges-justice-dept-to-prosecute-white-collar-crimes-more-than-cannabis/ (Accessed April 22, 2023.)

chart's showing the diminishing prosecution rate of white-collar crime from 1987, in contrast with the blooming white-collar crime rate, indicates a serious situation – white-collar crime is thriving and becoming an outside-the-law area.

B. Increasing difficulties in deterring white-collar crimes

As a multi-layered, large-scheme, non-violent crime, white-collar crimes are furtive and hard to detect until the appearance of some exorbitant losses or large groups of victims as in the Bernie Madoff's Ponzi scheme which had been conducted for at least 20 years[8]. With respect to the shrinking prosecution rate, besides political reasons, there are several key factors are at the play. They are not independent but usually intertwine with each other and create a "muddy pond" that most prosecutors are reluctant to step into.

The pervasive use of plea deal: The wide use of plea deals in the American criminal justice system has faced criticism from the public, particularly when it comes to white-collar crime. While plea deal can save the courts time and precious judicial resources, critics argue that it can contribute to a lower prosecution rate for white-collar crimes. Usually, the convicted offenders would only receive a 27-month incarceration on average[9], which has long been criticized as a challenge to our criminal justice system. Paul Manafort, President Trump's former campaign chairman was convicted of a series of fraud charges, he costed IRS several millions of dollars but only received 47 months in prison[10]. Such a surprisingly low sentencing time sparked an intense

[8] https://online.wsj.com/public/resources/documents/20090315madoffall.pdf, The Wall Street Journal. "Plea Allocution of Bernard L. Madoff," Page 2.
[9] https://www.zippia.com/advice/white-collar-crime-statistics/#:~:text=As%20of%202021%2C%20annual%20losses,white%2Dcollar%20crimes%20go%20unreported
[10] https://www.nytimes.com/2018/09/12/business/dealbook/sentencing-white-collar-criminals.html

debate and public outrage. However, by adopting a plea deal, those white-collar crime offenders may receive an even lighter sentence which may hinder the ultimate legislative goal –deterring future white-collar criminalities.

Even the plea deal itself indicates an effort to increase the conviction rate, a strong negative linear correlation exists between the non-conviction rate and the percentage of using the guilty pleas[11]. By widely applying plea deals in white-collar crime cases, the "rewards" for those prosecutors are reducing: As uncovering white-collar crimes becomes increasingly difficult, prosecutors may feel uncertain about pursuing these cases in trial. In such instances, they may offer plea deals with lenient sentences to secure a conviction, which in other words, is conceding the weakness of their case. This indicates a huge reduction in the incentives for them to pursue similar cases, as they are no longer as motivated to fully investigate and prosecute white-collar crimes.

Excessive investigation time and labor cost: Due to the extensive scales and sophisticated fraud scheme, extensive investigations and analysis by the experts are usually required for the prosecution side to tackle complex cases. To make matters worse, the extensive amount of relevant documents which may contain key information for the investigation are usually beyond human labors to deal with. For example, in the KPMG case, the court observed that:

> The government thus far has produced in discovery, in electronic or paper form, at least 5 million to 6 million pages of documents plus transcripts of 335 depositions and 195 income tax returns. The briefs on pre-trial motions passed the 1,000-page mark some time ago. The government

[11] Finkelstein, M. O. (1975). A Statistical Analysis of Guilty Plea Practices in the Federal Courts. Harvard Law Review, 89(2), 293–315. https://doi.org/10.2307/1340292, page 299-302.

> expects its case in chief to last three months, while defendants expect theirs to be lengthy as well. To prepare for and try a case of such length requires substantial resources.[12]

Further, the court in the KPMG case noted that, such a large amount of records and the exorbitant labor and monetary cost created a natural barrier to protect the offender[13]. Such a natural defense, without an effective way to deal with it, will inevitably have a chilling effect on the prosecutor's effort.

