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PREEMPTION V. PUNISHMENT: A COMPARATIVE STUDY OF WHITE COLLAR CRIME PROSECUTION IN THE UNITED STATES AND THE UNITED KINGDOM

Daniel Huynh *

I. INTRODUCTION

Compared to most types of crime, white collar crime is a relatively new phenomenon. After several high profile cases in the mid-1900’s in the United States, white collar crime emerged into the national spotlight. The idea materialized that there should be a separate and distinct category of crime aside from the everyday common crimes, like murder or burglary. More recently, large-scale scandals and frauds have been uncovered worldwide with public losses on the scale of billions of dollars. In the United States, white collar crimes have cost losses of more than $200 billion annually. In 2004, the United States Corporate Fraud Task Force recorded over five hundred corporate fraud convictions, which was twice many than was recorded in 2003. In the United Kingdom, in 2002, the estimated cost of fraud in the United Kingdom was approximately £14 billion.

The term white collar crime was first coined by Edwin Sutherland, who stressed the need to expand the study of criminology to include crimes committed by “respectable individuals in the course of their occupation.” Since then, many definitions have arisen, describing white collar crime as separate and distinct from “common crimes and street crime,” which led to the mistaken belief that white collar criminals were all from the upper class.

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* Special thanks to Professor Lucia Zedner at Corpus Christi College, Oxford for her insight and advice.
2 Zachary Bookman, Convergences and Omissions in Reporting Corporate and White Collar Crime, 6 DEPAUL BUS. & COM. L.J. 349 (2008).
3 LAWRENCE SALINGER, 2 Encyclopedia of White-collar & Corporate Crime 361 (Sage 2004).
4 Sutherland defined the term using words such as “respectability” and “high social status.”
5 Id. at 355.
Today, white collar criminals run the spectrum from executives, upper and middle management to general accountants. Sociologists in the past, like Sutherland, defined offenses only by the type of a violator, meaning white collar crimes were defined as any crime committed by wealthy, high standing individuals in the course of their occupation. In the alternative, today white collar crime is defined by the offenses committed, such as fraud or embezzlement. In an international context, the United Nations uses the term “abuse of power” when discussing white collar crimes.

The United States Federal Bureau of Investigation defines white collar crime as:

those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.

Within the past several decades, losses stemming from white collar crime have increased tenfold. In the United States, the “junk-bond king,” Michael Milken was responsible for over $650 million in losses and ordered to pay the same amount as restitution before he was sentenced. Bernard Madoff is responsible for over $50 billion in losses. With the economic structure and the fast pace markets in place today, losses from white collar crimes are on a Herculean scale. To compound the problem, the public is hard pressed to grasp the magnitude of loss from white collar crime because the actual cost and damage to people’s lives and the national economy are extensive and often impossible to calculate.

Because most white collar crimes are largely based on deception or fraud, it hard to detect. White collar crime might pose such a problem since

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7 Id. at 10.
8 INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME 31 (Gilbert Geis and Henry Pontell eds., Spring 2006).
9 Id. at 36.
10 FBI Los Angeles, Investigative Programs: Counterterrorism, available at http://losangeles.fbi.gov/investprior.htm
12 Id.
many times there are no readily identifiable victims and often times the perpetrators are only discovered after extensive investigation. Even when there are cognizable injured parties, the injured parties are unaware of even being victimized until it is too late. As a consequence, said individuals are not good witnesses nor reliable source of information. Furthermore, victims and, more importantly, prosecutors often lack the financial acumen necessary to understand and properly prosecute cases involving complex and sophisticated schemes. The nature of white collar crimes enables no detection long after its commission. Thus, the increase in commercial crime can be linked to "[t]he idea that white-collar offenders commit their crimes because they are unlikely to be punished.”

In response to national scandals and fraud often linked to white collar crime, both the United States and the United Kingdom have enacted statutes and other procedures aimed at curbing the occurrence of major commercial crimes. Today, both countries have weapons to combat would-be white collar offenders in various stages to prevent a second-round of national scandal.

The article examines two of the world’s leading economic and legal systems, the United States and the United Kingdom, and analyzes how each country deals with white collar crime and its prosecution. The white collar justice systems are compared in both countries for key differences in their systems by evaluating: (1) the current system in each country, (2) their respective effectiveness and weaknesses; and (3) what ramifications are derived from each country’s approach.

Part II, analyzes the United States regulatory system that oversees economic crime, specifically dealing with two statutory schemes, the Racketeer Influenced Corrupt Organization Act (RICO) and the Sarbanes-Oxley Act of 2002. Along with its regulatory agencies, there will be an examination of how the United States relies on its enhanced punishment scheme to deter white collar crime.

Part III scrutinizes the United Kingdom’s legal system and its

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13 Id. at 749.

14 White collar crimes like fraud and money laundering have an air of secrecy and concealment that make it difficult for victims or the authorities to detect them. With these crimes, the victim could be completely unaware and could even unknowingly help the criminal with their crime.


16 Because of this disparity and potential differences in detection and enforcement, the paper will only concentrate on large-scale corporate crimes. However, by looking at how each legal system deals with large-scale commercial crimes can also determine how effective the system is at catching smaller occurrences.
regulatory agencies. In 2007, Parliament passed the Serious Crimes Act (SCA), which established Serious Crimes Prevention Orders (SCPO). As will be discussed, the prevention orders have the potential to deter white collar crime.

Part IV compares and contrasts the legal systems in the United States and United Kingdom by applying a hypothetical situation to each country’s white collar prosecution system. Finally, Part V concludes with final comments on white collar crime prosecution and a recommendation for preventing white collar crime in both countries.

II. UNITED STATES SYSTEM

American outrage over white collar crimes is not new, rather it is a reaction stemming from a series of corporate misdeeds going back sixty years. Due to the misconduct of American companies like Wright-Mills in the 1940’s and 1960’s, public distrust of big business grew. Lawmakers began to realize the social and economic impact of white collar crimes. In response, legislators have tried to encourage a “court-organized social engineering of company compliance” movement. In 1934, Congress established the Securities and Exchange Commission (SEC) to be an economic watchdog. Later, other methods of compliance were established and have been somewhat effective. RICO is used currently to prosecute white collar crimes and after the Enron scandal the United States Congress passed the Sarbanes-Oxley Act of 2002, establishing a higher standard of accountability within corporations.

A. SEC

The SEC is responsible for the enforcement and regulation of the United States stock and securities market. The Commission is charged with regulating all companies that hold and trade public stock. Formed as an independent agency by the Securities Exchange Act of 1934, the SEC’s duties include enforcing various United States securities laws, including the Sarbanes-Oxley Act. In addition to its traditional executive functions, the SEC also serves to collect monies from securities violations and disburse those remedies to compensate fraud victims.

17 Nelken, supra note 11, at 736.
18 Id. at 764.
20 U.S. SECURITIES AND EXCHANGE COMMISSION, How Can Investors Get Money Back in Fraud Economics?


