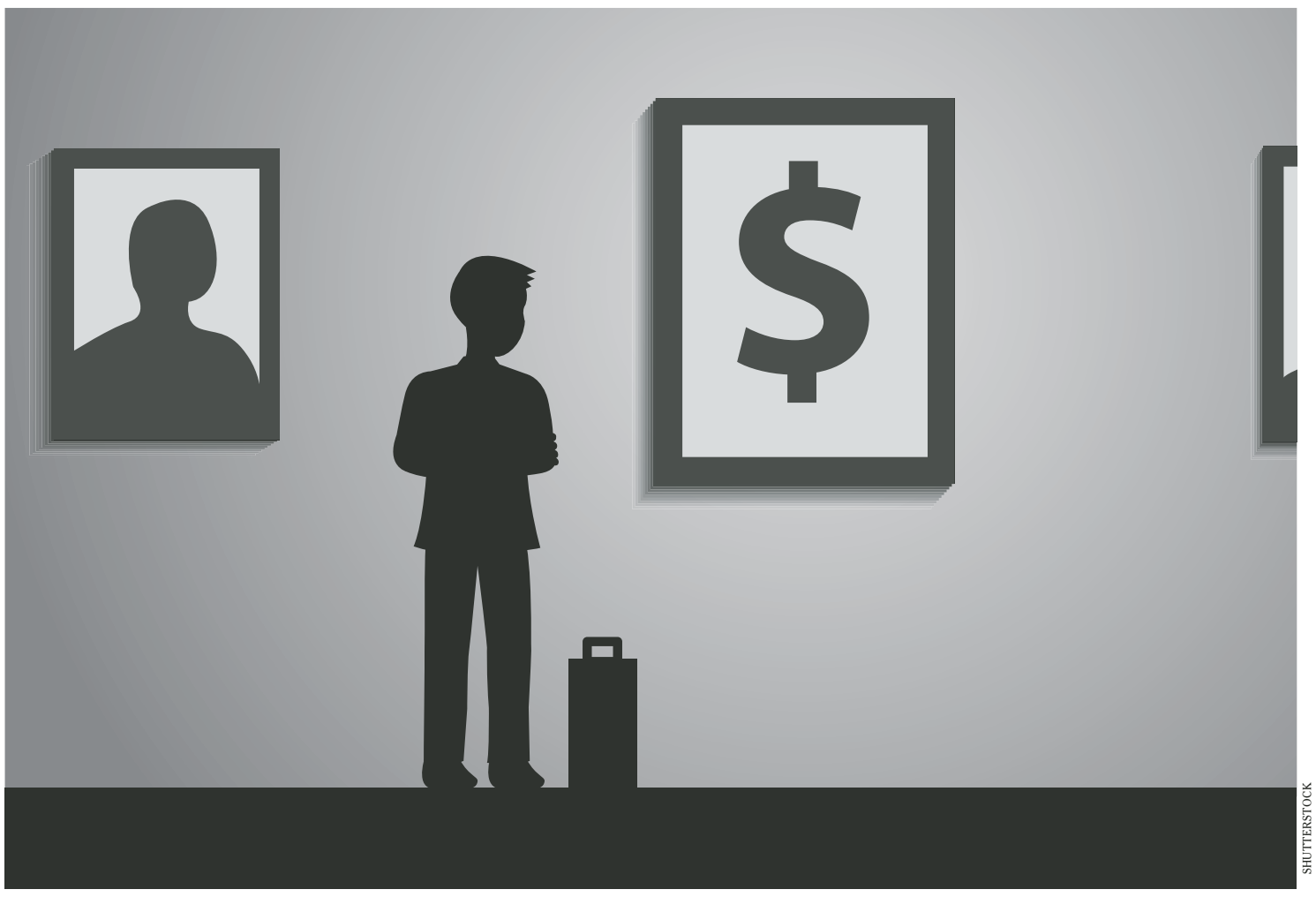
White-Collar Crime



SHUTTERSTOCK

Art Market May Be Asked to Reveal What's Behind the Curtain

BY LAUREN BURSEY AND DEAN NICYPER

The Panama Papers—referring to the 2016 leak of 11.5 million files from the Panamanian law firm Mossack Fonseca—detailed the ways in which offshore shell companies are used to store and transfer assets outside of legal regulations. One of those assets at issue? Art.

The Panama Papers demonstrated the extensive secrecy around the true ownership of art, and the possible use of fine and cultural art as an asset to evade taxes and launder money. The legal definition of money laundering is a financial transaction that aims to conceal the identity, source, and destination of illicitly-obtained money. 18 U.S.C. 1956. Despite efforts at reform, the art market is renowned for its secrecy in both its transactions and ownership of art. Indeed, the Panama Papers revealed, in one such example, that a collection of modernist works assembled by Victor and Sally Ganz and sold at Christie's for a landmark price in 1997 was not actually sold by their family, but rather by British financier Joe Lewis, who had secretly bought the collection months prior. Scott Reyburn, *What the Panama Papers Reveal About the Art Market*, The New York Times (April 11, 2016). Art advisers believe that members of the public bid such a high price because they were swayed by the provenance of the reported collectors, which provided its own indicia of authenticity. There are many more examples of how art transactions are helping to shield sources of funds, which of course are accompanied by questions of the more nefarious use and sources of those funds.

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While it would seem to be good public policy to enact legislation that will prevent money laundering, terrorism, and fraud, **art market leaders are concerned** that money laundering in art transactions is not a big enough issue to justify the regulatory burden.