Development of technology: Cybercrime and White-collar Crime are two different concepts, and many people fail to recognize the overlap between those two terms[14]. Criminologists use the term "dark figure" to refer to the amount of crime that was undetected, and the white-collar crime's "dark figure" is obviously higher than any other crime[15]. The ubiquitous use of computer and technology acts as an important multiplier to the dark figure of white-collar crimes. In one aspect, the development of technology makes it easier for the offenders to take advantage of the legal gaps between countries. Similar to the concept of "forum shopping," the offender can choose a country with better legal/regulatory protection over companies. For example, according to Chinese law, the audit letters/documents for those companies in China are not allowed to be sent overseas[16]. There has been a decades-long fight between SEC and Chinese authorities about this issue and there's no showing of potential solutions[17]. This un-transparency, from the perspective of a potential white-collar crime offender, would be an advantage to incentivize them

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[12] *United States v. Stein* (*Stein I*), 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006).
[13] *Id*. at 355.
[14] BK Payne, "White-Collar Cybercrime: White-Collar Crime, Cybercrime, or Both?" Vol. 19, Issue 3, Page 16–32 (2018), https://ccjls.scholasticahq.com/article/6329-white-collar-cybercrime-white-collar-crime-cybercrime-or-both/attachment/16533.pdf, page 18. (Accessed April 22, 2023)
[15] Id. page 21.
[16] J. Zhang, J. Parry, etc., ""
[17] YJ Fisher, "Resolving the Lack of Audit Transparency in China and Hong Kong: Remarks at the International Council of Securities Associations (ICSA) Annual General Meeting", SEC, May 24, 2022. https://www.sec.gov/news/speech/fischer-remarks-international-council-securities-associations-052422 (Accessed April 22, 2023)

to build a subordinate company in China. With the help of advanced communication, what the potential white-collar crime offenders need to do would be extremely easy: file some forms and papers. However, things would not be easy for the government investigators to request a foreign document, they would need permissions, good knowledge about foreign law, and must also need to heed the international political trends.

Another problem is about the emerging use of AI techniques. An important concept in the machine learning is the "reinforcement learning" and its defining feature is the ability to learn and predict patterns[18]. Briefly speaking, the user can simply set a goal, and during the data training, anything facilitates the wanted result would be deemed as a "reward" to the AI model. Without transparency in those codes, it would be hard to determine if anything illegal has been counted as a reward to the program. This feature further dilutes the existence of mens rea because the user-offenders can further allege that they were just following the suggested instructions from the program, which would make the investigations harder. Given that the source code is considered as protected intellectual property[19] and user data is usually safeguarded, it would be almost infeasible to prove the tenuous mens rea, just like trying to catch a shadow.

The hidden nature of white-collar crime: The standards for criminality are "vague, unsettled, and still developing."[20] In addition this undertone, white-collar crimes usually happen in a relatively "mild" environment in which the only difference between commerce and crime is

[18] Kathleen Walch , "How AI Is Finding Patterns And Anomalies In Your Data," Forbes (May 10, 2020), https://www.forbes.com/sites/cognitiveworld/2020/05/10/finding-patterns-and-anomalies-in-your-data (accessed April 22, 2023).
[19] See generally, U.S. Copyright Office, "Circular 61: Copyright Registration for Computer Programs," https://www.copyright.gov/circs/circ61.pdf (last visited April 22, 2023).
[20] Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 LAW & contemp. PROBS. 23 passim (Summer 1997).

merely the state of mind[21]. Sometimes it is even more elusive because no one except the offender can tell if it was a deliberate misconduct or an innocent mistake. And such subtle *mens rea* is covered by day-to-day commerce: "In complex organizational settings, the wrongdoing can be deeply nested within legitimate and valuable economic activity."[22] Furthermore, the white-collar social class position significantly helped the offenders to (1) to diffuse criminal intent into ordinary occupational routines; (2) to accomplish the crime without incidents or effects that furnish presumptive evidence of its occurrence before the criminal has been identified; and (3) to cover up the culpable knowledge of participants through concerted action that allows each to claim ignorance.[23] Within such setting and the defendants' ability to marshal resources, the prosecution side would be very unlikely to find related evidence, let alone a smoking gun.