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Historically, the SEC has been criticized as being “unnecessary” or only “sufficiently effective.”\(^{21}\) In the 1970s, the SEC took a more active role and expanded their enforcement of securities law. Later in the 1980s, the SEC gained recognition by focusing on the prosecution of insider trading. By the 2000s, the SEC has grown into a full enforcement agency with the help of Congress.

**(i) Procedure**

The SEC’s main tasks are to investigate potential violations, enforce statutes and its own guidelines and regulate companies that are connected to the United States stock and securities market. Congress granted the SEC the power to bring civil actions against persons who have violated any securities laws. In its regulatory function, all public companies are required to submit to the SEC quarterly and annual financial reports and company executives are required to submit an affidavit of management plans for the upcoming year.

When the SEC begins its initial investigation on a potential violation, the agency will send out either comment or “no action” letters. Comment letters are sent directly to the companies identifying possible violations, requesting a response from the company. In the alternative, “no action” letters demand the company engage in a particular action, if they fail to comply, then the SEC will pursue further action, such as initiating a civil suit or arbitration.

As stated earlier, Congress granted the SEC the power only to bring civil actions for securities violations. However, if the SEC staff determines a criminal prosecution is a viable option, they will recommend that the Justice Department pursue criminal proceedings.\(^{22}\) It is in the Department of Justice’s discretion to pursue such criminals and if they do, the SEC works closely with them to prosecute those individuals and corporations who violate criminal laws.\(^{23}\)

**(ii) SEC Collection Procedures**

Section 308 of the Sarbanes-Oxley Act of 2002 grants the SEC the

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\(^{21}\) SALINGER, supra note 3, at 725.

\(^{22}\) Id. at 725.

\(^{23}\) See Barbara Black, Should the SEC be a Collection Agency for Defrauded Investors? 63 BUS. LAW. 317 (2008).
power to compensate victims of corporate fraud.\textsuperscript{24} The SEC can disburse collected civil penalties and illegally obtained corporate profits. Originally, this section was added to the Act in order to create a fund for Enron employees to recover some of their losses as a result of the actions of Enron and Arthur Andersen.\textsuperscript{25}

In the first five years after Sarbanes-Oxley, the SEC obtained orders to disgorge $1.6 billion per year worth of profits and assessed $1.1 billion a year in penalties.\textsuperscript{26} The SEC’s collection power also extends to third parties. Profits received from investment bank or accounting fees can be designated as profits that may be disgorged.\textsuperscript{27} Furthermore, the SEC’s power under Section 308 allows the agency to seize corporate executive’s compensation specifically “performance-based bonuses as well as any profits derived from trading in the company’s securities while the fraud was ongoing.”\textsuperscript{28}

(iii) Limitations

Research has shown that one out of every ten SEC cases that are initially investigated are recommended to the Justice Department for further processing.\textsuperscript{29} A study completed in 1984 found that United States attorneys only prosecuted 26% of all cases referred to them for prosecution by the SEC. In all, almost 48% of cases that were recommended for prosecution by the SEC were not prosecuted and never went to trial.\textsuperscript{30}

The low rate of prosecution can be attributed to lack of resources and the inherent difficulty in investigating a white collar crime. The nature of white collar crimes and fraud cases may require expertise or special skill in a certain area outside the experience of some district attorneys. Their inexperience can put them and their prosecution of the case at a serious disadvantage.\textsuperscript{31} On the other hand, defense attorneys representing their clients charged with securities violations start their investigation and preparation as soon as the SEC investigation begins. Many times defendants hire a litany of professionals to provide expert counseling and to assist in the case.

The SEC’s low prosecution rate can also be attributed to other

\textsuperscript{24} Id. at 317
\textsuperscript{25} Id. at 326.
\textsuperscript{26} Id. at 328.
\textsuperscript{27} Id. at 329.
\textsuperscript{28} Id.
\textsuperscript{29} Id.
\textsuperscript{30} CYNDI BANKS, PUNISHMENT IN AMERICA 156 (ABC-CLIO 2005).
\textsuperscript{31} Id.
variables. The agency is notoriously understaffed and commands limited resources. Furthermore, the SEC is criticized for being too lenient against securities violations. Most recently criticisms of SEC's regulations emerged after the Bernard Madoff ponzi-scheme. Former SEC chairman, Christopher Cox, acknowledged the SEC's failure to fully investigate Madoff's company. An initial investigation of Madoff occurred in 1992, but the SEC neglected red flags indicating possible wrongful activity and even ignored numerous complaints of alleged fraud.

(iv) Overall Assessment of the SEC

The SEC is the United State's main regulatory agency that monitors an ever growing securities and stock market. White collar crimes are becoming more sophisticated and subsequently harder to detect and investigate. Because of the increased difficulties faced, Congress should recognize the demand placed on the agency and increase the federal budget allowance for the Commission. Without help of additional resources and staff, the SEC will continue to lag far behind and, as seen with the more recent scandals, white collar crimes left undetected and unhindered can cause astronomical losses.

B. RICO

The RICO statute was established by Title IX of the Organized Crime Control Act in 1970 to provide enhanced criminal penalties and establish a new civil cause of action for acts performed as a part of an ongoing criminal organization. The statute has a broad scope: it makes it illegal "to acquire, operate, or receive income from an enterprise through a pattern of racketeering activity."

32 SALINGER, supra note 3, at 725.
34 Id. Bernard Madoff established a ponzi-scheme promising steady returns on his clients' investments. However, no money was ever invested and instead returns were paid out of money that was newly invested from other clients. The fraud, spanning decades, grew to over $50 billion in losses.
36 SALINGER, supra note 3, at 660. The term "enterprise" is defined in the statute as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals
Congress originally drafted the Act to trigger and facilitate mafia criminal prosecution. In practice, however, RICO has been applied to a wide variety of cases. The purpose stated in the beginning of the Act was to

seek the eradication of organized crimes in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.\(^{37}\)

In 1985, the Supreme Court of the United States held in *Sedima S.P.L.R. v. Imrex Co., Inc.* that RICO can apply to legitimate commercial enterprises where the business was forging purchase orders and credit memos in order to increase their purchase price.\(^{38}\) Civil RICO’s were “rare” for the first ten years after RICO was enacted.\(^{39}\) Subsequently, Robert Blakely, who was one of the initial drafters of the Organized Crime Control Act, wrote an article popularizing civil RICO suits.\(^{40}\) After *Sedima*, RICO was used for white collar crimes and corporate offenses. Thus, commercial businesses have been prosecuted under the RICO statute.\(^{41}\)

The New York Times published an opinion in 1989, stating that RICO is among the few effective tools against economic crime. Law enforcers have used its enhanced criminal penalties against insider trading and government corruption... Civil RICO has been a powerful tool against white-collar crime.\(^{42}\)