The European Union undertook the first effort aimed at combatting the art market's potential for money laundering and terrorist financing last April when the European Parliament voted to adopt the Fifth Money Laundering Directive (5AMLD). 5AMLD builds on the previous Directive (4th AMLD), enacted in June 2015, which aimed to counter the use of the financial system for money laundering or terrorist financing. *Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC*, European Parliament and the Council of the European Union (Dec. 19, 2017). The new Directive makes the reporting requirements previously required of banks and other financial institutions applicable to "persons trading or acting as intermediaries in the trade of works of art, including when this is carried out by art galleries and auction houses, where the value of the transaction or a series of linked transactions amounts to €10,000 or more." Anti-Money Laundering Europe, *Agreement on 5th Anti-Money Laundering Directive* (December 2017), 26.

The United States has proposed similar legislation. The Illicit Art and Antiquities Trafficking Prevention Act (HR 5886) was introduced in the U.S. House of Representatives and referred to the House Committee on Financial Services in May 2018. The bill seeks to apply the Bank Secrecy Act (BSA), officially titled "The Financial Recordkeeping and Reporting of Currency and Foreign Transactions," which make up its two parts, to dealers in art or antiquities. (31 U.S.C. 5311 et seq.). The BSA, adopted in 1970, establishes program, record keeping, and reporting requirements for national banks, federal savings associations, federal branches, and agencies of foreign banks. It is aimed, among other things (inter alia), at money laundering and terrorist financing investigations. According to the BSA, banks must: establish effective BSA compliance programs; establish effective customer due diligence systems and monitoring programs; screen against Office of Foreign Assets Control and other government lists and; establish an effective suspicious activity monitoring.

The BSA has been updated many times, most recently in 2001 with the enactment of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (known as the USA Patriot Act) in response to the terrorist attacks of September 11. Just like the EU legislation, the Bank Secrecy Act requires that banks report cash transactions greater than $10,000 to the Treasury Department, in addition to Currency Transaction Reports and Suspicious Activity Reports, all in service of a documented paper and audit trail. The inclusion of art dealers among those responsible under the Act would also require dealers to ensure that any potential clients are not being sanctioned by the Office of Foreign Assets Control (OFAC).

While it would seem to be good public policy » Page 12

Time for the Government To Revisit DPAs and CIAs

BY BILL LEONE AND NEIL O'MAY

Deferred Prosecution (DPA) and Corporate Integrity Agreements (CIA) have been in widespread use in the U.S. now for nearly two decades. The motivation for adopting such agreements was understandable at the time. They represented a way to leverage limited government resources by procuring effective corporate cooperation in investigations, spared corporate entities and their shareholders from undue collateral damage associated with a corporate prosecution, and they assisted in bringing individual actors who engaged in criminal misconduct to justice, thus furthering the goal of deterrence.

Undoubtedly, there have been cases in which a DPA resolution reflected the right result and helped advance the cause of justice. However, the past two decades of experience with such agreements has also revealed their limitations and exposed serious abuses. The government has been explicit in its demands that corporate cooperation requires that scalps be delivered. The November 2018 Rosenstein Announcement, although it purported to be a modification of this principle, reaffirmed that corporate cooperation credit requires that "every individual who was substantially involved in or responsible for" the criminal conduct be identified by the corporation.

Faced with such pressure, corporations have, in some cases, assumed the role of a second prosecutor and paid billions of fees and costs to obtain the privilege of paying billions in fines. Caught in the crucible of unrelenting prosecutorial pressure, corporations have pled guilty or admitted wrongdoing and suffered irreparable damage to their reputations in situations where wrongdoing likely did not occur and could not have been proven simply to bring the investigation to an end. Many of the costs the corporation sought to avoid are incurred anyway due to strong indemnification laws, dramatically expanded compliance departments, endless investigations and out of control corporate monitors.

Individuals' lives and careers have been ruined as they are unfairly and wrongly implicated in these pleas of expediency, exacted as the cost of moving forward. The fabric of corporate governance has been tattered as employees increasingly mistrust their own management, doubt that they will be given a fair evaluation when the company's interests are at stake, and become reluctant to cooperate in internal investigations. Despite the government's pronounced policy of not requiring waiver of privilege, the conscientious issuance of *Upjohn* warnings, the potential for extension of *Garrity* to the private sector, and amendments to the Rules of Evidence that help protect privileged materials notwithstanding their delivery to enforcement officials, at its heart the enforcement » Page 12

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Prosecutorial Immunity: The Debate Reignited

BY MARANDA FRITZ AND BRIAN LANCIAULT

"The time has come to create some level of accountability for prosecutors."
—The Hon. Fredric Block, Let's Put an End to Prosecutorial Immunity, March 13, 2018

The most recent demands for prosecutorial accountability stem from disclosures concerning the conduct of New York hedge fund manager Jeffrey Epstein, and the agreement not to prosecute him entered into by then United States Attorney for the Southern District of Florida, Alex Acosta. Godoy, Jody, "*Epstein Case: A Turning Point for Prosecutorial Accountability?*" Law 360 (Feb. 11, 2019).

This discussion comes on the heels of the barrage of criticism that has been leveled against prosecutors in social media and on the airwaves for more than a year, and a decade of development of objective data relating to wrongful convictions and the improper prosecutorial actions that contributed to them. Each of these discussions, taken individually, is driven by dramatically different interests; however diverse may be the impetus of the debates, they all share a common complaint: Prosecutors have enormous power and can wield it with veritable impunity, unfettered by professional, ethical or civil penalties.

As we navigate another discussion of whether and how prosecutors could be held accountable, we now have the benefit of and should consider the evidence of the patent flaws in the rationale underlying prosecutorial immunity, analysis of the costs and benefits of the protections currently afforded to prosecutors, and the need to substantially revise the current responses to the fact of prosecutorial misconduct.