The attorney-client privilege, also mentioned by Jack Katz, serves as an important "shield" for those white-collar crime offenders[24] and will be the main topic being discussed later in this paper. In his discussion about the "concerted silence," he pointed out that more and more white-collar crime offenders had realized how convenient and powerful the attorney-client privilege is. Instead of using a traditional way to hire an accountant to do any illegal transactions, people can just insert the lawyers' role between themselves and their accountant: hiring a lawyer who has an accountant to work with. The existence of such a shield of privilege can prevent transactions and potentially incriminating communications from being disturbed by government investigations. The attorney-client privilege, functioning and being recognized as a black box[25],

[21] Buell, Samuel W. "IS THE WHITE COLLAR OFFENDER PRIVILEGED?" Duke Law Journal 63, no. 4 (2014): 823–89. http://www.jstor.org/stable/23792739. Page 841.
[22] *See* Samuel W. Buell, Criminal Procedure Within the Firm, 59 STAN. L. REV. 1613,1627 (2007).
[23] Jack Katz, "Legality and Equality: Plea Bargaining in the Prosecution of White-Collar and Common Crimes." Law & Society Review, vol. 13, no. 2, 1979, pp. 435. JSTOR, https://doi.org/10.2307/3053262. (Accessed 22 Apr. 2023.)
[24] Katz, "Legality and Equality", *supra* note 12, page 438.
[25] Id.

is now becoming a symbol for "a lawless territory" and to a significant extent, thwarting the governmental investigations for white-collar crimes.

II. The spear and shield: a protracted war

A. History: the formation of the spear – governmental efforts

In 1980s, the establishment of the federal and state sentencing guidelines indicated the raising awareness of white-collar crimes. The guideline was instructive rather than mandatory, and was established to change the indeterminate sentencing system, which allowed trial judges to impose sentences entirely at their discretion[26]. But the sentencing guideline did suggest increased penalties and punishment for the white-collar crime offenders[27], which can be deemed as the first step for the government to try to deter white-collar crimes. Following that, there has been a series of increasement in penalty. Title X of the Financial Institutions Reform, Recovery and Enforcement Act which passed in 1989, amended the Federal criminal code "to increase the criminal penalties and impose civil penalties for designated financial institution offenses including: (1) receipt of commissions or gifts for procuring loans; (2) *theft, embezzlement, or misapplication of funds;* and (3) *fraudulent activities*.[28]" In 2002, the establishment of Sarbanes-Oxley Act further increased the penalty for corporation fraud, mail and wire fraud[29].

The effectiveness of those penalty enhancement is still under debated. But from another point, the language of those legislative intents reflects that the definition and concept of white-

[26] "Sentencing," Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/sentencing. (Accessed April 22, 2023).
[27] John M. Ivancevich et al., "Deterring White-Collar Crime," The Academy of Management Executive (1993-2005), vol. 17, no. 2, 2003, pp. 114–27. JSTOR, http://www.jstor.org/stable/4165960. Page 119. (Accessed 25 April, 2023.)
[28] See Title X of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183, § 951 (1989), https://www.congress.gov/bill/101st-congress/senate-bill/774 (Accessed April 22, 2023.)
[29] See generally Sarbanes-Oxley Act of 2002 § 1107, 116 Stat. 800 (2002), https://www.govinfo.gov/content/pkg/PLAW-107publ204/html/PLAW-107publ204.htm (Accessed April 22, 2023.)

collar crime is expanding and developing. The 2002 Sarbanes-Oxley Act can be considered as a response to the Enron Scandal in 2001, and court decisions made after the demise of Enron all reflected a deeper understanding of white-collar crime[30]. However, a better understanding did not help with the situation. Even with broader definition, even with harsher punishments, there was no substantial improvement in deterring white-collar crimes[31]. Viewing white-collar crime as a sphere, the governmental efforts discussed so far can only be regarded as external forces to "intrude the sphere," and the results are below expectations.

B. Another Entry Point – from the inside.

The Intervention with Defense Fee and the 6th Amendment

In response to the unsatisfactory external efforts to combat white-collar crime, the government has shifted its focus to internal strategies. Rather than relying solely on external forces, they sought to undermine the white-collar crime sphere from inside and the outcome turned out to be more favorable.