Civil RICO actions have been used by relatively unsophisticated parties like middle income families victimized by home fraud to recover damages when there were no other alternatives.\(^{43}\) Unlike criminal prosecution, most civil actions for white collar offenses are brought by private plaintiffs.\(^{44}\)

Because of the complex, systematic and continuous nature of many

\(^{37}\) Lewis, *supra* note 35, at 621.
\(^{38}\) Id. at 662.
\(^{39}\) Id. at 624.
\(^{40}\) Id.
\(^{42}\) Waldman and Gilbert, *RICO Goes to Congress: Keep the Teeth in White Collar Law*, N.Y. TIMES, March 12, 1989 at 2F.
\(^{43}\) *Salingar, supra* note 3, at 662.
\(^{44}\) Id.
white collar crimes, prosecutors have found RICO to be an effective statutory tool in white collar prosecution. When comparing the two types of criminals, both white-collar and organized criminals use similar techniques, share the same illegal know-how, and share the same values—even if perpetrators come from different backgrounds. Their crimes are performed in or by organized structures, thrive on collusion, and normally enjoy the connivance of administrators and legislators.

RICO defendants have included Major League Baseball, anti-abortion activists, the Key West police department, inside traders, street gangs and crime families across the country. The most notable white collar prosecution under RICO involves Michael Milken, an inside trader. Milken, who had no ties to organized crime, was accused of manipulating stock and bond prices and as a result was indicted on ninety-eight counts of racketeering and fraud. Milken pled guilty to six lesser offenses. Milken’s employer, Drexel Burnham Lambert, could have faced RICO charges under the doctrine of respondeat superior, but claims against them were never pursued. If they had been convicted under RICO, Drexel would have been required to post a $1 billion bond to avoid their assets from being frozen and the charge would have likely put the firm out of business, as banks prohibit extending credit to indicted businesses.

(i) Statutory Effect

RICO’s statutory language allows for a broad application of the Act. Under the statute, one can be criminally liable if he is part of an enterprise that has committed a pattern of racketeering, even though such activity was done by others in the enterprise. Racketeering is defined under the statute as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year.”

45 Goldsmith, supra note 1, at 7.
46 Nelken, supra note 11, at 739.
48 Salinger, supra note 3, at 660. The RICO statute makes the maximum fine for offenses under the statute $25,000 and 20 years in prison.
49 Id.
Additionally, the statute lists other federal offenses such as bribery, sports bribery, counterfeiting, embezzlement, loan sharking, mail fraud, wire fraud, obstruction of justice, contraband of cigarettes, prostitution, trafficking of people, bankruptcy fraud, drug violations and obscenity. The central element of a RICO crime is proof of a pattern of illegal offenses. In order to be indicted of racketeering, a person must be a member of an enterprise that has committed two or more crimes listed in the Act within the span of ten years.

(ii) Penalties

The consequences of racketeering charges are two-fold. First, racketeering gives prosecutors a platform to show that the defendant is involved in a pattern of illegal activities that might otherwise be inadmissible in court. In general, a court may not allow past convictions into evidence in a proceeding, as it might be considered inadmissible propensity evidence. However, with the RICO statute, the prosecutor may produce evidence of past convictions to show participation in a racketeering enterprise.

Second, racketeering charges increase the penalty for criminal offenses since the crime is committed by an enterprise engaged in racketeering. The penalties are more than the standard punishment for the criminal offense. A racketeering charge brings a maximum fine of $25,000 and a twenty year prison sentence per charge. RICO also allows the government to seize any property that it believes was acquired from or purchased by illegal racketeering activities.

Additionally, the statute provides causes of action for private plaintiffs and the government. Private plaintiffs can request courts to seize assets, order sanctions, or provide injunctive relief against enterprises or individuals involved in RICO crimes. The RICO civil action procedure allows courts to force defendants to “forfeit any interest in property, restrict a defendant from

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50 Id. A “pattern” is defined under the RICO statute as “the commission of at least two identified offenses with a 10-year period.”
51 Id.
52 Id.
53 Id. In situations where asset forfeiture is appropriate, the government can seize the property without issuing notice to the defendant. Furthermore, the court proceedings that issue the grant of forfeiture may be ex parte. For the civil provisions under RICO, the burden of proof is by the preponderance of the evidence and not the traditional criminal standard. The burden then shifts to the defendant to prove that the assets in question were acquired through legitimate and legal channels.
54 Id.
55 Id. at 660-661.
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engaging in certain future activities or investments, or dissolve or reorganize an enterprise.\textsuperscript{56} RICO prevents a person from using finances that were generated from illegal racketeering activities that affect interstate commerce.\textsuperscript{57} Finally, private plaintiffs who are successful can collect treble damages.

(iii) In Practice

RICO has been quite an effective statute and is used frequently by federal prosecutors. As previously noted, the prosecution of white collar crimes is an arduous task. In the criminal context, prosecutors must prove their case beyond a reasonable doubt. Especially for cases dealing with sophisticated enterprises with a number of actors, the prosecutors must sift through a mountain of evidence to find what is relevant and admissible. However, there are potential problems of collecting evidence from criminal organizations.\textsuperscript{58}

When the government decides to pursue a RICO charge, the United States attorney obtains a pre-trial restraining order or preliminary injunction seizing the defendant’s assets and restricting the defendant’s access to certain property. A RICO defendant is sometimes required to post a performance bond to ensure that if found guilty that there will be collateral. These pre-trial seizures of company assets can have devastating effects on everyday business activity. Because of the commercially crippling effects of RICO, many defendants are forced into a decision of defending their case, and potentially having their business grind to a halt or pleading guilty to lesser charges, even if innocent, simply to avoid pre-trial seizures.

In the twenty-year span between 1970-1990, over one thousand criminals were convicted and sentenced under the RICO standards.\textsuperscript{59} Rudy Giuliani, then the U.S. Attorney for the Southern District of New York, praised the RICO statute as being the only criminal statute that gave juries in criminal trials a whole picture of how an organized criminal network operates.\textsuperscript{60}

(iv) Criticism

For all its benefits, prosecutor’s unfettered application of RICO has

\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Nelken, supra note 11, at 753.
\textsuperscript{59} Id.
\textsuperscript{60} Id. Here, Giuliani discussed the benefits of the RICO statute as it applies to organized crime families. If RICO did not exist, Giuliani posited that it would have been nearly impossible for all the criminal actors to be included in a single prosecution.
been denounced. RICO has been criticized for infringing one’s constitutional right to due process. Some have argued that RICO is far reaching and risks over-criminalization, as the statute can lead to prosecution of individuals involved in criminal behavior but not involved in the actual criminal organization. For example, an enterprise conducting a series of criminal activities over the years may involve the help of third party. This person is not truly involved in the main criminal venture such as planning or sharing the main proceeds of the crime. However, even though he has no major role in the racketeering enterprise, prosecutors can file RICO charges against this third party. Because RICO provides for enhanced damages, these individuals will be punished more severely as a result of this association. Over-penalizing individuals is unjust and is against societal goals in a punishment scheme.