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Evidence of Prosecutorial Misconduct

An ever-growing body of evidence concerning wrongful convictions has resolved any question concerning the existence, though not the extent, of prosecutorial misconduct. The National Registry of Exonerations reported that in 2017, of the 139 exoneration cases, 84 (60 percent) of those cases involved "official misconduct" of both prosecutors and police leading to the wrongful convictions. National Registry of Exonerations, Exonerations in 2017 at 6 (March 14, 2018). Other academic and governmental studies have analyzed and catalogued the characteristics of wrongful convictions, detailing the percentage of cases in which prosecutorial misconduct occurred and was a component of the wrongful convictions. Id. See also The Innocence Project, Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson (March 29, 2016) ("Prosecutorial Oversight").

Judges have likewise weighed in, citing their own experience with cases involving prosecutorial misconduct and the need for meaningful reform. District Court Judge Frederic Block penned a detailed commentary on the case of Jabbar Collins, who "languished in jail for over 16 years" for a murder he did not commit. Judge Block handled Collins' civil rights action against the prosecutors and concluded that he was bound by Circuit precedent to dismiss the case, but criticized the rationale underlying that precedent, recognizing that "solicitation and subornation of perjured testimony, the withholding of evidence, or the introduction of illegally seized evidence at trial are … truly 'deplorable' intentional acts." Concluding that "the time has come to create some level of accountability," Judge Block suggested that the veil of immunity be "judicially or legislatively lifted," that state bars and courts enforce ethical canons against prosecutors, and that prosecutors who intentionally withhold *Brady* material be "prosecuted for obstruction of justice."

Accountability vs. Immunity

The discussions of rights and remedies that could address the issue of prosecutorial misconduct focus on three areas: the imposition of sanctions or costs within the criminal proceeding where misconduct is demonstrated, allowance of civil remedies in favor of an accused, and disciplinary processes to sanction and deter prosecutors' improper conduct. Relevant data illustrate that each of these options is presently either unavailable or unavailing.

Within the criminal proceeding in which mis- » Page 13

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Inside

WHITE-COLLAR CRIME: Angela Turturro, Sections Editor | Agnieszka Czuj, Design

Armed Guards, Private Prisons, And Special Treatment for the Wealthy

BY ROSS M. KRAMER
AND SETH C. FARBER

"How glorious to be an American citizen," wrote U.S. District Judge Jed S. Rakoff in his Feb. 5, 2009 Order granting bail to prominent New York attorney turned Ponzi-scheme defendant Marc Dreier. "In so many countries, the rights of citizens are not worth the paper they are printed on. But here, any citizen—good, bad, indifferent, famous, infamous, or obscure—may call upon the courts to vindicate his constitutional rights and expect that call to be honored." *United States v. Dreier*, 596 F. Supp. 2d 831 (S.D.N.Y. 2009).

The constitutional right to which Judge Rakoff referred was the Eighth Amendment's mandate that "Excessive bail shall not be required."

Judge Rakoff applied that mandate by granting Dreier's request for bail on conditions that have long been a conundrum for district courts: 24/7 home detention, secured not only by electronic monitoring but by on-premises armed security guards, supplied by a third-party company, paid for by the defendant, his family, or his employer, and empowered to use force to thwart any attempt to flee.

Essentially, Marc Dreier created a "private prison" in his Midtown Manhattan apartment, in which he would serve months of pre-trial detention. Judge Rakoff ratified the arrangement under the plain language of the Bail Reform Act, 18 U.S.C. §3141, et seq., and the Eighth Amendment.

In the decade since Judge Rakoff's decision, and even before it, courts in the Second Circuit have wrestled with public policy issues surrounding the "private prison" bail model—an arrangement exclusively available to those defendants with the significant means to fund it.

The issue was recently revisited when U.S. District Judge William F. Kuntz denied pre-trial release to defendant Jean Boustani. Boustani had proposed a "private prison" bail package very similar to the one approved in *Dreier*, including home detention secured by private armed guards. But in an Order issued Feb. 4, 2019—nearly 10 years to the day after Judge Rakoff's *Dreier* decision—Judge Kuntz wrote that although Boustani "has vast financial resources to construct his own 'private prison,' the Court is not convinced 'disparate treatment based on wealth is permissible under the Bail Reform Act.'" *United States v. Boustani*, 18 Cr. 681 (WFK), 2019 WL 440642 (E.D.N.Y. Feb. 4, 2019).

This recurring issue has no simple solution. Should a wealthy defendant be permitted to "buy" his way out of pre-trial incarceration, when a defendant with less resources cannot? To date, the Second Circuit has offered little guidance, leaving district courts to (inconsistently) reach their own conclusions.

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The Bail Reform Act and 'Risk of Flight'

Under the Bail Reform Act, a court is required to order the pre-trial release of a defendant on a personal recognizance bond, unless the court determines that such release "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. §3142(b).

If the court determines that a defendant's release on an unsecured bond presents a risk of flight or a danger to the community, the Act still requires pre-trial release subject to "the least restrictive further condition, or combination of conditions" that the court determines will "reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. §3142(c)(1)(B).

Under the Act, pre-trial detention should only be ordered if a detention hearing shows that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. §3142(e)(1).

'United States v. Boustani'

Jean Boustani was a "wealthy international businessman" and a non-citizen who was charged in connection with a $2 billion fraud, bribery, and money laundering scheme.

The government argued that Boustani's "deceptive character, substantial wealth, minimal ties to the United States, and extensive ties to countries without extradition" made him a serious risk of flight. The government opposed any pre-trial release, arguing that Boustani was a flight risk "with access to significant financial resources and no ties to the United States," and therefore "no condition or combination of conditions" could reasonably assure his appearance.