With the government side moving their attentions to the "root" of white-collar crime, they first started by cutting off the offenders' defense fee provided by their companies. The Thompson Memorandum in 2003 suggested more emphasis on the corporation liabilities[32]. Under agency law and long-recognized *superior respondeat* theory, it explicitly suggested that companies' payment of defendants' defense fee should be taken into consideration and may also bring criminal liabilities to the companies[33]. This memorandum opened the "Thompson

[30] Ivancevich, "Deterring White-Collar Crime," supra note 22, Page 121.
[31] Id. Page 117. (Citing FBI white-collar referrals, 2002. Syracuse University: Transaction Records Access Clearinghouse) ("The Federal Bureau of Investigation's data and statistics from 1986-2002 indicate that white-collar crime referrals to the FBI were about 28-40 per cent of all cases. For example, in 2001 there were 12,835 white-collar crime referrals which constituted about 32.9 per cent of all referrals to the FBI.")
[32] See C. J. Carpenter, "Federal prosecution of business organizations: the Thompson Memorandum and its aftermath," pp 209-10, (November 27, 2007) https://www.law.ua.edu/pubs/lrarticles/Volume%2059/Issue%201/Carpenter.pdf (Accessed 22 April, 2023.)
[33] Id.

Memorandum Era" and significantly affected the level of governmental intervention in deterring white-collar crimes. Professor O'Sullivan, in his article commended this way because this is an ingenious "entry point" in terms of the corporation-offender relationship: different from a defendant, a company is more vulnerable to a white-collar crime charge, even if it ends up with accepting a plea deal, this is still a "death sentence" to the company[34]. In the Thompson Memorandum Era, the prosecutors had plenty of discretions and they "treated a refusal to pay employees' attorneys' fees as one element of cooperation.[35]" Further, Professor O'Sullivan insightfully perceived that, following the Thompson Memorandum, the governmental efforts had been touching to the scope of several "privileges," including the corporate privilege, work product doctrine, and the attorney-client privilege[36].

The Thompson Memorandum Era ended with the adaption of the McNulty Memorandum, which by its language, made the corporate payment of defense fee as a signal for cooperating only applicable to limited exceptions[37]. Professor Bharara, working as a U.S. Attorney, expressed his opinion that the McNulty Memorandum had in fact, made little change to the Thompson Memorandum Era[38]. The DOJ still did not disclose its reasons to the question of whether to indict; and companies, on the other side, were still under the deterrent effect from Thompson Memorandum Era. In order to show good faith and full compliance, they still cut off

[34] Julie R. O'Sullivan, "Some Thoughts on Proposed Revisions to the Organizational Guidelines," 1 OHIO ST.J. Crim. L. 487, 495-96 (2004), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1544&context=facpub, (Accessed 23 April, 2023.)
[35] See, Michael Elston, "Cooperation with the Government Is Good for Companies, Investors, and the Economy," 44 AM. Crim. L. Rev. 1435, 1436 (2007).
[36] See general, O'Sullivan, "Some Thoughts on Proposed Revisions to the Organizational Guidelines," *supra* note 33.
[37] Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Att'ys 11 n.3 (Dec. 12, 2006), http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf. (Accessed April 23, 2023.)
[38] Preet Bharara, "Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants," 44 AM. Crim. L. Rev. 53, 78 (2007).

employees' defense fees to show their signal of cooperation[39]. This explanation is particularly true because despite the later Filip Memorandum's flat prohibition on taking defense fee as a factor in making charging decisions, those companies were still "voluntarily" cutting off defense fees for their employees[40]. Without disclosing what was the actual "grading criteria" in the DOJ's mind, the deterrent effect would only continue because the companies knew, and nowadays still know, their every single action may change the outcome[41] – it is better safe than sorry.