There have been several challenges to the statutory construction of the RICO statute. In United States v. Angiulo, the defendants argued that the “pattern requirement” was unconstitutionally vague. Yet none of these challenges have been successful and the Supreme Court continues to allow wide use of civil RICO claims.

Moreover, RICO pre-trial seizures have the potential to be intrusive and erroneous. Assets are seized before the defendant company has his day in court. The drawn out process of litigation can last months, even years, and pre-trial seizures can hinder a company’s ability to operate successfully. Since a court grants pre-trial seizures of company assets, there is a chance that the defendant company is found not guilty. The fear of having the assets frozen may induce defendant companies to plead guilty to lesser charges even if they believe they have done nothing wrong.

As stated earlier, the traditional goal of RICO was to curb organized criminal activities associated with the mafia organizations. Thus, RICO prosecution of the defendant attaches the social stigma that a person or company is involved with organized crime, specifically the mafia. This stigma can be harmful to the defendant’s reputation and community goodwill. Because of RICO’s broad scope, potential defendants may unknowingly be associated with these criminal organizations or the defendants could be purely white collar criminals, with no mafia connection.

Finally because of its expanded application in commercial contexts, RICO’s enhanced punishment scheme as applied to white collar criminals

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61 Id.
62 Id. at 662.
63 Lewis, supra note 35, at 633-34.
64 Id. at 622.
65 Id.
derogates from original Congressional intent in punishing individuals involved in the mafia. Because RICO can be used in prosecution of white collar crimes, the treble damages feature is misplaced and punishes a defendant too severely. Arguably, pursuing treble damages may violate the 8th Amendment of the United States Constitution.66

C. Sarbanes-Oxley

In 2002, Congress passed the Sarbanes-Oxley Act of 2002 in response to the large corporate scandals involving Enron, Tyco International, Adelphia and Worldcom. 67 The Act requires additional obligations for publicly held companies to ensure compliance with securities laws and encourage transparency and accuracy in their public financial disclosures. Along with heightened disclosure requirements, the Act also codified enhanced penalties for securities violations.

(i) Independent Accounting Board

To prevent a fraud on the scale of Enron from ever occurring again, Sarbanes-Oxley established the Public Company Accounting Oversight Board (PCAOB), which is responsible for oversight, regulation, and discipline of accounting firms when auditing public companies. The PCAOB is an independent board that issues guidelines to define the procedures auditing firms should follow and enforces those measures within the reaches of Sarbanes-Oxley. Holding auditing firms accountable for their actions and monitoring for conflicts of interest help ensure that the audits conducted are trustworthy.

(ii) Corporate Responsibility

The statute compels new responsibilities on public corporations and their executives, auditors, securities analysts and attorneys. The Act does not apply to private companies. One major consequence after Sarbanes-Oxley is that corporate CEOs are personally responsible for the veracity of the company’s financial documents and any misrepresentation on those statements could result in criminal liability. Before a company’s financial report is sent to the SEC, the CEO is required to sign off on the disclosure validating that the

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66 U.S. CONST. amend. VIII. (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted”).
information contained within is correct. Establishing personal accountability on financial reports would deter CEOs from committing securities violations since any irregularities in the numbers would be directly linked to the CEO.

(iii) White Collar Crime Enhancement

One of the primary objectives in passing Sarbanes-Oxley was to strengthen criminal fraud accountability and create individual liability for deception on financial statements. Not only did Sarbanes-Oxley broaden the scope of liability, but it also enhanced the penalty for white collar crimes. The section, appropriately named the White Collar Crime Penalty Enhancement Act, increases the punishment for attempt and conspiracy to commit fraud, heightens the maximum penalty for certain white collar offenses, creates statutory liability for mail and wire fraud, and establishes individual corporate responsibility for financial statements. The Act codified specific penalties for corporate fraud and tampering. The sentencing guidelines were amended to increase penalties for other crimes and allow the SEC to temporarily seize large payments identified as criminal. More importantly, the penalty enhancement portion of the Act allows courts to increase the sentence based on the damages on a case by case basis.

(iv) Costs and Benefits

Many argue that complying with the Sarbanes-Oxley Act is costly and has adverse effects on companies operating in the United States. Studies were performed to estimate the actual cost of compliance with the Act. However, the actual monetary cost of complying with the Sarbanes-Oxley Act is difficult to calculate due to external variables that affect public companies and the stock market. Financial Executives International estimated the costs of internal controls required by the Act. In their 2007 survey of one hundred sixty eight companies averaging revenues of $4.7 billion, the average cost of compliance was $1.7 million.

Critics argue that Sarbanes-Oxley has a negative impact on businesses and the United States economy. After the enactment of the Act, the rate of United States companies deregistering from the American stock exchange tripled. There has been a call to repeal the Act in fear of rising costs of

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68 SALINGER, supra note 3, at 841.
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compliance, resulting in companies heading overseas to avoid these additional costs.71

With all the criticism concerning additional expenses, public companies are responding to the more strict disclosure requirements. A year after Sarbanes-Oxley was introduced over three hundred companies revised their earnings report. The Act has been credited as restoring investor confidence by forcing more accurate and reliable financial disclosure by companies. The Act creates additional incentives for corporate executives to take ownership of their company’s representations to the public. Finally, the Act addressed and prohibits any potential conflict of interests an auditor may face when he is given a consulting contract by the firm he is to audit.72

D. Punishment in the United States

In three years between 2002 and 2005, there were over seven hundred corporate crime convictions in the United States.73 As compared to prior times, the punishments for the same crimes are harsher and white collar criminals are serving longer sentences.74 The recent trend in ratcheting up the punishment for crimes is intended to serve as an example to deter future criminals.75 The United States government has set a clear precedent that “financial malpractice” on corporate sales can constitute serious crimes and will be prosecuted.76

Before the Federal Sentencing Guidelines were passed, white collar criminals were penalized under the same schemes as non-white collar criminals.77 One study, completed by John Hagan, Ilene Nagel and Celesta Albonetti, looked at the difference in sentencing for white collar criminals. The group factored into their assessment defendants who had a college education and income as a substitute for white collar status. The comparison showed that indeed white collar criminals were given lighter sentences than criminals committing non-white collar offenses.78 In 1991, the Federal Sentencing

73 Nelken, supra note 11, at 764.
74 Id.
75 Id.
76 Id.
77 Bookman, supra note 2, at 361.
78 INT’L HANDBOOK, supra note 8, at 41-42.
Guidelines were put into law and set out clear sentencing rules for white collar crimes. Critics argue that these guidelines are too severe, as twenty year sentences unnecessarily punish the defendants and do little to deter future crimes.\(^7\)

Coupled with the enhanced penalties codified by RICO and Sarbanes-Oxley, the Federal Guidelines provide a regime of increased penalties for white collar criminals, in order to deter potential white collar criminals.

