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Articles

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> Whatever evils today's opinion [affirming the conviction] may redress, in my view, pale beside those it will engender. Courts must resist the temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government. All Americans . . . are entitled to protection from prosecutorial abuse. The facts of this case suggest a depressing erosion of that protection . . . .
>
> Our criminal-justice system runs on the premise that prosecutors will respect and courts will enforce the boundaries on criminal conduct set by the legislature. Where, as here, those boundaries are breached, it becomes impossible to tell where prosecutorial discretion ends and prosecutorial abuse, or even discrimination, begins.

In this excerpt from a recent United States Supreme Court case, the dissent sharply denounces the majority's decision to affirm a criminal conviction. The essence of the dissenters' complaint is that the Court has inappropriately—indeed, recklessly—expanded the government's powers at the expense of individual rights. Given the general rightward shift in the Court's jurisprudence in criminal cases over the last twenty-five years, such criticisms are common in dissenting opinions.[1] Not surprisingly, these dissents have usually been written by justices perceived to be "liberal,"[2] most notably by former Justices Thurgood Marshall and William Brennan, and, somewhat less consistently, by Justice John Paul Stevens and, late in his tenure, former Justice Harry Blackmun.[3]

There is little doubt, in fact, that if the dissenting opinion quoted above had involved narcotics or violent crime—categories that

1. *See infra* Part II.

2. I use the terms "liberal" and "conservative," along with the terms "left" and "right," as shorthand to describe the judicial philosophies of certain United States Supreme Court justices in criminal cases. I do so because these are the terms used most frequently in common parlance. *See, e.g.*, Stephen L. Wasby, *Justice Blackmun and Criminal Justice: A Modest Overview*, 28 AKRON L. REV. 125, 125-26 (1995) (characterizing the ideological positions of the justices in criminal cases). These terms necessarily oversimplify both the individual justices' philosophies in criminal cases, and the nature of their judicial philosophies in general. But perceptions of "left" and "right" in criminal cases, imprecise though they may be, are more often accurate than not, and are therefore useful in framing the issues in this paper. *See infra* note 7.

3. Justice Blackmun's general leftward shift did not include criminal cases until near the end of his tenure in 1994; by 1990, he was part of a liberal criminal case bloc that also included Justices Brennan, Marshall, and Stevens. *See* Wasby, *supra* note 2, at 126 ("in roughly the last decade of his service on the Court, [Justice Blackmun] moved away from . . . conservatives . . . to change his tone—he was called a 'voice of reason' in criminal matters—and to vote more frequently with Justices Brennan and Marshall . . .").

consume the vast majority of the Court's docket in criminal matters[4]—it would likely have been authored by one of the Court's liberal members. The case from which the quotation is taken, however, involved a white collar crime;[5] the dissent was written by Justice Clarence Thomas, who was joined by Chief Justice William Rehnquist and Justice Antonin Scalia, together perceived to be the Court's three most conservative members.[6]

Justice Thomas' *pro-defense* posture is no aberration in the *white collar* crime context—a conclusion that will not surprise anyone who has taught, as I have, courses in both federal criminal procedure and white collar crime, or to anyone else who has carefully studied the Court's decisions in the white collar area.[7] Simply put, in a substantial number of the Court's leading white collar criminal cases, ranging from securities fraud to political corruption cases, the "liberal" justices have voted to affirm convictions, and the "conservative" justices to reverse them.[8] Even more frequently, these cases have produced strange alliances among the liberals and conservatives, who rarely split into such groupings in non-white collar criminal cases.[9] And it is not merely votes and alliances that change in white collar cases; judicial philosophies, attitudes, and rhetoric transmogrify into a veritable twilight zone of Supreme Court criminal law jurisprudence.

The justices' voting in the white collar criminal cases thus often appears to be philosophically at odds with their overall criminal

4. *See* Appendix, Table 1.

5. Evans v. United States, 504 U.S. 255 (1992), discussed *infra* at notes 213-21. The term "white collar crime" was originally coined by criminologist Edwin H. Sutherland in 1939 during his presidential address to the American Sociological Society in Philadelphia. Edwin Sutherland, *The White Collar Criminal*, 5 AM. SOC. REV. 1 (1940).

6. Evans v. United States, 504 U.S. 255, 289 (1992) (Thomas, J., dissenting).

7. Justice Thomas has consistently been labeled as one of the Court's most conservative members. *See* Christopher E. Smith, *The Impact of New Justices: The U.S. Supreme Court and Criminal Justice Policy*, 30 AKRON L. REV. 55, 60 (1996) ("Thomas immediately became a consistent member of the Court's most conservative voting bloc in his initial terms on the Court"). For a recent example of Justice Thomas' "liberal" approach in a case with a white collar defendant, see *United States v. Bajakajian*, 118 S. Ct. 2028 (1998), in which Justice Thomas' majority opinion—striking down a forfeiture as an excessive fine under the Eighth Amendment—was joined by Justices Stevens, Souter, Ginsburg, and Breyer. One commentator noted that Justice Thomas had never before joined this group in a five-to-four decision. Linda Greenhouse, "Justices Narrow the Uses of Forfeiture," N. Y. TIMES, June 23, 1998, at A14, Col. 1.

8. *See infra* Part III.A. For example, one commentator noted that, in five-to-four cases, Justice Marshall was consistently pro-defendant, *except* in white collar cases. Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 667, 693 (1993).

9. For an overview of the literature on coalition-building variables in Supreme Court cases, see *id.* at 693 n. 79.

justice philosophies, a conclusion I refer to as the "white collar paradox."[10] The common explanation for this paradox goes something like this: "Well, of course. The conservatives can relate to the white collar defendants, and are thus inclined to view the prosecution of such defendants with hostility. The liberals' instinct is just the opposite—to punish those who have abused their positions of wealth and prestige."[11] One prominent study of sentences imposed in white collar cases before the new federal sentencing guidelines in fact supports this conventional wisdom.[12] Apart from the sentencing context, however, no one seems to have studied carefully the apparent paradox that pervades the Court's white collar crime jurisprudence.[13]

The common or "traditional" view of the Court's white collar jurisprudence—that it is essentially class-based and result-driven—is a cynical one. It postulates that the members of the Court alter their views on criminal justice matters according to subjective reactions to the defendants' social status. From this perspective, legal analysis in white collar cases—which often involves complex issues of statutory interpretation[14]—simply cloaks decisions rooted in personal bias. These cases' discussions of legislative history, statutory language, and common law can be seen as fundamentally hypocritical efforts to justify decisions that are in reality rooted in the individual justices' visceral reactions to the cases' socio-economic contexts.[15]

This "traditional" perspective, if accurate, is disturbing. It bespeaks both deep-seated hypocrisy and intellectual shallowness on the Court. It is my view that the explanation is, not surprisingly, far more complex than the common wisdom would allow. First, when analyzing the types of issues white collar cases raise, we see that concerns over statutory construction and federalism may skew the justices' usual criminal case ideologies. Second, and more

10. "Paradox" is defined, *inter alia*, as "something (as a person, condition, or act) with seemingly contradictory qualities . . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY 830 (1977).

11. For an overview of authorities who subscribe to this view, see *infra* Section IV.A.

12. *See* WHEELER, MANN, AND SARAT, SITTING IN JUDGMENT: THE SENTENCING OF WHITE- COLLAR CRIMINALS 107, 161 (1988).

13. *See* Martin F. Murphy, *No Room at the Inn? Punishing White-Collar Criminal*, 40 JUN B.B.J. 4 (1996) (examining the sentencing practices of judges and "[t]he historic lenient treatment of white-collar criminals").

14. *See infra* at Part IV.

15. *See* Wheeler, *supra* note 12, at 160-61 ("There is the possibility that [judges] will treat white-collar offenders differently because they can empathize with their plight. Being able more easily to identify with them, they may be prone to leniency. . . . Part of the difficulty and the difference of sentencing white-collar offenders is that judges recognize that the life of the offender is not terribly different from that of the judge or people the judge knows.").

fundamentally, white collar criminal statutes often raise unique concerns over the nature of criminalization and punishment. It may be that the nature of white collar criminalization, and its current flaws, have more than any other factors contributed to the white collar paradox.

A comprehensive analysis of the Court's white collar crime jurisprudence is a daunting undertaking, but is also a necessary one given the pervasively cynical view of the American criminal justice system. This article takes a first step at understanding that jurisprudence. As an initial matter, even framing the question is problematic; defining "white collar crime," and determining the sets of white collar and non-white collar cases to compare, are preliminary and complex tasks. Once the parameters have been established, I examine some representative cases, pointing out the differences in philosophies and rhetoric in the two groups of cases. I conclude that the explanation for the apparent hypocrisy in the white collar cases is far more complex than most analysts have acknowledged. Finally, I offer a suggestion for an approach to white collar jurisprudence that addresses more directly than the Court's current approach the struggle to accommodate a category of crimes that does not neatly fit into generally held views of criminal "justice."

I. Defining the Inquiry

In comparing two universes of cases, the obvious preliminary tasks are both to delineate the distinction between them and to ensure its validity. As to the former, commentators over the last twenty years have complicated the issue by proposing that the traditional, status-based definition of white collar crime be replaced with myriad other definitions.[16] After reviewing the various proposed definitions, I suggest a pragmatic distinction between white collar and non-white collar crime based upon the types of cases lawyers and judges appear to treat as "white collar." Having drawn the sets of cases, I then examine two disparities that appear to exist. First, "substantive" criminal law issues are more common in the Court's white collar cases, while "procedural" issues predominate in the Court's non-white collar criminal cases. A look at the cases reveals, however, that the substance/procedure distinction is a somewhat artificial one, and that the two sets of cases (white collar and non-white collar) can be compared in their entireties. (Whether the *outcomes* in cases may be more driven by a substance/procedure

16. *See* DAVID WEISBURD, STANTON WHEELER, ELIN WARING, & NANCY BODE, CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 3-9 (1991), for a discussion of how the definition of "white collar crime" has evolved.

distinction than by a white collar/non-white collar distinction is an issue I address in Part IV.) Second, some cases commonly considered to be "white collar" crime cases in fact are cases brought by the government to obtain civil remedies.[17] Because the outcomes in these cases will directly or indirectly affect future criminal proceedings under the same or related statutory schemes, they are fairly included in the "white collar" sample.

A. Setting the Parameters of "White Collar Crime"

Coined by criminologist and sociologist Edwin Sutherland in 1939, the term "white collar crime" has been in use for 60 years.[18] It is only since the mid-1970s, however, that "white collar crime" has gained the focus of prosecutors, courts, and commentators.[19] Since that time, theorists and practitioners have come to employ the term in widely divergent ways.[20] For purposes of this paper, we must

17. *See, e.g.*, Dirks v. Securities and Exchange Commission, 463 U.S. 646 (1983). Commentators have noted that white collar "crime" often blurs the distinction between civil and criminal liability. *See, e.g.*, Pamela H. Bucy, *Criminal Tax Fraud: The Downfall of Murderers, Madams and Thieves*, 29 ARIZ. ST. L.J. 639 (1997); Pamela H. Bucy, *The Poor Fit of Traditional Evidence Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 FORDHAM L. REV. 383 (1994); John C. Coffee, *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 220 (1991).

18. Sutherland used the term during a 1939 address, entitled "The White-Collar Criminal," presented to a joint meeting of the American Sociological Society and the American Economic Association. *See* Sutherland, *supra* note 5.

19. *See* Norman Abrams, *Assessing the Federal Government's "War" on White-Collar Crime*, 53 TEMP. L. Q. 984, 984 (1980) (noting the new "war" on white collar crime); William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787 (1988) ("In the mid-1970s federal prosecutors became increasingly interested in white collar offenses..."); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will The Courts Allow Prosecutors to Go?*, 54 U. PITT. L. REV. 405, 408 (1993) ("Beginning in the mid-1970s... the federal government began targeting white collar crime as a high-priority prosecutorial area."); Ellen S. Podgor, *Corporate And White Collar Crime: Simplifying The Ambiguous*, 31 AM. CRIM. L. REV. 391, 392 (1994) (it is "evident that the federal government has made white collar crime a priority...").

20. *Compare, e.g.*, EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983) (white collar crime is that "committed by a person of respectability and high social status in the course of his occupation"), *with* Podgor, *supra* note 19, at 393-94 (a definition of white collar crime should "look[ ] to the activity involved and classif[y] that activity based upon its attributes as opposed to the socio-economic status of the individuals who engage in the act"), *and* BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (1981) (focusing on both criminal means and socio- economic status of the defendant). *See generally,* David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, LAW AND SOCIAL INQUIRY 63-66 (1993); Stanton Wheeler, *White Collar Crime: History of an Idea,* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1652-56 (S. Kadish ed. 1983); JEROLD H. ISRAEL, ELLEN D. PODGOR, & PAUL D. BORMAN, WHITE COLLAR CRIME: LAW AND PRACTICE 1-12 (1996).

distinguish white collar crime from all other types of crime for the simple purpose of evaluating the Supreme Court's white collar cases.[21]

(1) *Social/Professional Status*

The impetus for Sutherland's study of white collar crime was his thesis that, contrary to popular belief, crime is neither primarily caused by social determinants nor primarily perpetrated by those of low socio-economic status.[22] In his oft-quoted description, Sutherland wrote that "[w]hite collar crime may be defined approximately as a crime committed by a person of respectability and high social status in the course of his occupation."[23] In his studies, Sutherland focused on crimes committed by organizations acting through individuals of relatively high socio-economic status.[24] We can therefore modify Sutherland's original definition of white collar crime to include both individuals and *organizations* of respectability. Although Sutherland did not establish clear criteria for distinguishing "high-status" offenders from other offenders, his focus was on crime committed by managers and other professionals employed by legitimate businesses.[25]

In seeking to explore the determinants of crime, Sutherland and those who have followed in his steps have used "white collar crime" as a means to question the theory that the origins of crime are status- or class-based.[26] As a practical description for the study of white collar crime, however, the Sutherland definition is not particularly helpful. It is difficult to draw a principled distinction, for example,

21. White collar criminal offenses are of course defined by both state and federal law. Because this article focuses on United States Supreme Court cases, and most of those involve federal statutes, it is upon those statutes that I focus. *See* Part III *infra*.