The defense countered that assertion by proposing a bail package that they argued would make flight "virtually impossible," including home confinement secured by 24-hour private armed guards. Those armed guards, the defense argued, would be responsible for keeping Boustani confined "in a highly securitized and heavily monitored residence" and assuring his appearance as required.

> **This recurring issue has no simple solution.** Should a wealthy defendant be permitted to "buy" his way out of pre-trial incarceration, when a defendant with less resources cannot?

Judge Kuntz rejected the defense's "private jail proposal." Among other reasons, the court held that allowing the defendant to use his financial resources "to construct his own 'private prison'" could constitute impermissible disparate treatment for the wealthy under the Bail Reform Act, because other defendants "may not currently possess the financial capacity to pay for the private jail solution Defendant requests."

Courts Are Split

The Court of Appeals for the Second Circuit has, to date, offered little guidance to district courts on the "private prison" issue.

In *United States v. Sabhnani*, 493 F.3d 63 (2d Cir. 2007), the court concluded that home detention enforced by private security guards was sufficient, along with other conditions, to ensure against the defendants' risk of flight. However, the court expressly declined to address the larger issue of "whether it would be contrary to principles of detention and release on bail to allow wealthy defendants to buy their way out by constructing a private jail," because the government had not specifically raised that argument.

In *United States v. Banki*, No. 10 Cr. 373, 369 Fed. Appx. 152 (2d Cir. March 10, 2010), the court held that *Sabhnani* created no legal obligation on district courts to consider whether "privately-financed home confinement would suffice to secure a defendant's attendance," and added that it "remain[ed] troubled" by that possibility that wealthy defendants could secure pre-trial release by "constructing a private jail."

More recently, in *United States v. Esposito*, 18 Cr. 923, 749 Fed. Appx. 20 (2d Cir. Sept. 11, 2018), the court held that "district courts are not required to consider private security guards as a condition of release, but they are not precluded from doing so when the defendant has substantial resources and such wealth contributes to his risk of flight."

In light of the Court of Appeals' largely ambiguous rulings on the issue, district courts have taken different approaches and reached different results.

In *Dreier*, Judge Rakoff granted pre-trial release under home confinement secured by private armed guards, opining that "many kinds of bail conditions favor the rich, and … [t]his is a serious flaw in our system. But it is not a reason to deny a constitutional right to someone who, for whatever reason, can provide reasonable assurances against flight." More recently, in *United States v. Ng Lap Seng*, 15 Cr. 706 (VSB) (Order dated Oct. 23, 2015), Judge Vernon S. Broderick granted pre-trial release secured by, among other things, an "armed security team" responsible for ensuring the defendant's appearance in court.

On the other side of the ledger, various district courts have rejected a "private prison" solution. In *United States v. Agnello*, 101 F. Supp. 2d 108 (E.D.N.Y. 2000), for example, Judge Gershon opined that a wealthy defendant is not "entitled to greater consideration in the making of a bail decision than a defendant of modest means," and that "Congress did not intend that a dangerous individual should be released because that individual was sufficiently affluent to be able to pay the cost of extravagant release conditions monitored by private security officers." In *Borodin v. Ashcroft*, 136 F. Supp. 2d 125 (E.D.N.Y. 2001), Judge Nickerson opined that "it is contrary to underlying principles of detention and release on bail that individuals otherwise ineligible for release should be able to buy their way out by constructing a private jail, policed by security guards not trained or ultimately accountable to the government,

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Will the SEC Take an **Expansive Approach** To the **Extraterritorial Reach** of Its Jurisdiction?

BY ANN-ELIZABETH OSTRAGER

This article examines whether the U.S. Securities and Exchange Commission (SEC) may take a more expansive approach to the extraterritorial reach of its jurisdiction in light of the recent decision by the U.S. Court of Appeals for the Tenth Circuit in *SEC v. Scoville*, 913 F.3d 1204 (10th Cir. 2019), which held, in the context of an SEC enforcement matter, that the Dodd-Frank Act superseded the Supreme Court's decision in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), which limited the SEC's ability to enforce the federal securities laws to conduct that took place within the United States.

This article also considers *Scoville*'s potential impact in light of other decisions, particularly the decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), which takes a potentially more limited approach to the government's extraterritorial jurisdiction in the context of the Foreign Corrupt Practices Act (FCPA). Although it remains to be seen whether other circuit courts will align with the Tenth Circuit's decision in *Scoville*, this decision may alter and expand the playing field when navigating an SEC investigation or litigation.

The Jurisdictional Framework. Prior to the Supreme Court's decision in *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), the SEC could bring extraterritorial claims under the federal securities laws based on the "conduct-and-effects" test. Under that test, courts examined "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008).

In *Morrison*, the Supreme Court rejected this approach, limiting the substantive application of the antifraud provisions of the federal securities laws to transactions that take place within the United States. Specifically, *Morrison* held that §10(b) of the Securities Exchange Act applies "only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." *Morrison*, 561 U.S. at 273.

On the day Morrison was decided, June 24, 2010, the Dodd-Frank conference committee also held its final meeting. Actions Overview H.R.4173-111th Cong. (2009-2010). The next month, §929P(b) of Dodd-Frank amended the antifraud provisions in the 1933 and 1934 securities acts to add language regarding extraterritorial jurisdiction. On its face, the Dodd-Frank Act conferred jurisdiction over "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." 15 U.S.C. §78aa (2010).

While various lower courts have analyzed the potential implications of this legislation (see infra), until recently, no circuit court had held that Dodd-Frank superseded *Morrison*.