### III. UNITED KINGDOM SYSTEM

In 2002, the estimated cost of fraud in the United Kingdom was approximately £14 billion.\(^8\) Although the damages due to fraud are astronomic, the punishment of white collar criminals was lax. The Attorney General speaking in front of an audience at the 21\(^{st}\) International Symposium on Economic Crime in 2003 said,

> It is notable how often white-collar defendants receive non-custodial and suspended sentences despite committing serious economic crime . . . Social equality requires that we bear down on white collar crime as effectively as on blue collar crime, such as fraud in obtaining social security.\(^81\)

After a series of high profile scandals much like the events in the United States, white collar crime became the focus of public attention.\(^82\) In 2006, the United Kingdom established the Serious Organised Crime Agency (SOCA), which focused on reducing the harm caused by criminals rather than act as a law enforcing body.\(^83\) With the increased recognition that white collar crime was a problem in the United Kingdom, several solutions arose. As a result, a number of agencies were established that are responsible for the detection, investigation and prosecution of white collar and corporate crimes.\(^84\) Two of these agencies, the Serious Fraud Office (SFO) and the Financial

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\(^8\) SALINGER, *supra* note 3, at 836.

\(^81\) *Is White Collar Crime Taken Seriously?* UK LEGAL NEWS ANALYSIS, September 24, 2003.


\(^83\) Nelken, *supra* note 11, at 772.

\(^84\) *Id.*
Services Authority (FSA), are charged with monitoring and investigating commercial crimes in the United Kingdom.

In addition to establishing agencies to monitor financial crimes, Parliament created Serious Crime Prevention Orders as a preemptive step in white collar crime enforcement. The orders allow Courts to preemptively act upon suspicious activities, which led or potentially could lead to white collar crimes. The new prevention orders are in contrast with the traditional mode of agency regulation and prosecution of securities laws.

A. SCPO

The Preamble of the SCA defines the purpose of the statute to

make provisions about serious crime prevention orders; to create offences in respect of the encouragement or assistance of crime; to enable information to be shared or processed to prevent fraud or for purposes relating to proceeds of crime . . . to transfer to the functions of the Director of the Assets Recovery Agency to the Serious Organised Crime Agency. 85

These “orders” are court imposed to restrict the actions of persons, corporate bodies, partnerships, and unincorporated associations who are “involved in serious crimes.” 86 SCPOs cover persons who are criminally “involved in a serious crime,” who may have “facilitated the commission of a serious offence,” or even who are “likely to facilitate the commission of an offence (intentional or otherwise).” 87

(i) History

Before SCPOs, the prosecutor in the United Kingdom was left with a tough decision when determining whether to proceed with or drop a case. Parliament recognized that this “all or nothing” approach, which left the prosecutor with many quasi-actionable situations, meant cases were inefficiently prosecuted or wrongfully dropped. In response, Parliament introduced the SCPO as early as July 2006. 88 These orders give the prosecutor the option of

85 Serious Crime Act, 2007, c.27 Preamble (Eng.).
86 Id. at § § 3-4.
87 Id at § 2(1).
proceeding with a case where there is insufficient evidence to meet the criminal standard of proof, but where the civil standard could be satisfied. The government believed that a SCPO “fills a gap in the law to deal with persons who are involved in serious crime and who, for one reason or another, cannot be satisfactorily controlled by way of other judicial or administrative processes.” Newspapers have coined SCPO as “Super ASBO’s.” Anti-social Behaviour Orders are civil orders like SCPO, but are used to prevent persons from “carrying out antisocial acts that are likely to cause harassment, alarm, or distress to another person.”

An SCPO request can be made to the High or Crown Court in England if two requirements are met. First, the Court must be “satisfied that a person has been involved in serious crime; and secondly it [the High or Crown Court] has reasonable grounds to believe that the order would protect the public by preventing, restricting, or disrupting, involvement by the person in serious crime.” The request hearing for an SCPO does not have the strict evidentiary standards of a criminal proceeding and can consider information that would not be admissible otherwise. The grant of an SCPO has to meet the objective criteria of the commission of a serious crime, while the second requirement is up to the discretion of the High Court.

(ii) Against Whom

High Courts are given substantial leeway to issue a SCPO, subject to two exceptions: a minor under the age of 18 and any person that falls under written exception by the Secretary of State are immune from a SCPO. Besides these exceptions, there are three main categories of SCPO defendants: a person

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89 The criminal standard of proof entails that the state prove its case beyond a reasonable doubt. Serious Crime Act 2007, § 35 (“Proceedings before the High Court in relation to serious crime prevention orders are civil proceedings. One consequence of this is that the standard of proof to be applied by the court in such proceedings is the civil standard of proof”).
90 FORTSON, supra note 88, at 14 (stating that “other examples, set out in the Green Paper, include cases where: (a) evidence that would be admissible in civil proceedings is not admissible in criminal proceedings, (b) crimes have been committed overseas that cannot be prosecuted in the UK; or (c) a person has been released after conviction overseas ‘in circumstances where we would expect them in the UK to be subject to strict license conditions’”).
91 Id. at 4.
92 Id. at 3.
93 Id.
94 Serious Crime Act 2007, § 1(1).
95 Id. at § 36(3).
96 Id. at §§ 6-7.
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who “has committed a serious crime in England”; a person who “has facilitated the commission by another person of a serious offence in England”; or a person who has “conducted himself in a way that was likely to facilitate the commission by himself or another person of a serious offence in England.”

(iii) What is a Serious Crime?

A serious crime is defined as the commission of any offense in England that, at the time when the case is before the Court, it was specified as a serious crime under the Act or “is one which, in the particular circumstances of the case, the court considers to be sufficiently serious to be treated for the purposes of the application or matter as if it were so specified.” In drafting the wording of the Act, Parliament gave courts the opportunity to grant a SCPO to “sufficiently serious” circumstances. Thus, the Court has discretion to grant an SCPO even if the action is not a serious crime defined within the Act.

When the Court analyzes whether a person has facilitated the commission of a crime, the Act directs Courts to disregard “any act that the respondent can show to be reasonable in the circumstances; and subject to this, his intention, or any other aspect of his mental state, at the time.” As such, a person can be subject to a SCPO if he encourages or assists the commission of an offense. A person is liable if he commits “an act capable of encouraging or assisting the commission of an offence; and . . . he intends to encourage or assists its commission” or “he believes (i) the offence will be committed; and (ii) that the act will encourage or assist its commission.”