22. *See* Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOC. REV. 1 (1940).

23. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION 7 (1983). Following his 1939 address, Sutherland undertook a book-length study of white collar crime, which was published in 1949. *See* Harvey W. Kushner, *Book Review: White Collar Crime: The Uncut Version, by Edwin H. Sutherland*, 75 J. CRIM. L. & CRIMINOLOGY 509 (1984) (book review). At the behest of his employer and publisher, Sutherland in the original version of WHITE COLLAR CRIME edited out the names and descriptions of persons, corporations, and industries engaged in criminal activities. *Id.* at 509-10. The unedited version of the book was published in 1983.

24. *See* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UNCUT VERSION (1983).

25. Distinguishing "respectable" from "non-respectable" organizations is not always an easy task. In general, the latter would include corporations and other organizations with institutionalized ties to crime, in particular to organized crime.

26. *See* Kushner, *Book Review*, *supra* note 23, at 510; James William Coleman, *The Theory of White-Collar Crime: From Sutherland to the 1990s*, WHITE-COLLAR CRIME RECONSIDERED 53 (Kip Schlegel & David Weisburd, eds. 1992).

between tax fraud committed by a corporation or one of its executives and tax fraud committed by a person not of high socio-economic status (however such status is defined).[27] Even if the conventional wisdom relating to the Supreme Court's approach to white collar cases is correct, presumably the Court would not establish one set of rules for tax fraud committed by the rich and another set of rules for everyone else (though of course it might apply the rules differently depending on socio-economic status).

Nor does a status-based definition accurately delineate the group of Supreme Court cases generally perceived to be "white collar" cases. For example, some consider securities fraud committed by means of insider trading[28] to be the classic white collar crime.[29] Yet, the Court first addressed the subject in a case where the defendant was not a corporate manager but a "markup man" for a printing company.[30] Or consider one of the Court's leading mail fraud cases, where the defendant was a used-car distributor.[31] In fact, many "white collar" defendants, particularly in cases involving crimes such as bank embezzlement and government benefits fraud, do not look much different from defendants in many non-white collar cases.[32] Sutherland's sociologically-oriented definition thus fails to provide a workable framework for a substantive legal discussion of the *types* of crimes that lawyers, attorneys and academics speak of as "white collar offenses."

(2) Nature of the Conduct

Prosecutorial agencies and some scholars have defined "white collar crime" not in terms of the offender's socio-economic status but in terms of the nature of the offense charged. For example, in 1981 the United States Department of Justice employed the following definition:

> White-collar crime: Definition. Nonviolent crime for financial gain

27. *See generally,* Stanton Wheeler, David Weisburd, Elin Waring, & Nancy Bode, *White Collar Crimes and Criminals*, 25 AM. CRIM. L. REV. 331, 345-47 (1988) (examining the diversity among white collar defendants); SUSAN SHAPIRO, THINKING ABOUT WHITE-COLLAR CRIME: MATTERS OF CONCEPTUALIZATION AND RESEARCH 3 (1980).

28. *See infra* Part I.B.

29. *See, e.g.,* Weisburd, *supra* note 16, at 9.

30. *See* United States v. Chiarella, 588 F.2d 1358, 1363 (2d Cir. 1978), *rev'd* 455 U.S. 222 (1980).

31. *See* Schmuck v. United States, 489 U.S. 705, 707 (1989).

32. *See, e.g.,* United States v. Liparota, 471 U.S. 419 (1985) (food stamp fraud). *Compare* Weisburd, *supra* note 29, at 3 (many white collar defendants are middle class), *with* John Braithwaite, *Crime and the Average American*, 27 LAW & SOC'Y REV. 215, 216-24 (1993) (interpreting Weisburd's data to show that "white collar" defendants are much like non-white collar defendants).

> committed by means of deception by persons whose occupational status is entrepreneurial, professional or semi-professional and utilizing their special occupational skills and opportunities; also, nonviolent crime for financial gain utilizing deception and committed by anyone having special technical and professional knowledge of business and government, irrespective of the person's occupation.[33]

By focusing on the use of "deception," both prongs of this definition shift the emphasis from the defendant's socio-economic status to the criminal means. Aspects of Sutherland's definition remain, however, in the requirement that the defendants be at least "semi-professional" or have "special technical and professional knowledge." Again, this definition seems too limited. Many offenses traditionally considered to be white collar crimes,[34] including mail and wire fraud,[35] tax fraud, and bribery and extortion, can be and are committed without either professional/semi-professional status or special expertise or knowledge.

Others have attempted to define "white collar crime" solely as crime based upon deceptive practices.[36] For example, the United States Chamber of Commerce has described white collar crime as "illegal acts characterized by guile, deceit, and concealment—and are not dependent upon the application of physical force or violence or threats thereof."[37] But this definition also seems too narrow, for some quintessential white collar crimes do not necessarily involve deception.[38]

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33. BUREAU OF JUSTICE STATISTICS, UNITED STATES DEPARTMENT OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 215 (2d ed. 1981). *See also* J. Braithwaite, *White Collar Crime*, 11 ANN. REV. SOC. 1 (1985); M. I. Dixon, *The Re-defining of White Collar Crime*, 13 DICK. J. INT'L L. 561 (1995).

34. *See, e.g.*, KATHLEEN F. BRICKEY, CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS (2d ed. 1990); PAMELA H. BUCY, WHITE COLLAR CRIME: CASES AND MATERIALS (1992).

35. *See* Dixon, *The Re-Defining of White Collar Crime, supra* note 33.

36. *See, e.g.*, HERBERT EDELHERTZ, THE NATURE, IMPACT AND PROSECUTION OF WHITE- COLLAR CRIME (1970); Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous, supra* note 19, at 401 n.18 (quoting BUREAU OF JUSTICE STATISTICS, THE DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 121 (2d ed. 1981)) ("White collar crime has been defined as 'nonviolent crime for financial gain *committed by means of deception* . . . .'") (emphasis added).

37. CHAMBER OF COMMERCE OF THE UNITED STATES, WHITE COLLAR CRIME 3 (1974).

38. For example, offenses involving official corruption, such as bribery and extortion, do not necessarily require deception, except in the broadest sense that the violation of the public trust is not revealed. But concealment of criminal purpose cannot, as a matter of logic, be sufficient "deception" to help meaningfully limit the category of crimes we consider "white collar." Nor do antitrust criminal violations, considered to be among the classic "white collar crime," *see* Weisburd, *Crimes of the Middle Class, supra* note 29, at 9,

(3) Practical Considerations

As an initial matter, once professional or social status is excised from the definition, the term "white collar crime" is a misnomer. Apart from sociological considerations that do not provide a helpful basis for distinguishing cases for jurisprudential purposes, there appears to be no principled way to distinguish among mail and wire fraud and tax evasion schemes, for example, committed by those of highly divergent social, economic, and professional positions.[39] Nonetheless, I will use this term both because it is so widely accepted and because it evokes in common perceptions a type of crime different from the "street crime" that captures so much of the public's attention.

Perhaps the most useful definition of "white collar crime" can be derived from the real-world distinctions drawn by prosecutors and defense counsel practicing in the field. In this context a prosecutor or defense attorney could well best define "white collar crime" in terms of what it is not. A white collar offense is one that does not necessarily involve the use or threat of physical force, either against the victim or the victim's property.[40] Nor does "white collar crime" encompass offenses directly related to the possession, sale, or distribution of controlled substances.[41] The term "white collar crime"

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necessarily involve deception.

39. *See generally*, Wheeler, *White Collar Crimes and Criminals, supra* note 27, at 337-50.

40. The American Bar Association has adopted a somewhat similar definition for what it terms "economic offenses." *See* Gilbert Geis, *White-Collar Crime—What Is It?*, WHITE-COLLAR CRIME RECONSIDERED 31, 39 (Kip Schlegel & David Weisburd, eds. 1992). The ABA excludes from this definition crimes related to product manufacture and workplace death and injury by noting that "economic offenses" are "nonviolent" in the sense "the means by which crime is committed" is nonviolent, though the "harm to society can frequently be described as violent." Because these crimes are often excluded from the "white collar" category, *see, e.g.*, Weisburd, *supra* note 29, at 17, I likewise exclude those crimes from this study.

Note that, under this definition, whether a crime is white collar may turn not on the statutory definition but on the means used. For example, under the Hobbs Act, 18 U.S.C. §1951, crimes of extortion may sometimes be "white collar" (when "under color of official right" or by use by threat of economic harm), *see* U.S. SENTENCING GUIDELINES MANUAL § 2B3.2 (1997), and sometimes not (when committed by use or threat of physical force), *see* U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (1997). *See* James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1695 (1993) (explaining the types of extortion). For an example of a broad use of white collar extortion as a prosecution theory, see *United States v. Garcia*, 907 F.2d 380 (2d Cir. 1990).

41. Although many such offenses do not involve the use of force, they are excluded here both because of the common perception that the "drug culture" often has a violent context, and because criminal investigations and prosecutions of these offenses are typically handled by specialized agencies, e.g., the Drug Enforcement Agency, and units of

also excludes crime directly related to organized crime activities.[42] Finally, "white collar crime" excludes laws relating to certain policy-driven areas such as immigration, civil rights, and national security, and excludes common theft crimes.[43]

This definition of white collar crime is a broad one, encompassing offenses from simple fraud using the mail and wires[44] to local political corruption cases[45] and sophisticated securities and tax cases.[46] The definition dilutes the pure socio-economic focus of "white collar crime," but comports both with the legal practice world's and the general public's views of the distinction between white collar and non-white collar crime. This definition also allows a broad look at the Supreme Court's white collar cases, many of which do not involve defendants who would meet Sutherland's criteria.[47]

In this context, distinguishing white collar defendants from other defendants may not require comparing cases of elite vs. non-elite defendants. Rather, the sets of cases may be distinguished as primarily involving perpetrators of violent crime and drug-related crime vs. others.[48] If an examination of the Court's white collar cases

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the Department of Justice. *See* Alex Y. Seita, *The Role of Market Forces in Transnational Violence*, 60 ALB. L. REV. 635, 647 (1997) ("[M]uch of the violence associated with illegal drugs stems from buyers who commit crimes to finance their drug purchases and from drug dealers who use violence to protect and carry out their drug sales . . . ."); Harmelin v. Michigan, 501 U.S. 957, 960 (1991) ("Studies demonstrate the grave threat that illegal drugs, and particularly cocaine, pose to society in terms of violence, crime, and social displacement . . . ."); Michigan v. Summers, 452 U.S. 692, 702 (1981) ("[T]he execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence . . . ."). To say that "white collar crime" never relates to offenses involving controlled substances, however, would overstate the matter. For example, in areas such as money laundering (18 U.S.C.A. § 1956) (1989) and tax fraud (26 U.S.C. § 7201) (1977), a "white collar" offense might be directly related to the proceeds of narcotics trafficking.

42. Again, this is not a pristine distinction, for organized crime can be non-violent and, on the surface, conducted by "legitimate" businesses. As with controlled substance offenses, however, organized crime often has a violent context, and is investigated and prosecuted by specialized law enforcement. *See* DAVID O. FRIEDRICHS, TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY 188-90 (1996).

43. *See* Wheeler, *White Collar Crimes and Criminals*, *supra* note 27, at 332, n.5; Henry Solomon, *The Economist's Perspective of Economic Crime*, 14 AM. CRIM. L. REV. 641, 641 (1977).

44. For example, one of the most important cases interpreting the federal mail and wire fraud statutes (18 U.S.C.A. §§ 1341 and 1343) is *Schmuck v. United States*, 489 U.S. 705 (1989), which involved a scheme to defraud used car buyers by odometer tampering.

45. *See, e.g.*, Evans v. United States, 504 U.S. 255 (1992) (extortion).

46. *See* Carpenter v. United States, 484 U.S. 19 (1987) (insider trading); Cheek v. United States, 498 U.S. 192 (1991) (tax fraud).

47. *See* Braithwaite, *Crime and the Average American*, *supra* note 32, at 219-21; HAZEL CROALL, WHITE COLLAR CRIME 48-50 (1992).

48. That is not to say that the two categories will be the same in demographic terms.

supports this empirical observation, then the inquiry will be whether the results in these cases are driven by a class bias different from that identified by Sutherland, or whether some other variables determine the outcomes. If the latter is true, the task will be to identify the variables that produce the appearance of class bias but are in fact more difficult to describe.

B. Issues of Categorization

(1) The Problem of Overlap

By defining "white collar crime" by type of criminal activity—or, more accurately, by excluding types of criminal activities from the term "white collar"—the focus shifts from the characteristics of the defendant to the characteristics of the crime. Often, this distinction works relatively easily; securities fraud and tax fraud, for example, are "paper" crimes that are "white collar" by nature.

Some offenses, however, can be either white collar or non-white collar and some issues in white collar cases do not observe these neat categories. For example, some of the most important Supreme Court cases interpreting federal conspiracy statutes have arisen in the white collar crime context,[49] and a conspiracy count is typically included in a white collar indictment.[50] Governing legal principles in these cases, however, also apply to any federal conspiracy case, white collar or not. The substantive crime of extortion likewise involves some offenses that may be "white collar" offenses and others that may not be.[51] Also, the "cover-up" offenses of perjury,[52] false declarations,[53]

Studies have shown that white collar defendants are more likely to be white and male, better educated, and older than other defendants. "Compared to their representation in the defendant population (41.5%), Whites were over represented in numerous offense categories. They constituted between 47 and 76 percent of white collar offenses." UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 37 (1994). *See* Weisburd, *supra* note 12, at 50-51. Conversely, however, a great many white collar defendants *do* look much like the defendants in non-white collar cases, and the group of white collar defendants as a whole tends to be much more diverse than the common perception would allow. *See* Braithwaite, *supra* note 15, at 219-21.

49. *See, e.g.*, Pinkerton v. United States, 328 U.S. 640 (1946) (general principles of vicarious liability) (tax fraud); Kotteakos v. United States, 328 U.S. 750 (1946) (general principles of single and multiple conspiracies) (financial fraud against the United States).