The long-lasting deterrence on corporate defense fee was so strong that some scholars and some judges believed that such prosecutorial pressure, may constitute a violation of the 6th Amendment. But based on case law, the courts are split on this issue and hence, the constitutional protection may arguably be not absolute. One type of opinion, with the *KPMG* case as the leading one, says that the governmental interference of putting pressure on corporate defense fee was "intolerable in a society that holds itself out to the world as a paragon of justice.[42]" The court treated the corporate defense fee as defendants' own assets and referred back to the famous *United States v. Gonzalez-Lopez* case and follow the explicit rule: "Deprivation of the right [to be assisted by the counsel of one's choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.[43]" Under this strand of opinions, the right to be assisted by the counsel he/she wants had been virtually lifted almost to the same height as the 6th Amendment right to counsel, and any governmental action that may potentially affect the

[39] Id.
[40] Sarah Ribstein, "A question of costs: considering pressure on white-collar criminal defendants." Duke Law Journal, February 2009, Vol. 58, No. 5 (February 2009), pp. 857-871. https://www.jstor.org/stable/20684741 (Accessed April 23, 2023.)
[41] Id. at 872.
[42] *United States v. Stein*, 495 F. Supp. 2d 390, 428 (S.D.N.Y. 2007).
[43] *United States v Gonzalez-Lopez*, 548 U.S. 140, 148 (2006).

defendant's choice of counsel should not be allowed. In the earlier *KPMG* case (*Stein I*), the court decided that the Thompson Memorandum methods failed to pass the strict scrutiny test and the "economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate governmental interest - it is an abuse of power.[44]"

The other side's opinion is more complex but is mainly following the "criminal forfeiture" theory under 21 U.S.C. §853[45]. First, the choice of counsel is not absolute because it can be intervened by the court because of conflict of interest in *Wheat v. United States*[46]. Second, the language of "choice of counsel" is not embedded in the constitution. Third, based on the forfeiture theory, the governmental interference with the defense fee is not groundless. The signature case is *Caplin & Drysdale v. United States*[47], in which the court ruled that the defendant could not use his money from alleged illegal drug trafficking to pay his attorney's fee, and this did not constitute a violation of 6th Amendment right to counsel. Under this theory, the illegal gains arguably contribute to the corporate defense fee, hence the defendants cannot use them.

However, notwithstanding the rejection of the second viewpoint from the more recent *KPMG* case, the reality would be more likely to contradict the ruling. Although the *KPMG* court refused to apply the forfeiture theory in *Caplin*, its rejection is simply based on 1) it is not "other people's money" 2) defendants reasonably had expectations that the corporate legal fee could be used for them[48]. Neither of them is a strong reason. For the first reason, it would be hard to determine whether the legal fee from the corporation should be deemed as their pre-determined

[44] *United States v. Stein*, 435 F. Supp. 2d 330, 363 (S.D.N.Y. 2006).
[45] "21 U.S. Code § 853 - Criminal forfeitures," Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/uscode/text/21/853 (Accessed April 23, 2023.)
[46] *Wheat v. United States*, 486 U.S. 153 (1988).
[47] *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989).
[48] See *Stein*, 435 F. Supp. 2d 330, 366-67.

assets or other people's money. For the second reason, especially in year 2006 when the effect from the Thompson Memorandum Era was still lingering, defendants' expectations for those defense fee would not be that high. Moreover, the *KPMG* court missed one critical part – as aforementioned, with the Thompson deterrent effect still lingering, it is the corporation instead of a government actor who is "voluntarily" cutting off the defense fee. Although the voluntariness is still questionable, in light of this series of governmental efforts, the constitutional protections for those white-collar crime offenders are being impinged upon. On the battlefield named "defense fee/right to choose counsel", the spear – governmental efforts are winning.

The ongoing fight around the topic of the attorney-client privilege and the 5th Amendment – A more protracted war

The "Act of Production" doctrine and the collective entity doctrine are powerful grounds for the government to pierce the 5th Amendment "non-self-incrimination" right. The courts are still following the long-standing *Braswell* rule which made a distinction of capacity between corporation entity and individual person – individuals can claim their 5th Amendment rights but corporations cannot,[49] and individuals cannot expand their 5th Amendment rights to the corporation they have formed. The underlying reason is that the corporation is a collective entity and the custodians who are holding the documents and records are just "representatives.[50]" When it comes to the relationship between attorney and client, it becomes increasingly difficult for the government to penetrate the privilege shield. Government had been trying to pierce the work product doctrine but failed in doing so. In *United States v. Ruehle*, the Ninth Circuit Court of Appeals criticized the government's attempt to obtain privileged documents by arguing that they

[49] *Braswell v. United States*, 487 U.S. 99 (1988).
[50] *Id*. at 110.

were not prepared in anticipation of litigation and therefore not protected by the work product doctrine[51]. The court held that this argument was "unpersuasive."[52] Even if the work product protection falls apart, there would still be a solution. In consideration of the trend of governmental efforts trying to "erode" the privileges and constitutional protection, a prudent lawyer may perceive the risk – the fruit of his/her investigation could be seized by the government and be used against them, so he may simply not put any key information in written form.