Practically speaking, the SCA creates three offenses. First, the Act makes a person liable if he “intends to encourage or to assist another person to commit an offense.” However, the person must have the requisite intent for the crime to be committed. For example, the Act would hold A criminally liable for leaving a door unlocked if it was intent to have B come in at night and steal televisions from the store. Even if B did not commit the crime, A would be liable for burglary. The second offense covers the situation where “a person

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97 Id. at § 2(1).
98 Id. at Schedule 1, § 1-16 lists all the offences that are serious. They include: drug trafficking, people trafficking, arms trafficking, prostitution and child sex, armed robbery, money laundering, fraud, offences in relation to public revenue, corruption and bribery, counterfeiting, blackmail, intellectual property (acts that infringe intellectual property rights), environment (violating various wildlife and environmental regulations), inchoate crimes (any incomplete crime in this Schedule).
99 Id. at § 2(2).
100 Id. at § 4(2).
101 Id. at § 44-45.
102 FORTSON, supra note 88, at 5.
believes that the anticipated offence will be committed . . . and he believes that his act will encourage or assist its commission." Finally, the last situation covers cases where

[a person] does an act that is capable of encouraging or assisting the commission of one or more of a number of offences; and he believes - (i) that one or more of those offences will be committed . . . ; and (ii) that his act will encourage or assist the commission of one or more of them.104

(iv) Scope

The scope of an SCPO is largely up to the discretion of the Court and gives little guidance to what actions a SCPO prohibits. The Act allows the Court to issue obligations to the defendant, but gives little guidance to what is or is not allowed. The Court can also rationalize its grant of an SCPO under broad and sweeping justifications of “protection of the public.” Clearly, Parliament granted the Courts tremendous autonomy in issuing a large variety of SCPO’s.

(v) Process

A request for a SCPO can be made in the High Court or in the Crown Court.105 The requisite standard of proof is a civil standard. However, in practice, the courts will apply the criminal standard of proof.106 The person subject to an SCPO, or the relevant authority against a decision made, can appeal to the High or Crown Court.107

(vi) Control of SCPO

As noted before, the Court has discretion over SCPO to that which is “necessary and proportionate to prevent, restrict, or disrupt, that subject’s ‘involvement in serious crime.’”108 For example, Section 5 discusses the scope of SCPO. It can range from

103 Serious Crime Act, § 44.
104 Id. at § 46.
105 FORTSON, supra note 88, at 4.
106 Id.
108 FORTSON, supra note 88, at 4.
prohibitions, restrictions, or requirements, in connection with:
(a) an individual’s financial, property or business dealings or
holdings; and/or (b) an individual’s working arrangements;
and/or (c) the means by which an individual communicates or
associates with others, or the persons with whom he
communicates or associates; and/or (d) the premises to which
an individual has access; and/or (e) the use of any premises or
item by an individual; and/or (f) an individual’s travel
(whether within the United Kingdom, between the United
Kingdom and other places or otherwise).109

A SCPO can require a subject to answer questions, provide information
or produce requested documents.110

(vii) Type of SCPOs that can be Issued

The Act provides examples of SCPOs that may be issued to
corporations and individuals. Parliament envisioned that SCPOs would have
the power over an individual’s financial, property, or business dealings, work
arrangements, the means and whom an individual communicates, access of
premises, the use of premises or items by an individual and the individual’s
travel.111 An SCPO can require an individual to answer questions, provide
information, or produce documents specified in the order.112 However, the Act
prohibits SCPOs from requiring disclosure of privilege information and any of
the information requested be provided orally.113

For corporations and other business entities, SCPOs have the power
over a business’ financial, property, or business dealings, the types of
agreements they can enter, access of premises, the use of any premises or items,
and the employment of staff by that person.114

(viii) Violation

An SCPO can be in effect for a maximum of five years.115 The length

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109 Id.
110 Id.
111 Id. at § 5(3).
112 Id. at § 5(5).
113 Id. at § 11-12.
114 Id. at § 5(4).
115 Id. at § 16(2).

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of a SCPO is decided by the Court granting the order. If a person fails to comply with the terms of the SCPO they are in violation of Section 25 of the 2007 Act. Under Section 26 of the Act, the Court requires the person to “forfeit anything in the offender’s possession at the time of the offence, which the Court considers to have been involved in the offense.” An individual who violates the terms of an SCPO faces “imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or both.” If the conviction is on indictment, the prison sentence for a violation is a maximum of five years. In certain circumstances, the Court even has the power to “wind up companies, partnerships, or a relevant body” under section 27 of the Act.

(ix) Criticism

The SCPO has been criticized as a broad and far-reaching statute. The statutory provision allows for a Court to issue a SCPO to a person who “facilitated the commission of a serious offence” without defining the scope of such a crime. Thus the Court has wide discretion to determine who is the subject of a SCPO and what the SCPO entails.

Furthermore, there is no requirement that a crime be committed, only that it is “likely to facilitate the commission of an offense.” A person potentially could be subject of a SCPO even if he committed no affirmative act, but was likely to facilitate a crime. This situation is completely independent of whether the crime actually occurred. The statute does not require that the subject of the SCPO intend to facilitate the commission of the crime or was reckless about his acts and inadvertently facilitated in the crime. Because of the broad definitions of the statute, the court arguably could issue a SCPO based merely on speculation. Coupled with the fact the prosecution only has to prove their case by the preponderance of the evidence, the potential for an erroneously granted SCPO is high. SCA allows for considerable flexibility in drafting the conditions of a SCPO. The Court drafts requirements, restrictions and prohibitions that are “necessary and proportionate.”

Finally, another source of criticism is the duration of a SCPO. The statutory provisions allow for a SCPO to last for up to five years. With an order lasting up to five years, the effects to one’s professional and personal life can be drastic.

116 Fortson, supra note 88, at 4-5.
117 Serious Crime Act, § 25 (2).

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(x) In Practice

The first SCPO orders were issued by the Isleworth Crown Court on June 27, 2008 in response to an investigation conducted by SOCA. Since the SCPO’s aim is to prevent activities related to possessing or transferring money, the defendants were convicted of laundering cash for organized crime networks. The defendants were told that the SCPO would last for five years and any violation would result in five additional years in prison. To date, the only SCPO’s that have been issued are related to drug and organized crime related activities. However, SCPOs may prove to be an effective tool in preventing and combating white collar crime. Because of the broad scope given by Parliament to apply and draft different kinds of SCPO’s, Courts have the ability to tailor a SCPO to prevent a specific or potential criminal act.

B. The Serious Fraud Office

The SFO was established in 1988 by the Criminal Justice Act (CJA) and is responsible for investigating and prosecuting fraud in Britain. In 2007, the SFO employed fifty-six full time lawyers and in addition spent £4.2 million on external legal counsel.

(i) Investigation of a Fraud Case

The SFO does not investigate every reported case of suspected fraud. Instead, the agency considers each case individually based on a number of factors: if the value of the alleged fraud exceeds over £1 million, if it involves an international element, if the case affects the public or if the investigation and eventual prosecution require specialized skill and knowledge. Weighing these factors, the SFO tries to investigate and prosecute cases that are of public importance.