50. *See* Mark Pomerantz & Otto G. Obermaier, *Defending Charges of Conspiracy, in* WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES, § 4.01, at 4-3 (Otto G. Obermaier & Robert G. Morvillo, eds., 1998) ("[a]lmost without exception, an indictment charging a 'white collar' or economic regulatory offense will contain a conspiracy count"). In an off-cited passage in *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925), Judge Learned Hand described conspiracy as "that darling of the modern prosecutor's nursery."

51. *See supra* note 40.

52. 18 U.S.C. § 1621 (1994).

and obstruction of justice[54] fall with the definition of "white collar" offenses used here, and often arise in white collar cases.[55] When such charges arise in cases of violent crime, they lose their "white collar" association. Finally, the broad-ranging criminal provisions of the RICO[56] and money laundering statutes[57] are most often used outside the white collar context, but of course can apply in the white collar context.[58] Again, though, governing legal principles will apply in the white collar and non-white collar contexts.

With substantive federal statutes that criminalize white collar and non-white collar crime, the Court is establishing rules that, on their face, apply across-the-board. In assessing voting patterns in white collar and non-white collar cases, the task is to remain aware that some issues will apply to both sets of cases, and to take this overlap into account in the final evaluation.

(2) "Substance" vs. "Procedure"

The substantial majority of the criminal cases the Supreme Court decides turn on "procedural" issues that arise in the prosecution of drug crimes and violent crimes.[59] Only a small percentage of the Court's criminal cases involves white collar defendants. Conversely, partly because white collar crimes are typically investigated by grand juries rather than by police, most of the Supreme Court's white collar cases deal with "substantive" issues, such as statutory interpretation, rather than procedural issues.[60] But there are many nominally "procedural" issues, relating primarily to grand jury and self-incrimination matters, that arise in the white collar context. In comparing sets of cases, then, the most useful approach is to employ

53. 18 U.S.C. § 1623 (1994).

54. 18 U.S.C. § 1501 (1994).

55. *See generally*, Brickey, *supra* note 34, at 279-362.

56. 18 U.S.C. § 1961 (Supp. 1996); 18 U.S.C. §§ 1962-1963 (1994); 18 U.S.C. § 1964 (Supp. 1996); 18 U.S.C. §§ 1965-1968 (1994).

57. 18 U.S.C. § 1956 (Supp. 1996); 18 U.S.C. § 1957 (1994).

58. *See, e.g.*, United States v. Regan, 937 F.2d 823 (2d Cir. 1991) (RICO).

59. For example, in 1974 the Court heard eighteen federal criminal cases. Fourteen of those cases involved procedural issues, including double jeopardy, right to jury trial, searches and seizures, and stop and arrests. *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 280 (1975). The 1987 Term included twelve federal criminal cases; nine of which were procedural in nature. *The Supreme Court, 1987 Term*, 102 HARV. L. REV. 4, 357 (1988). In 1995, the Court's review of state criminal cases all involved procedural issues such as due process and searches and seizures. *The Supreme Court, 1995 Term*, 110 HARV. L. REV. 4, 376 (1996).

60. *See* note 97 *infra* and accompanying text. For an example of the rare criminal procedure case arising in the white collar context, see *Andresen v. Maryland*, 427 U.S. 463 (1976) (defendant was charged with the crime of false pretenses and his offices were searched pursuant to warrant).

the white collar/non-white collar categories, while recognizing that the substance vs. procedure distinction both muddies the categories' boundaries and cuts across the categories.

For purposes of comparing white collar and non-white collar cases, then, the question arises as to whether such a comparison is valid. If most non-white collar cases involve procedural issues, and most white collar cases involve interpretation of substantive federal criminal statutes, then perhaps any disparity in outcomes or voting patterns rests not on the "white collar" distinction but on the procedure vs. substance distinction. We might quickly conclude, for example, that the white collar paradox turns primarily on Chief Justice Rehnquist's oft-noted view, articulated in a memorandum he wrote as a clerk to Justice Jackson, that "defendants who are as 'guilty as sin' should not go free simply because of a 'technical' mistake by prosecutors or police."[61] As discussed more fully in Part IV, conservative members of the Court might thus be more inclined to affirm convictions when the issue is a procedural one rather than a substantive one.[62]

I believe, though, that comparison is useful based on the white collar/non-white collar distinction even if the non-white collar sample may be skewed towards procedural cases.[63] First, relative to the number of state criminal prosecutions, the number of federal criminal prosecutions is quite small.[64] The state cases that proceed to the United States Supreme Court of course will generally turn on federal constitutional criminal procedural issues, and will relatively rarely involve interpretations of substantive state criminal statutes.[65] As a practical matter, the universe of criminal cases decided by the

61. David G. Savage, *Rehnquist Wins Confession Battle*, L.A. TIMES, March 30, 1991, at A2. *See* Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 170-71 (1991) ("[t]he Fulminante Court correctly perceived a great deal of public intolerance for the justice system, stemming in large part from the view that too many guilty people escape justice because of technicalities); Harvard Law Review Association, *Probable Cause—Judicial Determination of Probable Cause:* County of Riverside v. Mclaughlin, 105 Harv. L. Rev. 187, 196 (1991) ("the primary impetus behind the Rehnquist Court's counter-revolution [is] that guilty criminals should not go free because of Fourth Amendment technicalities").

62. Whether the nature of the legal issue—rather than the variations between the white collar and non-white collar contexts—can explain the white collar paradox is discussed more fully *infra* p. IV.

63. *See* Appendix, Table 1.

64. One 1997 study estimated federal prosecutions at 35,000 per year, well less than five percent of all prosecutions nationally. *See* Harry Litman & Mark D. Greenberg, *Federal Power and Federalism: A Theory of Commerce-Clause Based Regulation of Traditionally State Crimes*, 47 CASE W. RES. L. REV. 921, 970 (1997).

65. The exception would be a federal constitutional challenge to such a statute. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37 (1996).

Supreme Court is all there is to work with. Second, the procedural/substantive distinction implicit in Chief Justice Rehnquist's criticism is often more apparent than real. In a number of areas, including issues relating to corporate and individual liability,[66] the Fifth Amendment,[67] and grand juries,[68] it is impossible to distinguish clearly between "substance" and "procedure."[69]

(3) "Civil" vs. "Criminal"

The final categorization issue is whether "civil" cases—those that do not involve a substantive criminal charge—are properly included within the comparison. I do include them, for the obvious reason that the Court's rulings in civil cases arising under such statutes as the securities laws[70] govern criminal cases in those areas as well. I also include quasi-procedural civil cases where the issues in those cases—involving the self-incrimination clause[71] and grand juries[72]—affect rights of parties to criminal proceedings. Once again, the white collar vs. non-white collar distinction is less than pristine.

The next inquiry is whether the justices' apparent shifts in philosophies between white collar and non-white collar cases rests upon an inherent difference between the two sets of cases, or is tied to some other variable, such as "substance" vs. "procedure" or "civil" vs. "criminal." Even if the latter appears to be the case, the task is to determine which characteristics seem to determine the outcomes, and why.

66. *See* United States v. Dotterweich, 320 U.S. 277 (1943) (established the test for corporate responsibility under strict liability statutes).

67. *See* Braswell v. United States, 487 U.S. 99 (1988) (a corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating).

68. *See* United States v. R. Enterprises, Inc., 498 U.S. 292 (1991) (the Court decided what standards to apply when a party seeks to avoid compliance with a subpoena duces tecum issued in connection with a grand jury investigation); United States v. Williams, 504 U.S. 36 (1992) (district court may not dismiss an otherwise valid indictment because the prosecutor failed to disclose to the grand jury "substantial exculpatory evidence").

69. For discussions of various aspects of the substance/procedure distinction, see Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123 (1996); Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269 (1998); Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995).

70. *See, e.g.*, Dirks v. Securities and Exchange Commission, 463 U.S. 646 (1983); and United States v. James Daniel Good Real Property, 510 U.S. 43 (1993).

71. *See, e.g.*, Braswell v. United States, 487 U.S. 99 (1988).

72. *See, e.g.*, United States v. Williams, 504 U.S. 36 (1992).

II. Criminal Justice Philosophies in Non-White Collar Cases

To fulfill this article's purposes, I have focused the white collar/non-white collar case comparison primarily on the years from 1971 to 1994. I have done this for two reasons. First, as discussed above, it was in the 1970s that the government began its "war" on white collar crime,[73] and that white collar criminal issues began to come before the Court regularly. Second, it was during this period that the Court's criminal law ideological division was particularly pronounced; current-Chief Justice Rehnquist ascended to the Court as an associate justice in 1971,[74] and Justice Blackmun retired in 1994.[75] After the retirements of Justices Brennan and Marshall in 1990 and 1991, this ideological division was not as distinct as it was for most of the 1970s and 1980s. Nevertheless, certain divisions have existed on the Court throughout the time of the Burger and Rehnquist Courts. Finally, I do review several important recent white collar and non-white collar cases, with a view to assessing the current Court's likely voting patterns in these cases.

A. Voting Patterns

In non-white collar cases, the common views of the individual justices' philosophies—"conservative" (pro-government),[76] "liberal"

73. *See supra* Part I.A. & note 19.

74. After William Rehnquist served for fifteen years as an Associate Justice, President Ronald Reagan on June 17, 1986 nominated him to be Chief Justice of the United States Supreme Court. The Senate confirmed the appointment on September 17, 1986.

75. Justice White retired in 1993, and was replaced by Justice Ginsburg; Justice Blackmun retired in 1994, and was replaced by Justice Breyer. For an overview of Justice Blackmun's move to the left in criminal cases in the last years of his tenure, see Wasby, *supra* note 2.

76. In criminal cases from 1986 to 1995, Chief Justice Rehnquist voted for the government in 80.7% of the cases, Justice Thomas voted for the government 77% of the time, and Justice Scalia sided with the government in criminal cases 70.8% of the time. These percentages are compiled from a yearly article entitled *Supreme Court Voting Behavior. See* Robert E. Riggs, *Supreme Court Voting Behavior: 1986 Term*, 2 BYU J. PUB. L. 15 (1988); Robert E. Riggs, *Supreme Court Voting Behavior: 1987 Term*, 3 BYU J. PUB. L. 59 (1989); Robert E. Riggs & Mark T. Urban, *Supreme Court Voting Behavior: 1988 Term*, 4 BYU J. PUB. L. 1 (1990); Robert E. Riggs & Mark T. Urban, *Supreme Court Voting Behavior: 1989 Term*, 5 BYU J. PUB. L. 1 (1991); Robert E. Riggs & Guy L. Black, *Supreme Court Voting Behavior: 1990 Term*, 6 BYU J. PUB. L. 1 (1992); Richard G. Wilkins, James L. Kimball III & Troy R. Braegger, *Supreme Court Voting Behavior: 1991 Term*, 7 BYU J. PUB. L. 1 (1993); Richard G. Wilkins, Troy R. Braegger & James L. Kimball III, *Supreme Court Voting Behavior: 1992 Term*, 8 BYU J. PUB. L 229 (1994); Richard G. Wilkins, James L. Kimball III & Scott M. Petersen, *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L. Q. 269 (1995); Richard G. Wilkins, Scott M. Petersen, Matthew K. Richards & Ronald J. Tocchini, *Supreme Court Voting Behavior: 1994 Term*, 23 HASTINGS CONST. L. Q. 1 (1995); Richard G. Wilkins, Matthew K. Richards & Scott Worthington, *Supreme Court Voting Behavior: 1995 Term*, 24 HASTINGS

pro-defense)[77]—are consistently borne out by the statistics from last 25 years. To understand why the voting patterns have taken shape as they have, we must carefully examine the philosophies and rhetoric of a sampling of key non-white collar cases during this time.[78] The table below examines the justices' voting patterns in fifty-five major cases from 1972 to 1996, ranked from most to least pro-defendant:

CONST. L. Q. 1 (1996).

77. Justice Brennan voted for the government in criminal cases only 12.4% of the time. Marshall voted for the government in only 11.5% of the cases. Stevens was pro-government in criminal cases 30.5% of the time. Blackmun was pro-government in 34.5% of criminal cases before the Court. *Id.*

78. Whether imagery and rhetoric are the product of ideology or whether the reverse is true, and whether this is the right question to ask in the first instance, are fascinating theoretical questions. *See* Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1214-27 (1995). These debates, however, are beyond the scope of this paper. The questions here are why the justices say such different things, and decide issues in such different ways, in the white collar vs. non-white collar cases.

Voting patterns in non-white collar criminal cases[79]

	Majority or Concurring		Dissenting					
Name	For Gov	For Def	For Gov	For Def	Total Cases	% pro Gov	% pro Def	% in maj
Marshall	4	12	0	42	58	6.90%	93.10%	27.59%
Brennan	6	10	0	36	52	11.54%	88.46%	30.77%
Stevens	19	14	0	26	59	32.20%	67.80%	55.93%
Blackmun	36	9	3	9	57	68.42%	31.58%	78.95%
O'Connor	33	9	4	3	49	75.51%	24.49%	85.71%
White	40	9	4	5	58	75.86%	24.14%	84.48%
Powell	30	7	3	2	42	78.57%	21.43%	88.10%
Burger	25	6	3	1	35	80.00%	20.00%	88.57%
Rehnquist	45	4	11	1	61	91.80%	8.20%	80.33%
Scalia	22	2	5	0	29	93.10%	6.90%	82.76%

At the ideological extremes, the justices' voting patterns in these cases are startlingly consistent. Justices Marshall and Brennan consistently—and, generally, in losing causes—voted for the defendants in these cases; Justice Stevens also usually did so, but less consistently. At the other extreme, Justices Rehnquist and Scalia were the most consistent in their support of the government's position, following in reverse order by the justices listed above them in the table. The next sections examine a sampling of the cases used to compile this table.

B. Non-White Collar Cases

(1) Fourth, Fifth, and Sixth Amendment Issues

My sample of non-white collar criminal procedure cases, primarily relating to pre-trial investigation, was easily drawn; I simply took the major Fourth, Fifth, and Sixth Amendment cases from some widely-used casebooks on federal constitutional criminal procedure.[80]

79. *See* Appendix, Table 1. I have excluded some justices—Stewart, Kennedy, Souter, Thomas, Ginsburg, and Breyer—where the samples were too small to compare them with the other justices' voting.