'Scoville': The Tenth Circuit's Broad Interpretation of the SEC's Extraterritorial Reach. On Jan. 24, 2019, the Tenth Circuit ruled that the antifraud provisions of the federal securities laws apply extraterritorially in SEC enforcement cases where the §929P(b) "conduct-and-effects" test is met.

The SEC initially brought an enforcement action against Charles Scoville and his company, Traffic Monsoon, an Internet traffic exchange business. Traffic Monsoon sold online advertising services including "Adpacks." *SEC v. Traffic Monsoon*, 245 F. Supp. 3d 1275 (D. Utah 2017). The SEC alleged that Adpack purchasers could share in Traffic Monsoon's revenue, thus qualifying Adpacks as investment contract "securities" under the Securities Act of 1933. The SEC also argued that Adpacks operated as a Ponzi scheme in securities because revenue shares were financed through the sale of Adpacks to other customers. The SEC sought, and the district court granted, a preliminary injunction halting Traffic Monsoon's sale of Adpacks. Id. at 1304.

Scoville argued that the SEC's claims did not reach the majority of Adpack sales because they were principally sold to customers outside the United States. The SEC, by contrast, argued that Dodd-Frank reflected Congress's clear intent to apply extraterritorially the antifraud provisions of the securities laws. See *SEC v. Scoville*, 913 F.3d 1204, 1215-18 (10th Cir. 2019). The Tenth Circuit affirmed the district court's decision, holding that, "[t]hrough the 2010 Dodd-Frank Act," Congress "'affirmatively and unmistakably' directed that [the antifraud provisions of the federal securities laws] apply extraterritorially in an enforcement action." Id. at 1215 (citations omitted).

> Given the lack of clarity in the law, the **SEC may take an expansive view of its extraterritorial reach** in investigating potential securities violations, and even in bringing actions. Such an approach would **present litigation risks for both the government and defendants,** but it is a risk of which counsel should be aware in defending a case with an extraterritorial nexus.

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'Hoskins': The Second Circuit's More Limited Approach to Extraterritorial Jurisdiction. On Aug. 24, 2018, in a closely watched decision, the Second Circuit ruled that the government is precluded from employing theories of conspiracy or complicity to charge foreign nationals acting abroad with violations of the FCPA without a showing that the defendant was acting as an employee, officer, director, or agent of a U.S. entity, and thus otherwise covered by the statute.

The Department of Justice (DOJ) alleged that Lawrence Hoskins, a U.K citizen and employee of a U.K. subsidiary of power and transportation company Alstom S.A., directed and authorized corrupt payments by a U.S. subsidiary of Alstom to Indonesian officials. See *U.S. v. Hoskins*, 123 F. Supp. 3d 316 (D. Conn. 2015). The DOJ argued that Hoskins violated the FCPA because he directed and authorized corrupt payments by a U.S. subsidiary of Alstom to foreign officials. Id. at 320. The district court ruled that the government cannot use accomplice or conspiracy-related charges to extend liability under the FCPA beyond the explicit categories of persons identified in the statute. Id. at 327.

The Second Circuit affirmed in part and reversed in part. The court affirmed the lower court's ruling that Hoskins, a foreign national, could not be liable for an FCPA violation without a showing that he was acting as an employee, officer, director, or agent of Alstom's U.S. subsidiary. See *U.S. v. Hoskins*, 902 F.3d 69 (2d Cir. 2018). However, the court reversed the lower court's ruling that prohibited the government from attempting to establish that Hoskins was liable as an agent of Alstom's U.S. subsidiary for conspiring with foreign nationals who committed relevant acts while in the United States.

The court examined the text and legislative history of the FCPA, ultimately determining that the FCPA's "omission of the class of persons under discussion was not accidental, but instead was a limitation created with surgical precision to limit its jurisdictional reach." Id. at 84. Further, the court held that the presumption against extraterritoriality independently "bars the government from using the conspiracy and complicity statutes to charge Hoskins with any offense that is not punishable under the FCPA." Id. at 97. The Second Circuit explained that, under controlling precedent, the government must "establish[ ] a 'clearly expressed congressional intent to' allow conspiracy and complicity liability to broaden the extraterritorial reach of the statute," and the government had not established such intent with respect to the FCPA. Id. at 95 (citation omitted).

The Implications of 'Scoville' on the SEC's Approach to Extraterritorial Jurisdiction. If followed, *Scoville*, which is a decision of first impression at the circuit court level, has the potential to dramatically expand the scope of the SEC's extraterritorial reach. Still, *Hoskins* demonstrates an unwillingness on the part of certain courts to expand extraterritorial jurisdiction and casts at least some doubt on whether the government will now be emboldened to broadly pursue more cases involving extraterritorial conduct.

Hoskins followed a line of Supreme Court cases relying on the presumption against extraterritoriality to reject claims brought against foreign nationals for conduct occurring abroad in connection with other federal statutes. See, e.g., *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 125 (2013); *Morrison*, 561 U.S. at 255. Yet, notwithstanding the Second Circuit's decision in *Hoskins*, lower court opinions in the Second Circuit are not uniform. Compare *SEC v. Tourre*, 2013 WL 2407172, at *1 n.4 (S.D.N.Y. June 4, 2013) ("Because the Dodd-Frank Act effectively reversed *Morrison* in the context of SEC enforcement actions, the primary holdings of this opinion affect only pre-Dodd-Frank conduct."), with *In re Optimal U.S. Litig.*, 865 F. Supp. 2d 451, 456 n.28 (S.D.N.Y. 2012) ("Although I recognize that [another S.D.N.Y. judge] has … extend[ed] the reach of the Exchange Act to foreign parties entering into a transaction referencing U.S. securities, I cannot reconcile this holding with the presumption against extraterritoriality in

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Government

« Continued from page 9

world still presses the expectation that cooperation means that the corporation will use its attorneys to ferret out incriminating information and turn it over. The sanctity of the attorney client privilege has been eroded.