121 See SERIOUS FRAUD OFFICE, supra note 119.
(ii) Section 2 Special Powers of Criminal Justice Act

Under Section 2 of the CJA, the SFO staff can require a person “to answer questions, provide information or produce documents for the purpose of an investigation.” These powers are to be used only to investigate, with good reason, a suspected offense which appears to involve a serious or complex fraud. When being questioned by the SFO staff, a person can refuse to answer any question so long as he has a reasonable excuse. Section 2 bars the use of a person’s answer to questions for evidentiary purposes in trial unless the person provided misleading answers in the interview.

A review was completed comparing the SFO with the prosecutorial office in the United States Southern District of New York (SDNY). Both the SFO and the SDNY serve an important function in the prosecution of white collar crime. SDNY is the district where the New York Stock Exchange is located, so the prosecutor’s office deals with white collar crime that affects the United States on a regular basis. The study focused on a joint prosecution completed between both the SFO and SDNY. In the course the prosecution, the study reported that the SFO used a total of thirty-one staff members to prosecute four defendants, while the SDNY used a team of eight people to prosecute fourteen defendants.

C. Financial Services Authority

The FSA, an independent non-governmental agency, was established by the Financial Services and Markets Act in 2000. The FSA is one the world’s first “unified financial services regulators” and operates on a budget of £270 million with a staff of over twenty-eight hundred. The FSA’s main goals are to bolster public confidence, increase public awareness in the financial system, maintain consumer protection and reduce financial crime. To meet these objectives, FSA has rule-making powers, an investigatory function, and

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122 Id.
123 Id.
124 Id.
125 Id.
126 de Grazia, supra note 120, at 2.
129 FSA: FINANCIAL SERVICES AUTHORITY, supra note 127.
enforcement powers.\textsuperscript{130} Currently, the FSA regulates over twenty-nine thousand companies in the United Kingdom and publishes an eight thousand page rule handbook for all authorized business operating in the United Kingdom.\textsuperscript{131}

With the large amount of companies operating in the United Kingdom, FSA has the important function of assessing a firm’s potential risk to consumers and the market. The FSA prioritizes their limited regulatory powers on medium or high impact firms. For these firms, the FSA conducts a regular risk assessment once every one to four years.\textsuperscript{132} In regulating and investigating financial crime, the FSA works along side the police and the SOCA.\textsuperscript{133}

IV. COMPARATIVE ANALYSIS IN THE UNITED STATES AND UNITED KINGDOM

A. Scenario

Apple Company has around three hundred employees. At Apple, the chief accountant Barry suffered major losses through bad investments in the market several years ago. Too embarrassed to tell his wife about his losses, Barry decides to manufacture a “loan” using Apple’s funds to cover up for his losses. Barry had full intentions of paying back the Apple quasi-loan. However, after some time, Barry did not save enough money to pay back the loan and replenish the amount he had lost in the market. Digging his hole deeper and deeper, Barry starts to skim several thousands of dollars from various accounts to pay off other accounts, some of which are pension funds for several of the employees at Apple. He continued to take the money for the past two years. To date, Barry has skimmed $1.8 million out of Apple’s accounts.

Running out of accounts to input forged charges, Barry resorts to siphoning funds from Apple’s fun account that are specifically reserved for their annual company outing. Barry knows that Apple is known for their extravagant outings, so he felt he could take as much money as he wanted without anyone noticing. However, all moneys from this account go through Apple’s events coordinator, Carol. Barry knows that he cannot commit the crime alone so he decides to recruit Carol and also recruits his own secretary, Diane, on a limited basis.

\begin{thebibliography}{99}
\bibitem{130} \textit{id.}
\bibitem{131} \textit{id.}
\bibitem{132} \textit{id.}
\bibitem{133} \textit{NATIONAL AUDIT OFFICE}, \textit{supra} note 128, at 45.
\end{thebibliography}
Barry contacts Eric, the mailroom clerk, and asks if he can help him with a project that needed to be done before the end of the year. Eric agrees to help with the project, unknowingly agreeing to be part of a scheme that would allow Barry to access millions of dollars.

Carol, on the side, owns a catering business, Carol Caters. On the weekends she goes to exotic places to oversee big events that her clients plan on the weekends. She also keeps a business account of $100,000 for costs such as airfare, down payments for venues, costs of foods, and payment of her employees. Some of the money Carol received from Barry is invested into the company. Carol hired Eric as an employee on the weekends doing odds and ends.

Barry’s secretary, Diane, was told that she could not tell anyone what she was doing. She was given $500 to go to the store to buy envelopes. She asks Eric to drive her and she buys the necessary item. She also buys a typewriter because she thought it might be useful.

Since Barry thinks this scheme is going well, he contacts his chief accountant friend, Fred, at Orange Company. He emails Fred the methods that he used to steal money from Apple.

B. In the United States

(i) SEC

The SEC is allowed to bring a civil cause of action against Barry on its own behalf for violating any securities laws. Here, Barry violated the truthful financial statement disclosure required by Sarbanes-Oxley. Being the chief accountant for Apple, Barry would be required to send quarterly and yearly financial reports. If the SEC discovered discrepancies in Apple’s disclosure during the investigation, they could send Apple a comment letter allowing the Apple to respond to any existing problem.

As a result of their investigation, the SEC would determine if criminal prosecution is necessary in this case. Here, after finding out the Barry was skimming an exorbitant amount of money from Apple and its employees, the SEC would likely refer the case to the Department of Justice for further criminal prosecution under Sarbanes-Oxley, the RICO Act, and relevant state laws. The SEC, under their collective power, could seek a civil penalty against Barry to disburse among the victims and get restitution damages for the borrowed funds.
(ii) Sarbanes-Oxley

The Sarbanes-Oxley Act requires that executives like Barry vouch for the accuracy of their financial statements. For at least two years, Barry made misstatements on financial disclosures to the SEC. As a result, he would face criminal liability for his misrepresentations to the SEC. Title III of the Sarbanes-Oxley Act requires that companies install internal controls to ensure accurate financial reports. Under this theory, Apple may be liable for not implementing an internal system that would alert others of Barry’s actions.

(iii) RICO

Since RICO allows the government or a private plaintiff to bring a cause of action, Apple could make a pre-trial request to freeze Barry’s personal assets and Carol Caters’ business account. These precautions ensure there would be available funds if their cause of action is successful. However, Barry and Carol would have an opportunity to respond and prove that those funds were acquired through legal means. If unsuccessful, the Carol Caters’ business account would be frozen, which would force the business to close or at the least be unable to pay for additional employees like Eric. Apple could require that Barry and Carol be suspended from their positions until after the trial.

To be convicted under RICO, the plaintiff would have to prove that the group comprised an enterprise and committed two or more crimes within the past ten years. Here, Apple could easily prove that Barry, who has committed countless acts of bribery and embezzlement, and Carol, who assisted him, were an enterprise. Because Barry committed multiple crimes covered under RICO within ten years, RICO could be applicable and Apple could collect treble damages from the defendants. Since both would be guilty of racketeering, Barry and Carol face an additional $25,000 fine and, in the case of government prosecution, twenty extra years in prison in addition to punishment for the base crime.