80. *See* WELSH S. WHITE & JAMES J. TOMKOVICZ, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF (2d ed. 1994); RONALD J. ALLEN, RICHARD B. KUHNS, & WILLIAM J. STUNTZ, CONSTITUTIONAL

Examination of a few key cases illustrates how the justices' philosophies were articulated in this context.

Few issues have so sharply divided the Court in this area as the substance and scope of the exclusionary rule, which potentially bars the introduction at trial of illegally-obtained evidence. The Court's 1984 decision in *United States v. Leon*[81] is a milestone in that debate. That case established the long-anticipated[82]—or long-dreaded, depending on your point of view[83] — "good faith" exception to the exclusionary rule, under which the products of a search based upon a warrant that is invalid for lack of probable cause will not be excluded from trial if the officers conducting the search or seizure acted in good faith.[84]

The practical implications of *Leon* for criminal defendants are, of course, enormous, and comport with Chief Justice Rehnquist's view that the "guilty" criminal should not go free based on mere technicalities.[85] That this policy, which extols truth-finding over

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CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS (3d ed. 1995). For a discussion of the Court's general pro-government orientation in criminal procedure cases, see Christopher Slobogin, *Having it Both Ways: Proof that the U.S. Supreme Court is "Unfairly" Prosecution-Oriented*, 48 FLA. L. REV. 743 (1996).

81. 468 U.S. 897 (1984).

82. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 250 (1983) (White, J., concurring) ("[a]s a jurisdictional requirement, I have no doubt that the exclusionary rule question is before us .... As a prudential matter, I am unmoved by the Court's lengthy discourse as to why it must avoid the question....")

83. *See Leon*, 468 U.S. at 929 (Brennan, J., dissenting) ("[i]t now appears that the Court's victory over the Fourth Amendment is complete").

84. *See Leon*, 468 U.S. at 922. The *Leon* decision brought to fruition the Court's efforts to deconstitutionalize the exclusionary rule that had begun with the 1974 decision in *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"). Prior to that time, the Court had held that the exclusionary rule—forbidding the introduction at trial of evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures—was compelled by the Fourth Amendment itself. *See* Weeks v. United States, 232 U.S. 383 (1914) (the Court first adopted the exclusionary rule, holding that evidence obtained by federal law enforcement officers in violation of Fourth Amendment can not be used in a federal criminal trial against the victim of the official misconduct); Mapp v. Ohio, 367 U.S. 643 (1961) (applied the *Weeks* exclusionary rule to the states on the basis that the rule is mandated by the text of the Fourth Amendment). The *Leon* holding confirmed the new view that the exclusionary rule is merely a judicially-created rule designed to deter future police misconduct, not a constitutionally-based rule designed to redress a constitutional violation. *See* 468 U.S. at 905 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

85. *See* Jenelle London Joset, *May It Please the Constitution: Judicial Activism and Its Effect on Criminal Procedure*, 79 MARQ. L. REV. 1021, 1024 (1996) ("The judicially active Court did not want a seemingly guilty man to go free because of a law enforcement officer's mistake. Therefore, the Court created a good-faith exception to the exclusionary

"technical" rights, drove the *Leon* decision is apparent on its face:

> The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern.... An objectionable collateral consequence of this interference with the criminal justice system's *truth-finding function* is that *some guilty defendants may go free* or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, *the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.*[86]

Justice Brennan's dissent was not gentle in setting forth its view that the *Leon* majority had undermined a basic constitutional principle:

> [I]n case after case, I have witnessed the Court's gradual but determined strangulation of the [exclusionary] rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decision represents the *piece de resistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case-in-chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed.[87]

Justice Marshall joined in Justice Brennan's dissent. In a separate dissent, Justice Stevens took a different tack, hitting the majority for ignoring original intent and suffering from "*constitutional amnesia.*"[88] The *Leon* opinions thus are cloaked in the usual Rehnquist-Court Fourth Amendment debate language; the majority decries the social cost of letting the guilty go free, while the dissents predict that Fourth Amendment rights will be eviscerated because of the majorities' policy-driven, result-oriented analyses.[89]

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rule."); Ogletree, *supra* note 61, at 171; and Harvard Law Review Association, *supra* note 59 at 196. For judicial examples of this philosophy, see *Oregon v. Elstad*, 470 U.S. 298, 311 & 318 (1985) ("This Court has never held that the psychological impact of voluntary disclosure of a *guilty* secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver...") (emphasis added); and *Murray v. United States*, 487 U.S. 533 (1988) (holding that evidence discovered during an unlawful search and subsequently obtained during a valid search is admissible if the valid search was independent of the unlawful search).

86. 468 U.S. at 907-08 (emphasis added).

87. *See Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting).

88. *See Leon*, 468 U.S. at 972 (Stevens, J., dissenting) (emphasis added).

89. That *Leon* is a controversial decision is proven nowhere more forcefully than in those states that have rejected its holding, and continue to apply the exclusionary rule under their respective state constitutions even where the police have acted upon a warrant

Other Fourth Amendment decisions cut more directly to the chase. In these cases, the dissents chastise the majority decisions for ignoring the possibility of race- and class-based abuse by law enforcement, while the majority decisions proclaim the need for greater flexibility for law enforcement, particularly in the "war on drugs." In *Florida v. Bostick*,[90] for example, the six- justice majority opinion authored by Justice O'Connor concluded that the defendant was not necessarily "seized" when drug-patrol officers approached him on a bus and asked to search his luggage.[91] Justice Marshall, joined by Justices Brennan and Stevens in dissent, responded by accusing the majority of sacrificing individual rights to the "war on drugs."[92] Justice Marshall also directly injected race into the case:

> [T]he police who conduct these sweeps decline to offer a reasonable, articulable suspicion of criminal wrongdoing sufficient to justify a warrantless 'stop' or 'seizure' of the confronted passenger. It does not follow, however, that the approach of passengers during a sweep is completely random. Indeed, at least one officer who routinely confronts interstate travelers candidly admitted that *race* is a factor influencing his decision whom to approach. Thus, the basis of the decision to single out particular passengers during a suspicionless sweep is less likely to be *inarticulable* than *unspeakable*.[93]

The other examples of this deep ideological division on the Court are too numerous to summarize here. The split between the Rehnquist/majority view and that of the Marshall/Brennan (and sometimes) Stevens dissents occurs in areas including searches and seizures, *Miranda* rights,[94] Sixth Amendment right-of-confrontation,[95]

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in good faith. *See, e.g.*, State of Minnesota v. Kahn, 555 N.W.2d 15, 21 (Minn. Ct. App. 1996); State of New Mexico v. Gurrola, 908 P.2d 264, 267 (N.M. Ct. App. 1995); Carroll v. State of Texas, 911 S.W.2d 210, 223 (Tex. Ct. App. 1995).

90. 501 U.S. 429 (1991). For an overview of issues arising in the "war" on drugs, see Patricia Wald, *A Report from the Front in the War on Drugs*, 7 GA. ST. U. L. REV. 1 (1990).

91. 501 U.S. at 439-440. Florida law enforcement officials acted pursuant to a policy under which they routinely boarded buses and asked passengers for consent to search their luggage. The majority found that "working" buses is a legitimate technique in drug-control efforts, refused to find that Mr. Bostick was necessarily seized, and remanded the case. Because the officers had no particularized suspicion as to Mr. Bostick, the search of his luggage was illegal if he was seized for Fourth Amendment purposes; *Terry* requires individualized suspicion before an officer may detain or "stop" a suspect. Terry v. Ohio, 392 U.S. 1 (1968).

92. 501 U.S. at 440-445 (Marshall, J., dissenting).

93. *Id.* at 442 n.1 (emphasis in original; citations omitted).

94. *See* New York v. Quarles, 467 U.S. 649, 659 n.8 (1984) (*Miranda* warnings need not be given prior to custodial questioning in a situation posing a threat to the public safety, *i.e.*, when there is an "objectively reasonable need to protect the police or the public from

and protections of due process under the Fifth Amendment.[96]

There are few Supreme Court cases that involve white collar criminal defendants and turn on general procedural issues. This is perhaps not surprising in light of the relatively prolonged nature of white collar criminal investigations, which typically gather evidence through use of grand jury subpoenas rather than searches pursuant to a warrant.[97] In one search and seizure case involving a white collar defendant, the Court split along familiar conservative/pro-government, liberal/pro-defendant lines.[98] And in two cases each arising under the Fifth Amendment's due process and Sixth Amendment's right-to-counsel provisions,[99] the Court split along those same lines to deny the defendants' claims in an area of significant concern to white collar defendants and their attorneys.

It is not surprising that, in procedural decisions affecting the cases across a broad spectrum of the law, including white collar crime, neither wing of the Court would even implicitly grant significance to the particular defendant's socio-economic status. For example, rules of Fourth Amendment interpretation, even in the occasional case where they arise in the white collar context, will have little impact in typical white collar cases. These issue are much more important to the non-white collar cases given that the vast majority of search and seizure cases the Court decides are controlled-substance cases,[100] and

immediate danger").

95. A recent Sixth Amendment case, decided by a five-to-four vote, split generally along predictable ideological lines, with Justice O'Connor providing the "swing" vote. *See* Gray v. United States, — U.S. —, 118 S. Ct. 1911 (1998). Justice Breyer wrote the pro-defendant majority opinion, which was joined by Justices Stevens, O'Connor, Souter, and Ginsburg.

96. *See* Colorado v. Connelly, 479 U.S. 157 (1986).

97. *See* William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 787-92 (1988).

98. *See* Andresen v. Maryland, 427 U.S. 463 (1976).

99. In these companion cases, *United States v. Monsanto*, 491 U.S. 600 (1989), and Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617 (1989), the five-member majorities rejected due process and right-to-counsel challenges to pretrial orders, issued under the RICO criminal forfeiture statute, freezing funds needed to pay the defendants' attorneys' fees. Justice Blackmun wrote the dissenting opinion, joined by Justices Brennan, Marshall, and Stevens. In language indicative of his then-recent shift to the left in criminal cases, *see supra* note 3, Justice Blackmun wrote that "it is unseemly and unjust for the Government to beggar those it prosecutes in order to disable their defense at trial." Caplin & Drysdale, Chartered, 491 U.S. at 635. For an overview of these decisions' impact in white collar cases, see Diana Parker & J. Kelly Strader, *Civil & Criminal Forfeitures*, *in* WHITE COLLAR CRIME, BUSINESS AND REGULATORY OFFENSES § 6A.03[5] (Otto Obermaier & Robert Morvillo, eds., 1998).

100. A review of search and seizure cases for the years of 1992 through June 22, 1998 reveals that there were fifteen search and/or seizure cases. Of the fifteen cases, ten involved controlled substances (Richards v. Wisconsin, — U.S. —, 117 S. Ct. 1416 (1997); Maryland v. Wilson, 519 U.S. 408 (1997); Ohio v. Robinette, 519 U.S. 33 (1996);

most of the rest involve crimes of violence against persons or property.[101]

That is not to say, however, that social, economic, and racial issues do not explicitly come up in search and seizure cases. As noted in the discussion of *Florida v. Bostick*,[102] the dissenters have on occasion noted the impact of the Court's decisions on racial minorities. Further, the dissenters have also opined, in particular cases, that law enforcement's biases—based on race and/or socio-economic factors—provide a reason for not contracting the scope of Fourth Amendment protections. For example, in *United States v. Robinson*,[103] Justice Marshall dissented, along with Justices Brennan and Douglas, from a holding that a search incident to lawful arrest, justified by the protection of the officer, can extend into containers found on the arrestee's body and taken into possession by the officer.[104] Justice Marshall wrote:

> The government argues that it is difficult to see what constitutionally protected 'expectation of privacy' a prisoner has in the interior of a cigarette pack. One wonders if the result in this case would have been the same were respondent a *businessman* who was lawfully taken into custody for driving without a license and whose wallet was taken from him by the police.... Or suppose a *lawyer* lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon...?[105]

In those procedural cases not focused on white collar crime, then, the ideological split on the Court seems clear: the truth-seeking, "technicality"-averse conservatives vs. the defendants' rights, process-

Pennsylvania v. Labron, 518 U.S. 938 (1996); Whren v. United States, 517 U.S. 806 (1996); Ornelas v. United States, 517 U.S. 690 (1996); Wilson v. Arkansas, 514 U.S. 927 (1995); Arizona v. Evans, 514 U.S. 1 (1995); Minnesota v. Dickerson, 508 U.S. 366 (1993); and United States v. Padilla, 508 U.S. 77 (1993)).

101. The same review of 1992 through 1998 cases showed that three of the remaining five involved violence (Pennsylvania Board of Probation and Parole v. Scott, — U.S. —, 118 S. Ct. 2014 (1998); United States v. Ramirez, — U.S. —, 118 S. Ct. 994 (1998); and Withrow v. Williams, 507 U.S. 680 (1993)). The remaining cases were Chandler v. Miller, 520 U.S. 305 (1997), and Vernonia School District v. Acton, 515 U.S. 646 (1995). Both of these cases involved drug testing, one of candidates for public office and the other of high school athletes.

102. 501 U.S. 429 (1991); *see supra* note 3.

103. 414 U.S. 218, 238 (1973) (Marshall, J., dissenting).

104. The *Robinson* defendant was stopped on suspicion of driving without a license, and was arrested for narcotics possession after a search incident to his arrest revealed narcotics in a cigarette pack the officer found on his person. *Id.* at 240-241.

105. *Id.* at 257 (emphasis added).

oriented liberals.[106] To the extent that the Warren Court's search and seizure decisions were the product of perceived law enforcement abuse of minorities, particularly African- Americans,[107] it makes sense that social and racial considerations sometimes rise to the surface of some opinions, as in the *Bostick* and *Robinson* dissents discussed above.

(2) Remaining Criminal Law Issues

In non-white collar cases before the Court, "substantive" criminal law issues most frequently involve the application of federal constitutional provisions to state statutes. In several ways, such cases are not precisely analogous to the "substantive" white collar cases the Court has decided. First, most of the non-white collar cases do not involve the statutory interpretation issues that arise in federal white collar cases.[108] Second, many of the cases are at once substantive (in that they affect the scope of criminal liability rather than the evidence to be introduced at trial) and procedural (in that they concern procedural aspects of constitutional protections afforded criminal defendants, such as due process).[109] Finally, many of these cases, although criminal in nature, also involve constitutional protections broader than those specifically afforded criminal defendants.[110] Again, however, even though precise comparisons may not be possible, the voting patterns of the justices in these cases again offer a fascinating contrast to the patterns in the white collar cases.