The fight around the topic of the attorney-client privilege is relatively longer and can be traced back to the earliest era when such privilege is recognized. The main purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.[53]" But such privilege hampers governmental interest because "it impedes full and free discovery of the truth.[54]" Hence, any governmental effort try to alter the attorney-client privilege can arguably be put under the strict scrutiny test to see if such approach is narrowly tailored, as the *Horowitz* court pointed out that "[T]he privilege stands in derogation of the public's 'right to every man's evidence' and as 'an obstacle to the investigation of the truth,' [and] thus, . . . '[i]t ought to be strictly confined within *the narrowest possible limits* consistent with the logic of its principle.'" [55]

The attorney-client privilege, however, is not a perfect shield. Courts have long recognized that such privilege is "not without its costs."[56] On that privilege shield there are

[51] *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).
[52] *Id*. at 611.
[53] *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).
[54] *United States v. Martin*, 278 F.3d 988, 999 (9th Cir. 2002).
[55] In re *Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973).
[56] *United States v. Zolin*, 491 U.S. 554, 562 (1989).

several "holes," and the most well-known exception is the crime-fraud exception. The fundamental reason for that exception is simple: the privilege can be used for prior wrongdoing, but not for the future or ongoing wrongdoing[57]. Recently, the several acts proposed by the legislative branch, for example the Enablers Act, the Corporate Transparency Act[58], all tried to pierce the existing "crime-fraud" hole and add an extra duty on the lawyers – mandatory reporting for clients' suspicious act. Such efforts to "erode" the attorney-client privilege, is an act of helplessness rather than narrowly tailored, because the individual offenders are protected by the 5th Amendment, and the person that know them the most, expect themselves, may be the lawyer.

On February 6, 2023, the ABA passed a resolution[59] which opposes a heatedly debated "Enablers Act" amendment[60] from last year, which intended to impose a duty to report *suspicious* financial crimes to authorities. ABA decided that such a stringent duty would be burdensome because it damages the attorney-client privilege, client confidentiality, and state court regulation of the legal profession[61]. Such an amendment also tried to impose regulations on small business and their attorneys. Not only that, if passed, the Enablers Act would regulate lawyers as "financial institutions" under the Bank Secrecy Act (BSA) and could require them to report attorney-client privileged and other protected client information to the government[62].

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[57] *Id*.
[58] "Corporate Transparency Act of 2019," 116th Congress, October 23, 2019, https://www.congress.gov/bill/116th-congress/house-bill/2513/text (Accessed April 22, 2023.)
[59] "Resolution," American Bar Association, February 6, 2023, https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2023/704-midyear-2023.pdf (Accessed April 23, 2023.)
[60] "Enablers Act," 117th Congress, October 8, 2021, https://www.congress.gov/bill/117th-congress/house-bill/5525/text (Accessed April 24, 2023.)
[61] "ABA Passes Resolution Opposing Suspicious-Transaction Reporting Rule for Lawyers", WSJ, Feb 7, 2023, https://www.wsj.com/articles/aba-passes-resolution-opposing-suspicious-transaction-reporting-rule-for-lawyers-11675803291 (Accessed April 24, 2023.)
[62] Id.