Diane would also be prosecuted under the RICO statute even though she arguably is not part of the criminal enterprise. The only knowledge she has was buying supplies for Barry, who she knew was doing something illegal. Eric may as well be prosecuted since he drove Diane to the store and agreed to help Barry on a project. Based on the RICO statute, although it might seem unfair, Eric and Diane could face the additional racketeering penalty.
C. In the United Kingdom

(i) SCPO

Based on the statutory language of the SCA, the High and Crown Courts both have wide latitude on to whom to issue a SCPO and what the SCPO requires. The SCPO can be tailored to the specific situation. Here, each of the players in the scenario would receive a different SCPO based on the specific circumstances.

In regards to Barry, the prosecutor could show that he was involved in a serious crime. Fraud is a crime within the Act. The Court has the discretion to issue a SCPO, if in a particular circumstance there is a sufficiently serious situation that necessitates a grant of an order. In the current case, the prosecutor could argue that Barry has systematically taken money from Apple’s employees and the company and an SCPO would appropriate. Under the SCA, the Court could proscribe an SCPO seizing Barry’s personal finances, inhibiting his ability to transfer any private property, and limiting his access to Apple’s accounts.

The High Court can also issue an SCPO on Carol. The prosecutor can argue that Carol “facilitated the commission by another person [Barry] of a serious offence.” Carol agreed to help Barry and received proceeds from their scheme. As a result, the SCPO covering Carol may include seizure of her personal property and her business account at Carols Catering. Carol may be prohibited from speaking to the other defendants or employees at Apple. Finally, SCPO is able to prohibit Carol from traveling even if it is for her business.

The prosecutor would likely not request for a SCPO for Diane. By simply going to the store and purchasing envelops, she might appear to have encouraged or assisted the commission of the crime, but it is unlikely she will be subjected to a SCPO because of her extenuated relationship with Barry.

Fortunately for Eric, he too will not likely be the subject of an SCPO. Eric agreed to help with the commission of the fraud and drove Diane to the store, but he agreed to help and did not intend to further the commission of fraud.

Moreover, Fred arguably will be the subject of an SCPO. According to the prosecutor, Fred is “likely to facilitate the commission” of the crime, since there was email correspondence between Fred and Barry specifically regarding the fraud. The SCPO under the discretion of the court can limit Fred’s access to his Orange Company’s files, require that Fred’s work be overviewed by another, or any other remedy that the court deems necessary.
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(ii) The Serious Fraud Office

Based on the factors that the SFO considers before investigating a case, it is most likely that the SFO would not investigate Barry’s case. Although Barry skimmed over $1.8 million, his crime has no international element and did not affect the public. Barry’s crime is seemingly too small and unsophisticated to draw the attention of the SFO.

(iii) Financial Services Authority

The FSA monitors over 29,000 companies in the United Kingdom and requires a risk assessment to be completed every one to four years. Given the size of Apple, the amount of money Barry has borrowed and the extent of time of the scheme, the FSA would categorize Apple as a high impact firm and begin an investigation. The reason for the high impact categorization is due to the amount of money that was loaned, the size of Apple’s company, employing three hundred people and the length of the scheme.

V. CONCLUSION

The systems of the United States and the United Kingdom for handling white collar crime are quite similar, but do differ in certain respects. Both have broad, far reaching statutes, RICO and the SCA respectively, are used by prosecutors to convict white collar criminals. Both statutes allow for seizure of property and funds to provide victims the ability to recoup some losses. Both countries established regulatory agencies to oversee the securities markets and investigate potential violations. The effectiveness of either country’s regulatory agencies has been put into question.

What differs between these two countries is the way each approaches deterring white collar crime. It may be readily apparent that the United States legal system has a harsher punishment system. RICO allows for treble damages and enhanced penalties for racketeering charges. Sarbanes-Oxley codifies enhanced penalties for securities violations. These tools are used as deterrents for future white collar criminals. Based on RICO and Sarbanes-Oxley, the United States relies on regulatory oversight by the SEC requiring companies to submit annual reports. The United States is not preventative in nature, but relies more heavily on harsher punishments and larger fines to deter corporate persons from committing crimes than the United Kingdom.

In the United States, the system is set up to catch criminals as they are about to commit the crime or after the crime is committed. The touchstone of the American white collar prosecution system is the heightened punishment
schemes and the availability of private causes of action. It seems apparent that the United States chose deterrence instead of early action in their battle against commercial crimes.

On the other hand, the United Kingdom does not grant harsher penalties for white collar crimes or those involved in organized crime. Like the SEC, the FSA and SFO are charged with monitoring public companies. What they lack in harsher punishment, the United Kingdom makes up in, arguably, a better preventative system. The United Kingdom places their emphasis proactively and tailors white collar prosecution focusing on early action against corporate criminals. The United Kingdom’s focus is ex ante, before the crime is committed. Given the overbroad statutory wording the SCA, prosecutors are able to strike would-be criminals early at the first sign of wrongdoing or even arguable at the first intention of wrongdoing. The SCPO allows for restrictions to put on those who are likely to facilitate in a crime, giving the Crown prosecutors a preemptive tool to tackle would-be white collar criminals. The SCPO can be tailored by the courts in a various ways. A court can restrict a person’s activities or prohibit travel for up to five years. Courts have a robust means to combat white collar crime in its initial stages.

The better choice between preemption versus a heightened punishment based system is unclear. Based on the recent news of financial scandal neither scheme is one hundred percent effective although neither has had time to be completely implemented. However, both systems could improve in increasing public knowledge, awareness, and involvement. If the public is made fully aware of corporate misdeeds at an early stage, then losses from financial crimes would not be able to grow in excess of a billion dollars.

In fact, the media may be an effective source in monitoring corporate and white collar crimes. By utilizing the media, each government can make corporate actions more visible to the public. One function of the press should be keenly aware of corporate transactions that are neither transparent nor understandable. What the mass media brings to the war against white collar crime is transparency, the dissemination of knowledge to the public. In doing so, the media plays a part in prevention, where news articles and opinion pieces can shed light on potential corruption in corporate settings.

The media has the power to draw national significance to any situation. Their traditional role as public watchdog needs to broaden into a more assertive public spotlight drawing the crowd’s attention to potentially damaging corporate scandals and calling for action. By reporting in detail and frequently about certain corporation actions, the public will scrutinize the corporation’s actions and perhaps prevent catastrophic damages by stopping corporate crime at its early stages. The media also can influence what is relevant in public opinion.

The introduction of the SCPO in the United Kingdom and the passing
of tough statutes like RICO and Sarbanes-Oxley in the United States is a step in the right direction. Utilizing the media could be another step to influence policymaking by creating public opinion about certain issues. Both countries have seen the importance of monitoring and stopping white collar crime no matter what method is used.