106. *See, e.g., Leon*, 468 U.S. 897, discussed *supra* notes 86-89.

107. *See generally* Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L. J. 369 (1994); Harcourt, *supra* note 78.

108. Issues of statutory interpretation of state statutes are, of course, generally resolved at the state court level, unless there is a federal constitutional claim. In terms of the Court's certiorari jurisdiction, 28 U.S.C. § 1257 (1994), provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Relatively rarely do federal statutory construction issues arise in non-white collar criminal cases. For examples of such issues, see *infra* note 359.

109. *See, e.g.*, Montana v. Egelhoff, 518 U.S. 37 (1996), discussed *infra* Part II.C.1.

110. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986), discussed *infra* Part II.C.1.

(a) Substantive and Procedural Due Process

Substantive due process may limit the degree to which the government can criminalize certain activities. For example, in *Bowers v. Hardwick*[111] the Court rejected the defendant's challenge to a Georgia law that criminalized consensual, private, non-commercial sexual activities between persons of the same sex. The majority opinion was written by Justice White, and was joined by Chief Justice Burger and Justices Rehnquist, O'Connor, and Powell.[112] The dissent was written by Justice Blackmun, who was joined by the usual criminal case dissenters, Justices Marshall, Brennan, and Stevens.

In a more recent case, the Court evaluated the scope of a defendant's rights in an area not easily classified as "substance" or "procedure." The case was *Montana v. Egelhoff*,[113] and involved a challenge to a statute that provides that a defendant's "intoxicated condition" cannot be considered "in determining the existence of a mental state which is an element of the offense."[114] Justice Scalia wrote the four-member plurality opinion, in which he was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas. The plurality concluded the defendant had failed to establish a due process "right" to introduce this evidence because any such right did not rise to the level of a "fundamental principle of justice."[115] In her opinion concurring in the judgment, Justice Ginsburg described the issue not as evidentiary but as substantive; the question revolved around the state's power to define an element of a crime.[116] Because the state had merely legislatively determined how to define the mental element of the crime of homicide, no principle of due process was violated.[117]

111. 478 U.S. 186 (1986). The challenge was based upon the right-to-privacy cases from *Griswold v. Connecticut*, 381 U.S. 479 (1965), to *Carey v. Population Services*, 431 U.S. 678 (1977). The Court found that the private activities at issue in *Hardwick*, unlike the previous cases, did not involve a "fundamental right" and was justified on the rational basis of enforcing morality. *Id.* at 196.

112. After he retired from the Court, Justice Powell stated that he believed the Court's decision in *Hardwick* had been in error. *See* Anand Agneshwar, *Powell Concedes Error in Key Privacy Ruling; Vote to Sustain Sodomy Law at High Court Called a 'Mistake'*, N.Y. L.J., Oct. 26, 1990, at 1, col.3.

113. 518 U.S. 37 (1996).

114. *See Egelhoff*, 518 U.S. at 41. The defendant argued that he was entitled, under the due process clause, to argue at his murder trial that his intoxication rendered him incapable of possessing the requisite mental state.

115. *See id.* at 51 ("Although the rule allowing a jury to consider evidence of a defendant's voluntary intoxication where relevant to *mens rea* has gained considerable acceptance, it is of too recent vintage, and has not received sufficiently uniform and permanent allegiance to qualify as fundamental . . . .").

116. *See id.* at 57 (Ginsburg, J., concurring).

117. *See id.* at 59 (Ginsburg, J., concurring). The dissent was written by Justice

The *Egelhoff* decision is interesting on many levels,[118] but one of the most intriguing aspects of the case is the vote split. It is apparent that the clear liberal/conservative split that existed during most of the 1970s and 1980s is no longer. Most obviously, the retirements of Justices Marshall and Brennan have left the Court without its most consistently pro-defendants' rights justices. In addition, Justices O'Connor and Kennedy have moved to the center on many issues, and can no longer consistently be counted upon to join the conservative wing.[119] Finally, to the extent generalizations can be made so soon in their tenures, it appears that neither Justice Ginsburg nor Justice Breyer will follow a consistently liberal approach in criminal cases.[120]

(b) Eighth Amendment

Across the range of Eighth Amendment cases, the standard

O'Connor, who was joined by Justices Stevens, Souter, and Breyer. The dissent reasoned that the defendant's ability to present his defense had been impeded, and that the state had been relieved of its constitutionally-mandated burden to prove each element of a crime beyond a reasonable doubt. *See id.* at 62 (O'Connor, J., dissenting) ("The Montana statute places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element.... [I]t frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state.").

118. This case has produced substantial commentary. *See, e.g.*, Jeffrey Scott Robinette, Montana v. Egelhoff*: Abandoning a Defendant's Fundamental Right to Present a Defense*, 46 CATH. U. L. REV. 1349 (1997); Robert J. McManus, Montana v. Egelhoff*: Voluntary Intoxication, Morality, and the Constitution*, 46 AM. U. L. REV. 1245 (1997); Brett G. Sweitzer, *Implicit Redefinitions, Evidentiary Proscriptions, and Guilty Minds: Intoxicated Wrongdoers After* Montana v. Egelhoff, 146 U. PA. L. REV. 269 (1997).

119. *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146 (1990) (Justices O'Connor and Kennedy joined the majority, holding that a law enforcement officer cannot reinitiate an interrogation without counsel present regardless of whether or not the defendant has consulted with counsel); United States v. Gray, discussed *supra* note 95 (O'Connor joined liberal majority).

120. *See* Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2282 (1998) (book review) ("The recent 'liberal' Clinton appointees to the Supreme Court seem as unfriendly to criminal procedure liberalism as their conservative colleagues...."). There is some evidence that Justice Ginsburg allies herself with the center/right in criminal cases as often as with the center/left, and that Justice Breyer appears to be more consistently with the center/left in criminal cases. *See Lady Justice: Her Commitment to The Underdog May Bring Ruth Bader Ginsburg The Court's Top Job,* THE DETROIT NEWS, January 3, 1997, at E1 ("While she's part of the moderately liberal wing of the court—along with Justices Stephen Breyer, David Souter and John Paul Stevens—she's been conservative in criminal cases"); and Christopher E. Smith, *Criminal Justice and the 1995-96 U.S. Supreme Court Term*, 74 U. DET. MERCY L. REV. 1, 7 (1996) ("[T]he relatively high degree of consensus in criminal justice cases created strong interagreement among the individual justices across the board. Two particular voting blocs emerged among the justices, one conservative (Rehnquist, Thomas, Scalia, O'Connor) and one moderate (Souter and Breyer)").

liberal/conservative split holds with remarkable consistency. At this point, we have moved beyond cases that provide law enforcement with wide latitude to development evidence. Here, rather, the focus seems to be on deferring to legislative bodies, particularly those at the state level, in establishing appropriate levels of punishment.

The death penalty, of course, raises unique Eighth Amendment concerns. Though a comprehensive review of the Supreme Court's death penalty cases is far beyond this paper's scope, a quick review of some of the major cases further reinforces the standard split in criminal cases. In 1972, the Court held for the first time that the death penalty, as then administered, violated the Eighth Amendment's prohibition of "cruel and unusual punishments."[121] The five-to-four decision split along standard lines.[122] Four years later, Justices Brennan and Marshall dissented from a decision upholding the death penalty, finding it unconstitutional in every instance.[123] That same year, however, five members of the Court found mandatory death penalties to be unconstitutional,[124] over a strong dissent.[125] In a six-to-three vote, the Court reached the same decision eleven years later, in the case in which a person serving a life term without parole committed a murder in prison.[126] Finally, in 1987 the Court rejected a challenge to the death penalty on the ground that it is racially-biased.[127] Once again, the five-to-four vote was along predictable lines, with Justice Blackmun having joined the usual liberal alliance of Justices Brennan, Marshall, and Stevens.

Outside the death penalty context, the Eighth Amendment cases have produced remarkably similar results. In two important decisions issued a decade apart, the Court sustained, against Eighth Amendment challenges, life sentences for a third felony (obtaining $120.75 by false pretenses)[128] and for a first-time narcotics transaction

121. *See* Furman v. Georgia, 408 U.S. 238 (1972).

122. Justices Brennan, Marshall, Douglas, White, and Stewart supported this holding; Chief Justice Burger, and Justices Blackmun, Powell, and Rehnquist dissented. Nowhere was Justice Blackmun's move left in criminal cases more apparent than in the death penalty cases. *See* Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari). In *Callins*, Justice Blackmun announced that he believed that the death penalty, in every case, is unconstitutional.

123. *See* Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting).

124. *See* Woodson v. North Carolina, 428 U.S. 280 (1976) (Justices Stewart, Powell, Stevens, Brennan, and Marshall joined in the holding).

125. *See id.* at 306 (Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented).

126. *See* Sumner v. Shuman, 483 U.S. 66 (1987) (Justice Blackmun wrote the majority opinion; Chief Justice Rehnquist and Justices White and Scalia dissented).

127. *See* McClesky v. Kemp, 481 U.S. 279 (1987).

128. *See* Rummel v. Estelle, 445 U.S. 263 (1980) (Justices Powell, Brennan, Marshall, and Stevens dissented).

(sale of 650 grams of cocaine).[129] Both cases were decided by five-to-four margins, with three liberals and one moderate dissenting in each case. Finally, in one recent case decided under the Eighth Amendment's excessive fines clause, a five-member majority of Justices Stevens, Souter, Ginsburg, Breyer, and Thomas invalidated a criminal forfeiture.[130]

C. Common Patterns in the Non-White Collar Cases

In broad categories of non-white collar criminal cases, then, the United States Supreme Court justices have voted with remarkable consistency over roughly the last twenty-five years. Although there are notable exceptions,[131] these patterns hold true in cases ranging from purely "procedural" cases involving the introduction of evidence based upon police investigation to "substantive" cases that define the scope of a defendant's potential liability and assess the potential limits on punishment.

The "conservative" justices prevailed in the vast majority of these cases, in which certain themes emerge. In the "procedural" cases, the opinions generally seek to give wide latitude to police in the investigation of criminal activities, citing both the difficulty of law enforcement and the need of society to investigate and prosecute criminals successfully.[132] These decisions focus on police conduct, not on the role of prosecutors or on the statutes the government is enforcing.[133] The "substantive" cases focus on issues ranging from definitions of crimes to the limitations on the states' abilities to render certain activities criminal and to punish.[134] The focus in these cases is

129. *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (Justices White, Blackmun, Stevens, and Marshall dissented).

130. *See* United States v. Bajakajian, — U.S. —, 118 S.Ct. 2028 (1998). *See* Part I, note 7 *supra*, for a discussion of this unusual line-up.

131. *See, e.g.*, Arizona v. Hicks, 480 U.S. 321 (1987) (Justice Scalia wrote a majority opinion, joined by the liberal justices, finding a search to be unreasonable under the Fourth Amendment); New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring) ("*Miranda* is now the law of the land and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures.").

132. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("Moreover, characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws").

133. *See* Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?*, 54 U. PITT. L. REV. 405, 408 (1993).

134. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Montana v. Egelhoff, 518 U.S. 37 (1996).

not on the effectiveness of law enforcement but on the role of states in defining and enforcing criminal laws. Thus, judicial restraint is a common conservative theme.[135]

On the other hand, the liberal dissents' focus on the importance of individual rights is consistent across the range of non-white collar cases. In the procedural cases, the dissents consistently lament the majorities' short-shrifting of constitutional protections afforded criminal defendants.[136] In the substantive cases, the dissents seek to read narrowly the permissible scope of the criminal laws, to afford defendants the ability to present a defense at trial, and to place restraints on punishment.[137] The states' overwhelming power to intrude on individual rights both in investigating and prosecuting criminal cases is the reason, according to these dissents,[138] that constitutional protections must be carefully safeguarded.

The next section focuses on criminal justice rhetoric and philosophies in white collar cases. As we will see, the liberal/conservative themes apparent in the non-white collar cases do not translate into clearly-definable approaches to white collar crime.

III. Criminal Justice Philosophies in White Collar Cases

Since 1971, the Court has decided far too many white collar cases to discuss here.[139] So, I have made a highly selective, and subjective, determination of some of the most interesting and important white collar cases. Among these cases, I have selected a broad cross-section, from complex securities cases to a relatively simple case of food stamp fraud. They also include, as indicated in Part I above, nominally "civil" cases. Finally, as with the non-white collar cases, these range from purely substantive cases to cases that could more fairly be termed "procedural." I believe, though, that one conclusion

135. *See Bowers*, 478 U.S. at 190 ("[This case] raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.").

136. *See supra* note 133.

137. *See supra* note 134.

138. *See Bowers*, 478 U.S. at 199-200 (Blackmun, J., dissenting) ("I believe we must analyze Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an 'abominable crime not fit to be named among Christians.'").

139. The white collar cases here are a fraction of the total. *See* Appendix, Table 2.

is irrefutable: across the spectrum of these cases, we see both (a) voting patterns (pro-defense or pro-government) by individual justices, and (b) alignments of blocs of justices, that rarely occur elsewhere in the Court's criminal law jurisprudence.