Historically, the attorney-client privilege served to allow the client and their trusted counsel to fully and without fear unravel the facts of a matter, and to permit counsel to advise about compliance and right the ship. Today, as internal investigations are routinely delivered to prosecutors to serve as the core of a criminal prosecution, not even the compliance function is permitted to work as it should. The government relies too heavily on an interested corporation and its controlling executives and can be embarrassed when the full facts become known and the case against the individual defendants unravels.

This article argues for a more skeptical and restrained use of such agreements, and for a more restrained deployment of the criminal laws in situations that are better regarded as a regulatory failing. It challenges the assumption that corporations can or should be regarded as "partners" of law enforcement, except in the clearest of circumstances. It advocates for an enlightened theory of corporate cooperation that does not involve or require the deliverance of a putative defendant. Finally, it asserts that in our adversary system of justice, just results are best obtained without the perverse incentives levied by government imposed corporate cooperation policies.

Two recent high-profile examples illustrate the hazards that can infect the DPA process in the United States and abroad: the London Whale cases in the Southern District of New York and the Tesco prosecution pursued by the Serious Fraud Office (SFO) in the UK. Both involved hasty corporate settlements reached with enforcement authorities that implicated individual executives. Norton Rose Fulbright represented the individual defendants in both cases. In the United States, after much publicized, and politicized, proceedings claiming culpability had been established, the claims were exposed to the harsh scrutiny of the adversary process and the government's case collapsed. In the UK, after a DPA deal was struck between the company and the SFO naming three key managers as being manifestly guilty, the judge in the later trial of those same individuals ruled there was not even a case to answer.

There is a better formula for corporate cooperation. It preserves the attorney-client privilege. It empowers corporate compliance efforts. And it gives the government the benefit of the corporation's willing assistance in tasks that would otherwise consume vast amounts of limited enforcement resources. It protects the rights of individual employees. It respects the relative roles of the government and private actors. In the end, it will produce better results for the corporate and government actors.

First, the government must recognize that the corporation is not its partner, nor should it be. Corporate executives answer to shareholders. Lawyers retained by corporations gather facts and advise about legal risks. Both of those roles are important, valuable and time-tested. Titles like "Independent Investigator" blur the roles. There is nothing inconsistent between being a good advocate and assisting the government. Good advocates bring true hard facts to light, help the government refine its theories in a good way, prevent unjust prosecutions and prevent bad mistakes. Credible and constructive advocacy does not mean that the corporation or its counsel must agree with the government.

Second, the government must accept a different, more limited concept of what constitutes cooperation. A corporation can dramatically reduce the cost and time associated with the government's work. It can do so by not taking constrained views of the scope of an information request, by trying to understand what types of corporate data the government should be interested in and providing it, or explaining what it is, without waiting for the government to guess what is there and describe it correctly. Everyone knows the difference between a cooperative party and one that presses every argument, minces every word, and demands compliance with every formality. A cooperative corporation helps the government obtain and understand the mass of information generated in the modern corporation and delivers it in a way that is easily used in getting at the underlying truth.

> The government needs to **meaningfully modify its cooperation policy** to eliminate the perverse incentives that lead to a rush to judgement and create the need to find a sacrificial lamb who occupies a suitably insulated place in the corporate hierarchy.

Aside from cases where a corporation is a true victim and is seeking criminal prosecution as redress, the corporation's legitimate value in the criminal context does not extend to interviewing witnesses and nominating individuals for prosecution. Communications with employees in the context of an internal review by corporate lawyers are and should remain privileged. Despite *Upjohn* warnings, employees often make not only unguarded, but inaccurate or speculative statements simply because the questioning is premature, rushed, or inartful. The quality and accuracy of statements obtained and then memorialized by internal investigators are often suspect. Judgements about culpability are reserved, in the criminal context, for public officials who presumably operate in the interests of justice. In the civil context, of course, the corporation must form those judgements, take appropriate employment action and implement or improve control systems needed to prevent a recurrence of the conduct at issue. Companies take action in the civil arena for many reasons that are inapplicable in a criminal case including to remedy bad judgement or to punish undue risk-taking.

Those judgements should be formed through a conventional application of fact-gathering and confidential advice, not in an environment where the price of not "naming names" is a corporate criminal prosecution.

Third, the government needs to meaningfully modify its cooperation policy to eliminate the perverse incentives that lead to a rush to judgement and create the need to find a sacrificial lamb who occupies a suitably insulated place in the corporate hierarchy. In the criminal context people's lives are at stake and the corporation's reputation is at stake. Sometimes groups of people do things that, in hindsight, violate a rule. Often the bad decision reflects neglect in governance but not true criminal intent. The truth is that assessing individual culpability in a corporate context is very difficult. In those cases where criminal remedies cannot in good faith be imposed on a person or persons, regulation should be left to the civil world.

In the cases described above, large companies were faced with unrelenting pressure to name names and deliver defendants. The end result of a misguided but very proactive investigation was the legal equivalent of an unguided missile.