ABA, since last year, has shown its strongly disagreement[63]. ABA has long been taking the stand of inviolableness of attorney-client privileged information[64]. In its resolution published on February 6, ABA held that it "supports *reasonable* and *appropriate* legislation, regulations, and other governmental measures that require business entities to disclose their beneficial ownership information to the federal government and authorize government authorities to access that information on an appropriately confidential basis…[65]" But "Constitutional rights and confidentiality interests must be protected.[66]"

On the other hand, ABA itself clearly understands the hazard of white-collar crime, especially for money laundering. ABA always seems to be complying with the governmental efforts – it always advocates for improved legal education, and it is collaborating with other organizations like the Financial Crimes Enforcement Network (FinCEN) and the Financial Action Task Force (FATF). However, ABA staunchly asserts its position - attorney-client privilege is inviolable. While ABA is collaborating with those organizations, at the same time, ABA is opposing those organizations' adoption of any anti-money laundering legislation that undermines client confidentiality[67].

The work of a lawyer is like walking on the boundary between light and darkness, with justice on one side and your client on the other. Those congressional acts can be characterized by

[63] "ABA Urges Senators to Oppose ENABLERS Act Amendment to Defense Authorization Bill", ABA, Oct. 31, 2022, https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/oct22-wl/enablers-1022wl/ (Accessed 24, 2023.)
[64] See ABA "Gatekeeper Regulations on Attorneys", ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/independence_of_the_legal_profession/bank_secrecy_act/; See also "ABA 2020 Fact Sheet", ABA, https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/gatekeeper-factsheet-july-2020.pdf?logActivity=true (Accessed April 24, 2023.)
[65] "Resolution," ABA, supra note 48, page 1.
[66] Id.
[67] See generally, "What's new in Washington," ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/new/ (Accessed April 23, 2023.)

encouraging lawyers to take on a more investigative role or aligning themselves more closely with the principles of justice. This is a departure from the traditional role of a lawyer, and for now, can hardly be said as narrowly tailored to pass the strict scrutiny. But in light of the decreasing rate of white-collar crime prosecutions and the increasing annual losses due to such crimes, there is a possibility that such a deviation could be considered justifiable in the future.

III. Possible Outcome and Potential solutions:

For deterring white-collar crimes, we are approaching a singular point, at which actions should be taken. Those congressional acts may have a good reason, but altering the lawyer's role and imposing extra duty could hardly be said as "narrowly tailored" to overcome the potential consequences. First, if clients cannot trust that their lawyers will protect their confidential information, they may be less likely to seek legal advice, which could lead to a loss of trust in the legal system as a whole; Second, the adversarial system is the foundation of the American legal system, and it relies on lawyers advocating zealously for their clients. If lawyers were required to report their clients' misconduct, they may be less likely to zealously advocate for their clients. Moreover, this would interfere with the individual defendants' choice of counsel – since you would report me to the authorities, why don't I find someone who would not? Third, if lawyers were required to report their clients' misconduct, clients who engage in misconduct may be more likely to retaliate against their lawyers by filing complaints, suing them for malpractice, or engaging in other forms of retribution.

ABA's ground for rejecting those acts is sufficient and should not be deemed as an overreaction. After all, the attorney-client privilege is the cornerstone of a trusted relationship. Putting a tinge of governmental investigator on the lawyer's role would be too much of a bright-

line rule, and the balancing test of costs and benefits does not weigh in favor of those legislations. Rather than viewing the attorney-client privilege as an obstacle obstructing transparency and criminal investigation, the government side should know the importance of such privilege to our legal system. These safeguards are essential for lawyers to provide clients with informed opinions and sound legal advice based on a comprehensive understanding of the matter at hand. And prosecutors should not seek to waive these vital protections.

A. Potential solutions

Establishing new government authorities

Since the lawyers' duty of confidentiality is not likely to be undermined, the government can explore alternative measures to increase the possibility of discovering white-collar crime. One potential solution is the establishment of an independent authority or committee with the mandate to investigate and monitor suspected cases of financial wrongdoing. For example, the IRS can plant governmental accountants within companies' financial systems to detect any irregularities. Those accountants can work as heralds or scouts to sense potential on-going white-collar crimes. This way would allow the government to take a more proactive approach to white-collar crime detection and prevention without infringing upon the attorney-client privilege. Moreover, by leveraging specialized knowledge and advanced technology, such system could potentially identify suspicious activities and flag them for further investigation. By exploring innovative solutions, the government can strike a balance between the governmental interest of deterring white-collar crimes and the long-standing attorney-client privilege. The two are not incompatible.