A. Voting Patterns

The justices' voting patterns in the white collar arena are not as consistent as with the non-white collar cases summarized in the table in the previous section. Nonetheless, certain patterns are clear:

Voting patterns in white collar crime cases[140]

	Majority or Concurring		Dissenting					
Name	For Gov	For Def	For Gov	For Def	Total Cases	% pro G	% pro D	% in maj
Burger	5	2	3	0	10	80.00%	20.00%	70.00%
Blackmun	8	4	6	1	19	73.68%	26.32%	63.16%
White	10	7	2	0	19	63.16%	36.84%	89.47%
Kennedy	4	4	1	0	9	55.56%	44.44%	88.89%
Powell	6	5	0	0	11	54.55%	45.45%	100.00%
O'Connor	6	4	3	4	17	52.94%	47.06%	58.82%
Marshall	6	6	3	2	17	52.94%	47.06%	70.59%
Stevens	8	7	1	3	19	47.37%	52.63%	78.95%
Brennan	4	5	2	4	15	40.00%	60.00%	60.00%
Rehnquist	7	9	1	4	21	38.10%	61.90%	76.19%
Scalia	2	5	0	4	11	18.18%	81.82%	63.64%

This table orders the justices from most-to-least likely to vote for the government in white collar cases. Many strange patterns emerge. First, the moderate/conservative and moderate justices - Justices White, Kennedy, Powell, and O'Connor - frequently vote for the government. Doctrinaire conservative justices Rehnquist and Scalia, however, are the *least likely* of all the justices to vote for the government; Rehnquist is six times, and Justice Scalia eleven times, more likely to vote for the defendant in a white-collar than in a non-white collar case.[141] Second, the Court's most liberal members - Justices Marshall and Brennan - vote for the government (in majority and dissenting opinions) far more often than in the non-white collar cases; Justice Brennan is two and a half times, and Justice Marshall

140. *See id.*
141. *See* Appendix, Table 2.

seven times more likely to vote for the government in white collar cases.[142] The variations between the sets of cases are set forth in the tables below:

Shifts in Liberal/Conservative Voting Patterns[143]

Liberal Justices

Name	% pro G in non-wcc	% pro G in wcc	Times more likely to vote pro G in wcc
Marshall	6.90%	52.94%	6.67
Brennan	11.54%	40.00%	2.47
Stevens	32.20%	47.37%	0.47

Conservative Justices

Name	% pro D in non-wcc	% pro D in wcc	Times more likely to vote pro D in wcc
Scalia	6.90%	81.82%	10.86
Rehnquist	8.20%	61.90%	6.10
Powell	21.43%	45.45%	1.12
O'Connor	24.49%	47.06%	0.92
White	24.14%	36.84%	0.53
Burger	20.00%	20.00%	0.00

Further, these cases produce strange alliances among the justices, where the traditional "liberal" and "conservative" labels seem to lose their meaning.[144] Thus, we will see repeated groupings of justices in these cases that rarely appear in the non-white collar cases.

B. White Collar Cases

(1) Economic Regulation

Paradigmatic among the Supreme Court's white collar cases are those arising under criminal statutes that seek to regulate economic activity. Securities, antitrust, and, to a lesser extent, tax laws meet this definition. There are few Supreme Court criminal antitrust cases, however.[145] And tax cases do not require the sort of organizational

142. *See id.*

143. In order to compute these figures, I calculated the difference between the likelihoods, and then divided by the less likely alternative. For example, in Marshall's case, I found the difference between his likelihood to vote for the government in non-white collar cases, and then divided that by the likelihood of voting pro-government in white collar cases.

144. *See infra* Part III.B.

145. For one example, see *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

setting in which typical white collar crimes arise.

Of the cases included in the sample here, therefore, the securities cases—and, in particular, the Supreme Court's insider trading cases—are the most useful. These cases are important in practical terms to the topic here because they fall within virtually any definition of "white collar" crime,[146] and are considered by some to be the quintessential example of such crime.[147] Although the insider trading laws and regulations[148] are highly technical, only a basic overview of the law in this area is necessary to gain an understanding of the unusual nature of the Supreme Court's white collar jurisprudence.

(a) Securities Fraud

The Supreme Court has considered four insider trading cases, and reached a decision in three of them.[149] The first case, *Chiarella v. United States*, was decided in 1980.[150] The decision in *Chiarella* merits extended discussion, for it both set forth the doctrinal parameters for the cases that followed and illustrated the incipient ideological schism on the Court with regard to the criminal enforcement of the securities fraud statutes.

In *Chiarella*, the defendant was employed by a commercial printing company that prepared soliciting materials for bidders in tender offer transactions.[151] Knowing that his conduct was prohibited by his employer's policies, the defendant discerned the "codes" for

146. Under the socio-economic definition, the cases qualify because the defendants are engaged in "professional" activities (albeit sometimes at lower levels, *see* Chiarella v. United States, 445 U.S. 222 (1980)); under the conduct-focused definition, the cases qualify because deception or "fraud" is an inherent part of the crime; and under a pragmatic approach the cases qualify because they involve a highly specialized area of the law where initial investigations are generally initiated by a specialized agency, the Securities and Exchange Commission, and do not involve the use of force against persons or property. *See supra* at note 30.

147. *See* David Weisburd, Stanton Wheeler, Elin Waring, & Nancy Bode, CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS (1991).

148. *See* Section 10 (b) of the 1934 Act, 15 U.S.C. § 78j, and 17 C.F.R. § 240.10b-5 (1979).

149. Chiarella v. United States, 445 U.S. 222 (1980); Dirks v. Securities and Exchange Commission, 463 U.S. 646 (1983); United States v. Carpenter, 484 U.S. 19 (1987); United States v. O'Hagan, 117 S. Ct. 2199 (1997).

150. *Chiarella*, 445 U.S. 222. The printing company employed Chiarella as a "mark-up man." He was in charge of receiving the manuscripts from the customers and then selecting the type fonts and layouts. After this was done, Chiarella passed the manuscript on to the next department to be set into type. 588 F. 2d. 1358, 1362-63 (2d Cir. 1978).

151. A "tender offer" is "[A] public announcement by a company or individual indicating that it will pay a price above the current market price for the shares 'tendered' of a company it wishes to acquire or take control of." BLACK'S LAW DICTIONARY 1468 (6th ed. 1990). Tender offers are one of several types of corporate takeover techniques, and are regulated by state and federal securities laws.

the companies involved in five such transactions, bought stock in the target companies before the bids were made public, and sold afterwards.[152] Chiarella made a profit of over $30,000 over fourteen months.[153]

At trial, Chiarella was convicted of securities fraud based on the theory that anyone who receives secret, material information relating to the purchase or sale of a security is under a duty either to disclose that information or refrain from trading on it. On appeal, Chiarella argued that there could be no fraud absent a duty running from the purchaser of stock (Chiarella) to the sellers (owners of the target companies' stocks). In examining this issue, the Supreme Court first found that neither the language of the statute nor the legislative history indicated whether a duty is required.[154] Turning to earlier insider trading cases and to the common law definition of fraud, the Court held that

> a purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has . . . no obligation to reveal material facts . . . .[155] No duty could arise from (defendant's) relationship with the sellers of the target company's securities, for petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom the sellers had placed their trust and confidence. He was, in fact, a complete stranger who dealt with the sellers only through impersonal market transactions.[156]

Thus, the majority voted to reverse Chiarella's conviction. The opinion was written by Justice Powell, who was joined by Justices Rehnquist, White, Stewart, and Stevens. Justice Brennan concurred in the result only, allying himself with the dissent in setting forth a broader theory of liability than the majority adopted.[157]

Chief Justice Burger dissented, arguing that the conviction could stand on the broader, "misappropriation" theory; because the defendant had breached a duty to his employer (and also, arguably, to his employer's clients, as their agent) by misappropriating the information, he could be convicted of securities fraud.[158] Under this theory, the fraud is not upon a market participant (a buyer or seller of

152. *See Chiarella*, 445 U.S. at 224.
153. *See id.*
154. *Id.* at 226.
155. *Id.* at 229.
156. *Id.* at 232-33.
157. In his concurring opinion, Justice Stevens also agreed with the dissent that this broader theory of liability—not charged by the government in *Chiarella*—could have provided a basis for liability. *Id.* 237-38.
158. *Id.* at 243-44.

the securities), but upon someone (an employer or other principal)[159] to whom the defendant owed a duty.

Justice Blackmun, joined by Justice Marshall, dissented separately. Justice Blackmun indicated his general agreement with the Chief Justice's views, but also opined that Chiarella's conviction could stand even without reliance on the misappropriation theory because the defendant had "access to confidential information that the honest investor... could not legally obtain."[160] The philosophical thrust of Justices Blackmun and Marshall—that the Court had inappropriately hampered effective law enforcement by an overly-narrow interpretation of the securities laws—is resonant of the pro-government, non-white collar decisions discussed above:

> The Court continues to pursue a course... designed to transform § 10(b) from an intentionally elastic 'catchall' provision to one that *catches relatively little of the misbehavior that all too often makes investment in securities a needlessly risky business for the uninitiated investor.* Such confinement in this case is now achieved by imposition of a requirement of a 'special relationship' akin to fiduciary duty before the statute gives rise to a duty to disclose or to abstain from trading upon material, nonpublic information. The court admits that *this conclusion finds no mandate in the language of the statute or its legislative history....*[161]

This split in the Court continued with its next insider trading case, *Dirks v. Securities and Exchange Commission.*[162] In *Dirks*, the defendant was an investment analyst who was informed by a company's former employee that the company had engaged in fraud.[163] The employee's purpose was to enlist Dirks' aid in exposing the fraud.[164] Dirks advised his clients to sell their stock in the company, and later helped expose the fraud.[165] Dirks did not personally own or trade in the securities.[166]

In a civil enforcement action, the SEC found that, where one knowingly receives material, nonpublic information, that person has a duty to disclose the information to the public or refrain from trading. Thus, because Dirks had disclosed the information to seller-clients without first disclosing it to the public, he had violated Section

159. *See, e.g.*, United States v. Willis, 737 F. Supp. 269 (S.D.N.Y. 1990); United States v. Willis, 778 F. Supp 205 (S.D.N.Y. 1991).

160. 445 U.S. at 247.

161. *Id.* at 246-47 (emphasis added).

162. 463 U.S. 646 (1983). Although a civil enforcement action rather than a criminal case, *Dirks* governs the law in criminal 10(b)(5) actions as well as in civil cases.

163. *See Dirks*, 463 U.S. at 648-49.

164. *See id.* at 649.

165. *See id.*

166. *See id.*

10(b).[167]

In reversing and holding Dirks not liable, the Supreme Court focused on Dirks' status as the tippee of information received from a corporate insider.[168] The Court again rejected the view that equal information is required among all traders of the security at issue. Instead, the Court determined that one who learns inside information (a "tippee") can assume the tipper's duty only in limited circumstances—where the tipper/insider stands to gain personally from divulging the information.[169] Because the insider in Dirks was a whistle-blower who did not stand to gain financially, Dirks could not be liable as a tippee.[170] Justice Powell wrote the majority opinion, and was joined by Chief Justice Burger and Justices Rehnquist, White, O'Connor, and Stevens.

Justice Blackmun wrote the dissent, joined by Justices Brennan and Marshall. The dissent, as it had in *Chiarella*, again scored the majority for adopting an unduly restrictive interpretation of the securities laws:

> The Court today takes still another step to limit the protections provided investors by § 10(b).... *The improper purpose requirement not only has no basis in law*, but it rests implicitly on a policy that I cannot accept. The Court justifies [the insider's] and Dirks' action because the general benefit derived from the violation of the [the insider's] duty to shareholders outweighed the harm caused to those shareholders.... As a citizen, Dirks had at least an ethical obligation to report the information to the proper authorities.... *The Court's holding* is deficient in policy terms not because it fails to create a legal norm out of that ethical norm,... but because it *actually rewards Dirks for his aiding and abetting*....[171]

In 1987, the misappropriation issue, discussed but not decided in *Chiarella*, was squarely presented to the Court in *United States v. Carpenter*.[172] The defendant in *Carpenter* was a Wall Street Journal reporter who had traded on and profited from information he had gathered for publication in the newspaper. The Second Circuit

167. *See id.* at 650-51 ("Where 'tippees'—regardless of their motivation or occupation—come into possession of material 'corporate information that they know is confidential and know or should know came from a corporate insider,' they must either publicly disclose that information or refrain from trading.").

168. *See id.* at 655-56.

169. *See id.* at 662-63 ("It is important in this type of case to focus on policing insiders and what they do... rather than on policing information per se and its possession....").

170. *See id.* at 667.

171. *Id.* at 667-68 (emphasis added).

172. 484 U.S. 19 (1987).

affirmed the conviction under the misappropriation theory,[173] but the Supreme Court split four-to-four on the issue.[174] Justice Powell wrote a draft dissent from an initial denial of certiorari, joined by Justices O'Connor and Rehnquist; the Court later voted to grant certiorari, and Justice Powell retired before a decision in the case was reached.[175] Based upon these votes and the votes in *Chiarella*[176] and *Dirks*[177] (though not the votes to come in *O'Hagan*[178]), it appears that Justices Stevens, Brennan, Marshall, and Blackmun—the key liberal bloc at this point on the Court—voted to affirm the conviction, and Justices Rehnquist, White, Scalia, and O'Connor voted to reverse.[179] One commentator has concluded that, had Justice Powell remained on the Court, it would have rejected the misappropriation theory in *Carpenter*.[180]

The Court revisited the misappropriation issue ten years later in *United States v. O'Hagan*.[181] In the years since the Court evenly divided on this issue in *Carpenter*, Justices Powell, Brennan, Marshall, White, and Blackmun had been replaced by Justices Kennedy, Souter, Thomas, Ginsburg, and Breyer, respectively. In *O'Hagan*, the Court voted six-to-three to affirm the conviction under the misappropriation theory.[182] Justice Ginsburg wrote for the six-member majority; Justice Scalia wrote an opinion dissenting from this holding, as did Justice Thomas, who was joined by Chief Justice Rehnquist.

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173. 484 U.S. at 21.

174. 484 U.S. 24.

175. *See* A.C. Pritchard, United States v. O'Hagan*: Agency Law and Justice Powell's Legacy for the Law of Insider Trading*, 78 B.U. L. REV. 13, 16, 34 (1998).

176. *See supra* note 149.

177. *See supra* note 163.

178. *See infra* note 181 (Justice O'Connor voted to sustain the misappropriation theory in *O'Hagan*).

179. *See* Pritchard, *supra* note 175, at 16. The *Carpenter* opinion simply states that "[t]he Court is evenly divided with respect to the convictions under the securities laws and for that reason affirms the judgment below on those counts," without identifying how the particular justices voted. 484 U.S. 24. The Court also unanimously affirmed the defendants' mail fraud convictions. *Id.*

180. *See id.*

181. 117 S. Ct. 2199 (1997). The defendant in *O'Hagan* was an attorney who bought stock in a corporation that was the target of a bid by a company represented by the defendant's law firm. Because the defendant was not in a fiduciary relationship with the company whose stock was traded, he could only be charged under the misappropriation theory.