Art

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to enact legislation that will prevent money laundering, terrorism, and fraud, art market leaders are concerned that money laundering in art transactions is not a big enough issue to justify the regulatory burden. Andrew Schoelkopf, the President of the Art Dealers Association of America (ADAA), argues that "money laundering is simply not something that's pervasive in the art market." Margaret Carrigan, *US anti-money-laundering bill could reappear early next year*, The Art Newspaper, Dec. 11, 2018. Although the United Nations Office on Drugs and Crime estimates that laundered money makes up 2-5 percent of the global GDP annually, there is no clear data that demonstrates how much the art market contributes to that total, and at the present time, there have been no convictions for money laundering solely stemming from the art trade. Rather, when art is involved, it usually plays a role as part of a larger criminal enterprise. That number may not be the strongest factor, however, as the sponsor of the bill, Congressman Luke Messer (R-IN), stated that the aim of the bill was to "counteract terrorist financing and crack down on terrorist organizations like ISIS." Id. The media and academics have long expressed their horror at ISIS's fundraising through looting and trading in antiquities, estimating its payout in the billions of U.S. dollars. Nancy C. Wilkie, in her capacity as President of the U.S. Committee of the Blue Shield (USCBS), referenced the UN Security Council's 2017 Resolution 2347, which confirmed that the looting of archaeological sites in Iraq and Syria by ISIS and Al-Qaida has helped to fund terrorist activities in the Middle East, in her letter of support for the bill on behalf of the USCBS. Letter from Nancy C. Wilkie, President, U.S. Committee of the Blue Shield, in support of H.R. 5886 (May 29, 2018) (published on USCBS website). The Security Council had expressed its concern about "the links between the activities of terrorists and organized criminal groups that, in some cases, facilitate criminal activities, including trafficking in cultural property, illegal revenues and financial flows as well as money-laundering, bribery and corruption." S/Res/2347 (2017) Preamble. Notably, the IAATP is the first regulation in the U.S. that proposes to affect the entire art market, from fine art to antiquities, and it does not discriminate between sellers of different types of art depending on their potential for money laundering. Eileen Kinsella, *US Art Dealers May Soon Be Subject to Government Financial Regulation*, artnet news (May 2, 2018).

The biggest concerns for art dealers, in addition to the additional scrutiny of their practices this bill will bring, include the high administrative burden, the responsibility to "know your customer," and a potential chilling effect on the art market. In addition to the previously noted reporting requirements, dealers would also need to establish suspicious activity monitoring programs and processes for reporting. This high administrative burden is especially problematic for small and even mid-sized art dealers, who do not have resources comparable to the financial institutions already being regulated. While the BSA does enumerate certain "persons" who routinely use currency and may be exempt from the filing requirements, which would ultimately lessen the administrative burden, none of those listed would apply to art dealers or the purchasers or sellers of art. The major auction houses, primarily Sotheby's and Christie's, already have anti-money laundering protocols in place, boosted by their robust legal and compliance departments. Christie's' program includes "client, transaction and artwork due diligence, monitoring, record keeping and independent audits," and it enforces "strict cash payment limits" and a no third-party payment policy. *Buying at Christie's*, Christie's. Both Christie's and Sotheby's have a history of lending money and using art as collateral, putting them in a different risk category than other dealers. The major auction houses have been forced to follow the call for more transparency in the art market, after multiple lawsuits concerning Holocaust looted art and looted antiquities and a greater emphasis on provenance, so in some way the IAATP but is one more step in a continuing trend to demystify the market for the public.

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In addition to the burden on the art dealer, the IAATP may be a burden on art purchasers as well, leading to a chilling effect on the whole market. Conversely, the legislation may help sales because awareness of the stringent reporting requirements with which art dealers must operate could add credibility to those sales, in the same way that a work of art with a well-established provenance helps increase the work's value.

The IAATP is currently dead following the November mid-term elections, although many experts speculate that the bill will be reintroduced to the new Congress to keep pace with the global trend in anti-money laundering activities. The bill must still pass through the House's legislative process and the committee process in the Senate, a long road for a Congress currently embroiled in other security concerns.

Immunity

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conduct occurs, there are motions that can and should be made, but case law strongly favors an effort to "cure" the misconduct as opposed to discontinuing the case. Attorney's fees are supposedly available for a "prevailing party" under the Hyde Amendment, but decisional authority has rendered an award of fees all but impossible. In *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), for example, the defense obtained the dismissal of an indictment for prosecutorial misconduct, but the defendants were denied an award of fees, with the trial court concluding that the defendant had not "prevailed" because a dismissal of the indictment was not a "judgment on the merits" and the litigation as a whole was not vexatious (though the prosecutor's violations were determined to be in bad faith); the Ninth Circuit affirmed. *Chapman* is not unusual, and the overwhelming authority interpreting the Hyde Amendment has required the substantial showing that the entire case was initiated "without reasonable or probable cause," effectively excusing any misconduct that occurs after indictment. See, e.g., *United States v. Terzakis*, 854 F.3d 951 (2d Cir. 2017).

Separate civil actions under §1983 remain largely precluded by the decisions creating and upholding prosecutorial immunity, but those decisions rest on an unsound foundation and need to be revisited. Described as a "constitutional ditch" in need of filling, prosecutorial immunity stems from a 1976 Supreme Court decision, *Imbler v. Pachtman*, 424 U.S. 409 (1976), which concluded that prosecutors, when engaged in their roles as advocates in the courtroom, possess complete immunity, and where they stray outside that pure courtroom advocate role, possess qualified immunity. Grometstein & Balboni, "*Backing Out of* a *Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*," *75* Albany Law Review No. 3, Spring 2012. The *Imbler* court relied first on an analysis of Congress' intent when it enacted 42 U.S.C. §1983, concluding that since prosecutors possessed immunity at the time §1983 was enacted, Congress must have incorporated that immunity into its prohibitions against due process and equal protection violations. The *Imbler* court also relied on the assumption that prosecutors, like other attorneys, would be subject to discipline for their misdeeds. See also *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (where defendant alleged failures to train and establish information management systems, held that conduct because is "directly connected to the conduct of a trial" and therefore immune); *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (a single instance of a *Brady* violation was not sufficient to impose liability on the district attorney's office for failure to train).