Changing the evidentiary standard for white-collar crime:

As mentioned before, to capture the tenuous *mens rea* in an economic setting would be nearly infeasible. Although a collection of circumstantial evidence may suffice, the number of documents involved is usually beyond human labor to disentangle. To make matters even worse, the criminal evidentiary standard is to prove "beyond a reasonable doubt," which is the highest bar in our legal system.

Would the evidentiary standard for white-collar crime be too high? Courts have not established a clear rule to determine that, in those white-collar crimes, what specific evidence would be enough to prove specific intent to defraud beyond a reasonable doubt[68]. Professor Buell further mentioned that "[n]or has anyone demonstrated how to overcome defenses of good-faith reliance on purportedly adequate disclosure to reviewing accountants and lawyers or to sophisticated buyers of derivatives who were well-informed about the housing market.[69]" Hypothetically, if the evidentiary level gets lowered, the number of documents would decrease exponentially. It will also make it more prospective for the prosecutors to pursue the case because it "pulls the goal closer." And with certainty, this method would have a deterring effect on potential offenders. Granted, challenging the time-honored "beyond a reasonable doubt" standard may sound reckless, but it is not groundless. First, the phrase "beyond a reasonable doubt" is not explicitly in the U.S. constitution. Second, as Prof. Lee's proposition in his paper, a line should be drawn between the factual elements and moral elements in criminal cases because it is not only a question about "what happened but also about the evaluative significance of what happened[70]." People's feelings differ from each other, and he suggested that a more subjective

[68] Samuel W. "IS THE WHITE COLLAR OFFENDER PRIVILEGED?", supra note 16, page 847.
[69] Id.
[70] Young Jae Lee, "Reasonable Doubt and Moral Elements," The Journal of Criminal Law and Criminology (1973-), Vol. 105, No. 1 (Winter 2015), pp. 1-37, https://www.jstor.org/stable/26402439 (Accessed April 22, 2023.)

element of a crime should have more lenient standard, other than beyond a reasonable doubt. He used “reckless” as an instance of "moral elements" in his paper, suggesting that “fraudulent” could also be considered a moral element warranting a lower evidentiary standard.

However, some may argue it would be too risky to lower the long-standing evidentiary standard. Granted, juridically it is imperative to uphold the integrity of the legal system to ensure justice and fairness for all. Another crucial thing is that, lowering the evidentiary standard indicates a higher possibility of wrongful conviction. Further, there may also be some economic concerns since white-collar crimes usually have a significant impact on the economy. From another perspective, lowering evidentiary standard would lower public trust because this method is not a solution to the problem “at its root.” What if future white-collar crime becomes more furtive? Changes are usually paid, but at what cost and can we afford it? To answer this question, we need to carefully evaluate the cost and avoid unnecessary sacrifices, and a temporary solution is not preferred.

Conclusion

Although the data shows white-collar crime is a serious concern and government side may probably feel urged to make changes to deter it, eroding the long-lasting attorney-client privilege is not a good option. By taking away that cornerstone, the lawyer’s role and our adversarial legal system would be significantly changed. Granted, you cannot make an omelet without breaking eggs, but authorities should carefully consider about what eggs they should break. Before trying to pierce the shield of “attorney-client privilege,” there may still be some less harmful way. Changing the evidentiary standard only for white-collar crime may be

possible, but at most it would only be a temporary solution. On the government's side, establishing independent expert system to permeate into corporations or other important financial institutes would be possible to help with the discovery of on-going white-collar crimes.

As we have seen throughout this paper, white-collar crimes are a complex and multifaceted issue that requires careful consideration and attention from lawmakers, legal professionals, and society as a whole. The Spear and Shield metaphor also implies that the spear – government side should not be over-aggressive. In consideration of the effect Thompson Memorandum is still lingering, it would not be wise to walk in Thompson's shoes – pierce the attorney-client privilege and revoke it, because the subsequent lingering effect may not be under control. While there is no easy solution to the blooming white-collar crime, it is my hope that this paper can shed some light on the issue and sparked further discussion about how best to address it.