182. The other two issues in the case involved whether the SEC exceeded its rule-making authority and O'Hagan's other arguments attacking the mail fraud convictions on alternate grounds. The Court ruled the SEC did not exceed its rule-making authority, did not address O'Hagan's other arguments, and remanded to the Eighth Circuit. *Id.* at 2206, 2220.

The anti-government, pro-defense thrust of the *O'Hagan* dissents—by the Court's three most conservative members—is startling. In his opinion, Justice Scalia made the standard argument against a broad reading of a criminal statute—that such a reading conflicts with the principle of lenity, which requires that an ambiguous criminal statute be read in favor of the defendant.[183] And Justices Thomas and Rehnquist went further, finding that, on policy grounds, the parameters of the judicially-defined misappropriation rule render it so vague as to be neither "coherent [nor] consistent" as a theory of criminal liability.[184] The latter is a basis that these particular justices rarely use to argue that a non white-collar criminal conviction should be overturned.[185]

(b) Tax Fraud

Another essentially economic offense, criminal tax fraud, has also come before the Court in recent years. Tax crimes can run the gamut from cases against individuals for allegedly failing to report income[186] to cases against organizations for allegedly filing a false return in a securities fraud scheme.[187] The Supreme Court considered criminal tax fraud in the former circumstance in *United States v. Cheek*.[188] In *Cheek*, the defendant failed to file tax returns and to report income based upon his asserted beliefs that the government had misinterpreted the tax code and that the income tax itself was unconstitutional. The defendant was convicted of charges that he willfully evaded taxes[189] and willfully failed to file returns.[190] The issue before the Court was whether an honest, but unreasonable, belief is a defense to the willfulness elements of these crimes.

In an opinion by Justice White, the Court reversed the convictions. Specifically, the Court held that the general rule that "ignorance of the law or a mistake of law is no defense" does not apply to the tax laws. Thus, "willfulness" in the tax crime context

183. 117 S. Ct. at 2220 (Scalia, J., dissenting).

184. *Id.* at 2221 (Thomas, J., dissenting).

185. *See* Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998). Note that the *conservatives* invoked the doctrine of lenity in *O'Hagan*, even though, as Professor Solan observes, "[t]ypically, conservative courts will exercise their discretion to construe concepts in criminal statutes broadly, while more liberal courts will be more generous to defendants," *id.* at 121, and *O'Hagan* involves "a classic case of statutory vagueness," *id.* at 117.

186. *See, e.g.*, United States v. Cheek, 498 U.S. 192 (1991).

187. United States v. Princeton-Newport, 858 F. 2d 115 (2d Cir 1988); United States v. Regan, 713 F. Supp. 629 (S.D.N.Y. 1989).

188. 498 U.S. 192 (1991).

189. 28 U.S.C.A. § 7201 (West 1989 & Supp. 1998).

190. 28 U.S.C.A. § 7203 (West 1989 & Supp. 1998).

does allow for a defense of mistaken reading of the law because "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws."[191] Justices Rehnquist, Kennedy, Stevens, and O'Connor joined in the majority, while Justice Scalia concurred.[192] Justice Blackmun dissented, in an opinion joined by Justice Marshall. The dissent was incredulous that the Court would allow an honest but unreasonable belief as to whether "wages" are "income" to be put to the jury as a defense: "[I]t is incomprehensible to me how, in this day, more than 70 years after the institution of our present federal income tax system . . . any taxpayer of competent mentality can assert as his defense to charges of statutory willfulness the proposition that the wage he receives for his labor is not income . . . ."[193]

The opinions in the securities and tax areas thus affirm certain common themes; in these cases, the liberals are generally loath to read a statute so as to benefit the defendant, while the conservatives take the opposite tack. The question arises whether these themes are unique to issues of economically-focused statutory schemes, where conservatives might be expected to vote to limit the state's powers, or extend to other types of white collar crimes.

(2) Public Corruption

Although not necessarily related to business, public corruption cases are generally thought to fall under the rubric of "white collar crime,"[194] and certainly fall within the general definition of the term set forth in Part I above. Alleged corruption of public officials is prosecuted federally under a number of statutes.[195] Although such

191. 498 U.S. 192, 199-200. The Court held that a good faith belief in the interpretation of the laws is a defense, but not a good faith belief in the law's constitutionality. 498 U.S. 192, 206. Justice Scalia challenged this distinction in his concurring opinion. 498 U. S. 192, 207.

192. Justice Souter did not participate. 498 U.S. 192, 207.

193. 498 U.S. 192, 209 (Blackmun, J., dissenting). The *Cheek* decision, needless to say, is controversial. See Dwight W. Stone, *Cheek v. United States: A Precise Definition of the Willfulness Requirement in Federal Tax Crimes*, 51 MD. L. REV. 224 (1992); Mark D. Yochum, *Cheek is Chic: Ignorance of the Law is an Excuse for Tax Crimes—A Fashion That Does Not Wear Well*, 31 DUQ. L. REV. 249 (1993); and Mark C. Winnings, *Ignorance is Bliss, Especially for the Tax Evader*, 84 J. CRIM. L. & CRIMINOLOGY 575 (1993).

194. *See, e.g.*, Brickey, *supra* note 34, at 363-416; Israel, Podgor, Borman, *supra* note 20, at 30-36; Bucy, *supra* note 20, at 274-320.

195. On federal prosecution of state and local corruption, see Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Andrew T. Baxter, *Federal Discretion in the Prosecution of Local Political Corruption*, 10 PEPP. L. REV. 321 (1983).

cases have involved a myriad of charges, including RICO,[196] money laundering,[197] tax fraud,[198] and mail fraud,[199] this section focuses on two offenses directed to public corruption: extortion,[200] and bribery.[201] Once again, strange voting patterns, both by individual justices and by blocs of justices, are immediately apparent.

The federal bribery statute criminalizes the giving of a bribe to, or the receipt of a bribe by, a "public official," defined to include members of Congress, government officers and employees, jurors, and anyone "acting for or on behalf of" the federal government "in any official function, under or by authority of" a federal agency or department.[202] The United States Supreme Court has seldom considered the interpretation of this statute; one significant case was *Dixson v. United States*,[203] decided in 1984. The issue in *Dixson* was whether officers of a private, non-profit corporation administering and expending federal block grants are "public officials" under this statute.[204] The *Dixson* defendants were not federal employees, and were several steps removed from the federal agency that gave the grants.[205]

In a five-to-four decision, the Court determined that the defendants fell within the statute. Justice Marshall wrote the pro-government opinion, and was joined by rare bedfellows Justices Burger, Powell, and White, and by sometimes-bedfellow Justice Blackmun.[206] Justice O'Connor wrote the dissent, which was joined

196. 18 U.S.C. §§ 1961 & 1962.

197. *E.g.*, United States v. Montoya, 945 F.2d 1068 (9th Cir. 1991) (18 U.S.C. § 981).

198. 26 U.S.C.A. § 7201 (West 1989 & Supp. 1998).

199. 18 U.S.C. § 1341 (mail fraud) & 18 U.S.C. § 1343 (wire fraud); McNally v. United States, 483 U.S. 350 (1987).

200. 18 U.S.C.A. § 1951(West 1989 & Supp. 1998).

201. 18 U.S.C.A. § 201 (West 1989 & Supp. 1998).

202. 18 U.S.C.A. § 201(a) (West 1989).

203. 465 U.S. 482 (1984).

204. *See id.* at 484.

205. Dixson was Executive Director of United Neighborhoods, Inc. (UNI), a community- based, social service organization set up by the City of Peoria. UNI was in charge of the administration of federal block grants in the amounts of $400,000 and $636, 000. The grants were funded through the Housing and Community Development Act of 1974. Petitioner Dixson and Petitioner Hinton, Housing Rehabilitation Coordinator, were indicted by a federal grand jury in an 11-count indictment. The indictment charged petitioners as "public officials" under 18 U.S.C. § 201(a). The indictment charged petitioners with taking a series of bribes in return for "being influenced . . . in awarding of housing contracts." *Id.* at 484-85.

206. The majority framed the issue as whether the defendants "occupie[d] a position of public trust with official federal responsibilities." *Id.* at 496. The Court answered in the affirmative: "[T]hese officials hold precisely the sort of positions of national public trust that Congress intended to cover with the 'acting for or on behalf of' language in the bribery statute. The Federal Government has a strong and legitimate interest in

by Justices Brennan, Rehnquist, and Stevens, an odd criminal dissent alignment indeed. The dissent found that the majority's broad reading of the statute was justified neither by the statute's language nor by Congressional intent.[207]

Unlike the federal bribery statutes, the federal extortion provisions of the Hobbs Act have the potential to reach purely state and local officials. The Hobbs Act, and the cases brought under it, raise complex issues,[208] but an overview of two recent Supreme Court will suffice to show voting patterns in this area. In 1991, the Supreme Court in *McCormick v. United States*[209] considered the appeal of a state elected official who had been convicted of extortion in connection with the receipt of a campaign contribution. The Court reversed the conviction, holding that an element of such an offense is that the contribution have been made in exchange for a quid pro quo.[210] Justice White wrote the majority opinion, and focused on the policy implications of a broad reading of the statute, which would "open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures . . . ."[211] Justices Stevens, Blackmun, and O'Connor dissented.[212]

One year later, in *Evans v. United States*,[213] the Court considered whether a public official must affirmatively induce the allegedly extorted party to give the official something of value, or whether the elements of extortion can be proven even where the extorted party

prosecuting petitioners for their misuse of Government funds." *Id.* at 500-01.

207. *Id.* at 501 (O'Connor, J., dissenting).

208. 18 U.S.C. § 1952 criminalizes, *inter alia*, "extortion," defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." As noted above, *supra* note 40, the use of physical force and threats removes this offense from the realm of white collar crime. In most cases, "white collar" extortion will involve extortion "under color of official right," as when a public official uses his or her position to demand payment. Extortion by fear, however, can also include fear of economic harm, and some white collar prosecutions have included this theory. *See, e..g.,* United States v. Garcia, 992 F. 2d 409 (2d Cir. 1993). *See* Martin B. Goldberg, *White-Collar Crime: Fourth Survey of Law, Extortion*, 24 AM. CRIM. L. REV. 547 (187); James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 U.C.L.A. L. REV. 815 (1998); and Thomas A. Secrest, *Criminal Law: Bribery Equal Extortion: The Supreme Court Refuses to Make Inducement a Necessary Element of Extortion "Under Color of Official Right" under the Hobbs Act, § 18 U.S.C. 1951:* Evans v. United States, 19 U. DAYTON L. REV. 251 (1993).

209. 500 U.S. 257 (1991).

210. *Id.* at 265.

211. *Id.* at 272.

212. *Id.* at 280.

213. Evans v. United States, 504 U.S. 255 (1992).

initiated the transaction.[214] The Court affirmed the conviction, finding that an affirmative act of inducement is not required. In reaching this conclusion, the Court focused on the common law of extortion and upon the statute's plain language.[215]

Since *Evans* was decided, commentators have struggled to make sense of the federal law of extortion given the potential disharmony between *Evans* and *McCormick*.[216] For our purposes, the votes are intriguing, and perhaps explain the apparent disjunction between the cases. Justice Stevens, who dissented from the pro-defendant holding in *McCormick*, wrote the pro-government majority opinion in *Evans*, and was joined by Justices Blackmun, Souter, and White. Justices O'Connor and Kennedy filed limited concurrences.

Justice Thomas dissented in an opinion quoted at the beginning of this article. That he was joined by Chief Justice Rehnquist and Justice Scalia—together the triumvirate of the most consistently conservative, pro-government justices on the Court[217] – surely sends some sort of message, though exactly what is not clear. Justice Thomas' rhetoric is startling, given its source. After criticizing the majority's reading of the common law, Justice Thomas then attacks the decision as "repugnant . . . to the basic tenets of criminal justice reflected in the rule of lenity."[218] In Justice Thomas' view, lenity rests upon two considerations. First, if a defendant is to be given fair notice, then the definition of the crime should be clear. Second and perhaps more significant, as we shall see, Justice Thomas wrote, "because of the seriousness of criminal penalties, and because criminal punishment usually represents the *moral condemnation* of the community, legislatures and not courts should define criminal activity."[219]

Justice Thomas next characterized the majority opinion as violative of principles of federalism. He then turned to the theme

214. *Id.* at 257. The *Evans* defendant was a county commissioner who had been ensnared by an FBI sting operation targeting local corruption.

215. *Id.* at 258.

216. *See, e.g.*, Steven C. Yarbrough, *The Hobbs Act in the Nineties: Confusion or Clarification of the Quid Pro Quo Requirement in Public Corruption Prosecutions under the Hobbs Act*, 31 TULSA L.J. 781 (1996).

217. *See* Harvard Law Review Association, *Supreme Court: 1996 Term Leading Cases*, 111 HARV. L. REV. 197, 434; Harvard Law Review Association, *Supreme Court: 1995 Term Leading Cases*, 110 HARV. L. REV. 135, 370; Harvard Law Review Association, *Supreme Court: 1994 Term Leading Cases*, 109 HARV. L. REV. 111, 343; Harvard Law Review Association, *Supreme Court: 1993 Term Leading Cases*, 108 HARV. L. REV. 139, 375.

218. Evans v. United States, 504 U.S. 255, 289 (1992) (Thomas, J. dissenting). This rule requires that ambiguous criminal statutes be read in favor of the defendant. *Id.* at 290.

219. *Id.* at 289 (quoting United States v. Bass, 404 U.S. 336, 348 (1971))(emphasis added).

that produced his most dramatic attack on the majority—the potential for prosecutorial overreaching: "All Americans, including public officials, are entitled to protection from prosecutorial abuse. The facts of this case suggest a depressing erosion of that protection."[220] The dissent ends with the specter of doors opening to "prosecutorial abuse."[221]

(3) *Cross-over crimes*

Unlike economic and public corruption crimes, many "white collar crimes" involve charges under statutes that do not describe a particular type of offense. In particular, the mail/wire fraud statutes[222] and the RICO statute,[223] as with the federal conspiracy statute, provide prosecutors with avenues for additional criminal charges in the context of a white collar scheme involving other, substantive charges[224] (although some mail/wire fraud cases stand on their own[225]). Other statutes, such as the false statements statute[226] and the financial transaction reporting statutes,[227] may be used on their own, or may be charged in conjunction with other offenses.[228] The voting patterns in cases involving all these areas follow the patterns I described above.