Both of the assumptions underlying *Imbler* are erroneous. As confirmed by Justice Scalia, "[t]here was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (concurrence). Various scholars have likewise demonstrated the utter lack of historical evidence supporting the Court's premise in *Imbler*.

Its subsidiary premise has also been debunked. Numerous empirical studies since 1976 show that discipline of prosecutors is near non-existent. See, e.g., Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 521-27 (2011). For example, in 2016 the Innocence Project published a report revealing that between 2004 and 2008, out of 660 acknowledged instances of prosecutorial error or misconduct, a prosecutor was disciplined in only *one* case. See *Prosecutorial Oversight*, supra. Other studies suggest that disciplinary processes have resulted in action against prosecutors in only 1 percent of cases, even where the misconduct has been litigated and documented.

A cost-benefit analysis of the issue of prosecutorial immunity strongly supports the view that the most targeted and effective means of addressing the problem lies in the imposition of individual monetary penalties. A comprehensive survey of the incentives and effective deterrents to prosecutorial misconduct analyzed potential sanctions and ultimately concluded that individualized and targeted monetary sanctions would most effectively influence those who actually engage in the conduct. Dunahoe, Alexandra, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. Ann. Sur. Am. L. 45, 59-66, 96-107 (May 2005). Analytically, immunity only serves to embolden the individual actors *and* dissuades agencies from devoting attention and resources to training and oversight on issues that, if liability existed, would become a matter of far greater importance.

> Given that all attorneys (except prosecutors) litigate effectively every day with the certainty that if they violate ethical principles or engage in improper conduct they will be subject to monetary and disciplinary penalties, **we should continue to question why prosecutors possess enormous power but face little accountability.**

Recent Initiatives

The last year has seen some stutter steps toward revising the means by which allegations of prosecutorial misconduct are addressed. The New York State Legislature passed a law to create the nation's first Commission on Prosecutorial Conduct, scheduled to take effect in January 2019. That effort may have been short lived: The District Attorney's Association of the State of New York filed suit in October 2018 to block the Commission and, in January, the parties entered into a stipulation that prevents the law from taking effect until changes are made to address the concerns raised by DAASNY.

The federal landscape may also be changing. The Jeffrey Epstein case and the actions of former USA Alex Acosta were cited by members of Congress as evidence of the "urgent" need for passage of the Inspector General Access Act, which would enable the Office of the Inspector General to review complaints regarding Department of Justice attorneys, shifting those matters away from DOJ's internal Office of Professional Responsibility. A bill effecting this transition was recently proposed by Representative Cedric Richmond and co-sponsored by Senators Mike Lee and Lisa Murkowski. In January, the House unanimously passed the bill and it is now pending before the Senate Judiciary Committee, where Chairman Chuck Grassley has already confirmed his support.

Conclusion

As white-collar lawyers, we confront this issue every time we are able to achieve for our clients what we consider a positive result—an acquittal at trial, dismissal of an indictment, or even the closure of an investigation without charges being filed. The client inevitably asks what recompense exists for the enormously destructive forces that were unleashed against the client and his business along the way. Where we achieve that positive outcome due, in whole or in part, to evidence of improper conduct of the prosecution, the issue is exacerbated: the client insists that the prosecutor or the government should somehow be called to account. Given that *all attorneys* (except prosecutors) litigate effectively every day with the certainty that if they violate ethical principles or engage in improper conduct they will be subject to monetary and disciplinary penalties, we should continue to question why prosecutors possess enormous power but face little accountability.

Wealthy

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even if carefully selected." In *United States v. Cilins*, No. 13 Cr. 315 (WHP), 2013 WL 3802012 (July 19, 2013), Judge Pauley opined that "Federal judges swear an oath, with ancient roots dating to Deuteronomy, to 'administer justice without respect to persons, and do equal right to the poor and to the rich,'" and that "[t]hat pledge is violated if a defendant, who is a serious risk of flight with every incentive to flee and the means to do so, is permitted to buy his way out of detention."

Going Forward

District courts appear destined to wrestle with the "private prison" issue unless and until the Second Circuit issues definitive guidance, or the legislature amends the Bail Reform Act. As detailed above, district judges currently appear to rule on such bail proposals based on some combination of statutory interpretation and their own view of fundamental fairness and public policy. This is not ideal. At best, it leads to inconsistent results in connection with a basic constitutional right.

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The plain language of the Act allows for defendants to propose creative bail solutions that minimize any risk of flight. Following the plain language of the Act to its natural end, for wealthy defendants that may include using their own resources to secure pre-trial release in a self-funded "virtual prison." If a set of conditions reasonably protects against a risk of flight, defense attorneys would seem remiss in failing to propose them, even though many district judges appear to find them morally dubious. Unless and until the Court of Appeals takes a firmer stand against it, attorneys representing defendants with the means to create a "private prison" can continue to argue, as Judge Rakoff opined in *Dreier*, that wealth inequality "is not a reason to deny a constitutional right to someone who, for whatever reason, can provide reasonable assurances against flight."

Jurisdiction

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Morrison."). One Northern District of Illinois case—though refusing to confront the issue directly—concluded that §929P(b) "may be jurisdictional" though "[i]t is unclear, however, whether the Court's analysis should stop there because it is possible that this interpretation would create superfluity or contradict the legislative intent." See *SEC v. Chi. Convention Ctr.*, 961 F. Supp. 2d 905, 916 (N.D. Ill. 2013).

Given the lack of clarity in the law, the SEC may take an expansive view of its extraterritorial reach in investigating potential securities violations, and even in bringing actions. Such an approach would present litigation risks for both the government and defendants, but it is a risk of which counsel should be aware in defending a case with an extraterritorial nexus.