In two important mail fraud cases, the Court considered whether the mailing was in furtherance of the fraud, the use of the mails providing the jurisdictional element of the crime.[229] In both cases, the substantive charge was the fraud. In *United States v. Maze*, the five-member majority voted to reverse the conviction, finding that the mailings were not "for the purpose of executing" the fraud.[230] Justice Rehnquist wrote the pro-defendant opinion; Justices Brennan and Blackmun, along with Justices Burger and White, voted to affirm the

220. 504 U.S. 255, 295 (citing Morrison v. Olson 487 U.S. 654, 727-732 (1988)).

221. *Id.* (citing *Morrison*, 487 U.S. at 727-732).

222. 18 U.S.C.A. §§ 1341 & 1343 (1997).

223. 18 U.S.C.A. § 1961 (1997).

224. For example, many of the criminal securities fraud cases also included mail/wire fraud charges. *E.g.*, Carpenter v. United States, 484 U.S. 19 (1987); United States v. O'Hagan, 117 S. Ct. 2199 (1997).

225. *E.g.*, United States v. Maze, 414 U.S. 395 (1974); Schmuck v. United States, 489 U.S. 705 (1989).

226. 18 U.S.C.A. § 1001 (West 1989 & Supp. 1998).

227. *See* 31 U.S.C.A. §§ 5311-5325 (West 1989 & Supp 1998).

228. *See, e.g*, United States v. Woodward, 469 U.S. 105 (1985).

229. United States v. Maze, 414 U.S. 395 (1974); Schmuck v. United States, 489 U.S. 705 (1989).

230. 414 U.S. at 402. The defendant had used a stolen credit card to pay for travel expenses. The government's theory was that the vendors' mailing of receipts to the issuing bank, and the bank's mailing of the bills to the card's owner, were for the purpose of carrying out the fraudulent use of the card.

conviction. Fifteen years later, a similar issue came before the Court in *Schmuck v. United States*.[231] Once again, the Court split five-to-four on whether the mailings were in furtherance of the fraud, this time sustaining the conviction. Justice Blackmun wrote the pro-government majority opinion. Justice Scalia wrote the pro-defendant dissent, advocating a narrow construction of the statute: "[I]t is mail fraud, not mail and fraud, that incurs liability. . . . The mailing must be in furtherance of the fraud."[232] Justices O'Connor, Brennan, and Marshall joined the dissent.

The Supreme Court considered another element of mail fraud in *McNally v. United States*.[233] The defendants were a state official and private individual who allegedly engaged in a self-dealing patronage scheme. The government's theory was that the scheme, which involved the use of the mails, defrauded the state's citizens and their government of their right to the good and honest services of state officials. In reversing the convictions, the Court overturned all the federal courts of appeals that had considered the issue. The Court held that deprivation of money or property is an element of mail fraud, and that no such deprivation was alleged in the case before it. Justice Stevens wrote the pro-government dissent, arguing that the majority's decision deprived the federal government of a powerful anti-corruption tool.[234]

The strange voting patterns extend to other areas as well. In *Ratzlaf v. United States*,[235] the Court reversed the conviction of a defendant who paid off a gambling debt in cash transactions "structured" to avoid currency reporting requirements. In a five-to-four decision, the Court held that an element of the crime was proof that the defendant "knew the structuring he undertook was unlawful," that is, a specific intent to violate the law.[236] Justices Scalia and Kennedy joined in Justice Ginsburg's majority opinion, along with Justices Souter and Stevens. Justice Blackmun wrote the pro-

231. 489 U.S. 705 (1989). The defendant was a used-car distributor who rolled back odometers on the cars he sold to dealers; the government's theory was that the mailing element was satisfied by the dealers' mailing of title application forms on behalf of purchasers.

232. 489 U.S. 705.

233. 483 U.S. 350 (1987).

234. 483 U.S. 350, 361. Justice O'Connor joined in the dissent. That same year, in *Carpenter v. United States*, 484 U.S. 19 (1987), the Court unanimously held that the "money or property" requirement is met when an employee steals confidential information from his employer, in breach of a fiduciary duty. As noted *supra* at 172, the Court split evenly on the defendant's securities fraud conviction.

235. 510 U.S. 135 (1994). Money laundering and financial reporting statutes are often the basis for charges in drug- and/or organized crime-related cases, but can of course apply in white collar cases. *See, e.g.*, 18 U.S.C § 1956.

236. *Id.* at 658.

government dissent, joined by Justices O'Connor and Thomas and Chief Justice Rehnquist.

The required mental state was again at issue in *United States v. Yermian*,[237] a false statement prosecution. In that case, the appeals court had reversed the conviction on the ground that the government was required to prove that the defendant had acted with actual knowledge of federal agency jurisdiction.[238] In yet another five-to-four decision, the Court found that the appeals court had misinterpreted the statute, and reinstated the conviction.[239] Justice Powell wrote the majority opinion, joined by Chief Justice Burger and Justices Marshall, Blackmun, and White. Justice Rehnquist wrote the pro-defendant dissent, accusing the majority of having violated the rule of lenity and criticizing the "unfairness" of the result.[240] Justices O'Connor, Brennan, and Stevens joined in the dissent.

(4) *Procedural Issues*

The Supreme Court has not decided many cases where procedural issues—those not based on substantive violations of the law—were raised that were unique to white collar crimes.[241] In two important such cases, however, the Court split in ways that mirror the splits in the "substantive" white collar cases. Although the sample is small, these cases are potentially significant for this article because they test whether the substance/procedure dichotomy discussed above[242] may be a key variable in the white collar/non-white collar voting disparities. These cases arise in areas generally considered to be part of the "law" of white collar investigations and prosecutions—the courts' supervisory powers over grand juries, and the Fifth Amendment as applied in the corporate context.[243]

In the grand jury context, the most significant recent case in which there was substantial disagreement on the Court produced another five-to-four decision. In *United States v. Williams*,[244] the defendant was charged with making materially false statements to banks to influence their actions.[245] After he was indicted, Williams

237. 468 U.S. 63 (1984).

238. 741 F. 2d. 267 (9th Cir. 1984).

239. 468 U.S. at 75.

240. *Id.* at 83. Again, the false statement statute can apply in white collar or non-white collar cases.

241. Furthermore, as noted *supra* Part I.C., standard procedural issues, such as those arising under the Fourth Amendment, rarely arise in white collar cases. *See* Henning, *supra* note 19, at 408 n. 18.

242. *See supra* at Part I.C.

243. *See* Bucy at 418-93; Israel, Podgor, & Borman at 292-715; First at 382-622.

244. 504 U.S. 36 (1992).

245. *See id.* at 38; case was brought under 18 U.S.C. § 1014.

moved to dismiss on the ground that the prosecutor had failed to present "substantial exculpatory evidence" to the grand jury. The district court agreed with Williams, finding that the prosecutor's failure warranted remedy under the courts' "supervisory power," and the Tenth Circuit affirmed.[246] The Supreme Court reversed the dismissal. Justice Scalia wrote the majority opinion, which was joined by Chief Justice Rehnquist and Justices White, Kennedy, and Souter. The majority found that grand juries operate with independence, and are not subject to strict court supervision.[247] Nor, according to the majority, would requiring disclosure of exculpatory materials comport with the historical background of grand juries.[248]

Justice Stevens wrote the dissent, which focused on the dangers of prosecutorial misconduct. In particular, the dissent argued that courts have power to supervise grand juries so as to remedy misconduct.[249] Justice Stevens' opinion was joined by Justices Blackmun, O'Connor, and Thomas—yet another strange lineup. Especially significant is Justice Thomas' vote, a rare split at that point in his tenure from Justice Scalia.[250] Based upon his dissenting opinion in *Evans v. United States*,[251] quoted at the beginning of this paper, it is apparent that the theme of prosecutorial misconduct resonates with Justice Thomas in the white collar crime context. Why that might be so is explored more fully in the next section.

In the corporate Fifth Amendment context, the Court in *Braswell v. United States*[252] once again split five-to-four along strange lines. The majority found that a corporate custodian of records may not rely upon the Fifth Amendment and decline to respond to a subpoena for those records, even if production would be personally incriminating. The Court relied upon the established rule that corporations do not have a Fifth Amendment privilege. The Court also noted that "recognizing a Fifth Amendment privilege on behalf of the records custodians of collective entities would have a detrimental impact on the Government's efforts to prosecute 'white-collar crime,' one of the most serious problems confronting law enforcement authorities."[253] Chief Justice Rehnquist's opinion was

246. *See id.* at 45.

247. *See id.* at 47-50.

248. *See id.* at 51-55.

249. *See id.* at 55-69 (Stevens, J., dissenting).

250. *See* Christopher E. Smith, *The Constitution and Criminal Punishment: The Emerging Visions of Justices Scalia and Thomas*, 43 DRAKE L. REV. 593, 594-96, 610-12 (1995); Christopher E. Smith & S. Thomas Read, *The Performance and Effectiveness of New Appointees to the Rehnquist Court*, 20 OHIO N. U. L. REV. 205, 213-14, 220-21 (1993).

251. 504 U.S. 255 (1992). *See supra* note 213.

252. 487 U.S. 99 (1988).

253. *Id.* at 115.

joined by Justices White, Blackmun, Stevens, and O'Connor. Justice Kennedy's dissent concluded that the majority's holding "avoided and manipulated" core Fifth Amendment principles.[254] The dissent was joined by Justices Scalia, Marshall, and Brennan, a line-up rarely otherwise seen in Supreme Court Fifth Amendment cases.[255]

C. Common Patterns in White Collar Cases

Across a range of substantive and procedural white collar issues, conservative and liberal justices abandon their usual pro-government and pro-dissent positions. The common "Rehnquist Court" conservative majority, apparent across the spectrum of non-white collar cases discussed in Part II, has been widely deemed to be "pro-government" and "anti-defendant." As one commentator has noted, "Whereas the opinions of the Warren Court are often described as 'pro-defendant,' the opinions of the Rehnquist Court can be characterized as 'pro-state' or 'anti-defendant.'"[256] *Except in white collar cases*, we should add. Major white collar decisions involving securities fraud, tax fraud, bribery, extortion, financial crimes, and procedure evince either a complete reversal of the usual Rehnquist Court majorities' approaches to criminal cases, or, at a minimum, the dissolution of those blocs and their reconstitution in unexpected forms. The next section addresses the possible reasons for this white collar paradox.

IV. An Analysis of White Collar Judicial Politics

It is hard to dispute that the Supreme Court justices in white collar cases act in ways that appear to be, at a minimum, inconsistent with those justices' general criminal justice philosophies. The question, then, is whether we can identify variables that determine the justices' conceptions of issues in these cases—variables, not deducible from the cases' rhetoric alone, that drive the voting. Professor Kelman has noted that "legal argument has two phases, interpretive construction and rational rhetoricism, and that the former, a vital step which undercuts the rationality of the latter, goes virtually unexamined."[257] In this view, a judge must first translate

254. *Id.* at 120 (Kennedy, J., dissenting).

255. For more typical dissenting line-ups in Fifth Amendment cases, see *Rhode Island v. Innis*, 446 U.S. 291, 305 (1980) (Justices Brennan, Marshall, and Stevens dissented from a decision that the defendant had not been "interrogated" for *Miranda* purposes), and *North Carolina v. Butler*, 441 U.S. 369, 377 (1979) (Justices Brennan, Marshall, and Stevens dissented from a decision declining to require an express waiver under *Miranda*).

256. Harcourt, *supra* note 78, at 1221.

257. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 591-92 (1981).

real-world controversy into substantive legal controversy ("interpretive construction"). It is the process of framing and contextualizing the controversy that goes unexamined; the usual focus is instead on the language of the opinion, which expresses the supposedly rational analysis ("rational rhetoricism") by which the judge reaches the legal conclusion.[258] I believe it is fair to say that the Supreme Court's white collar crime cases are a prime example of unexamined "interpretive construction."

In this section, I use the cases discussed in the last two sections to examine the unarticulated determinants of the white collar case voting patterns. First, I ask whether the white collar paradox can fairly be said to be attributable to class bias—the "common" perception of the Court's white collar jurisprudence that extends back to Sutherland's original focus. Because I believe that this "traditional" explanation for the inconsistency does not survive close scrutiny, I next explore other explanations for the justices' apparent inconsistencies. For example, it could be that the types of issues usually raised in the white collar cases (statutory rather than constitutional, substantive rather than procedural), rather than the white collar context itself, determine the voting. Or, it may simply be that conservative justices seek to reign in big federal government, especially in areas involving economic regulation and/or federal intrusion into areas of traditional state responsibility. Finally, I explore whether the paradox might rather be due to the justices' views of the very process of criminalization, as applied in the white collar context. Because I believe that the latter is the case, I conclude with a call for a more direct, and less hypocritical, approach to issues of white collar criminalization.

A. Socio-Economic/Class/Race-Based Decision-Making

An overview of the cases discussed in Parts II and III above does reveal the basis for the common impression that the defendants' socio-economic status influences the Supreme Court justices' criminal case votes. As noted above,[259] at a minimum the *perception* is that white collar crime is crime of the upper-middle and upper-classes, while other kinds of crime are committed primarily by lower-status defendants. To again borrow Professor Kelman's language, in this light the justices' votes in white collar cases can be seen as the product of "result determinism;" that is, these votes "correspond to the political program of a social group, and the interpretive construction may simply serve to *cover up* the result-oriented, overtly political

258. *Id.*
259. *See supra* note 24.

nature of resolving disputes."[260] Conservative justices' politics is rooted in their obeisance to the dominant socio- economic class, the argument would go, while liberal justices' politics is that of oppressed social and racial groups. Because of these political orientations, the justices' criminal law ideologies metamorphose in the land of white collar crime. This section tests that argument.

(1) Imagery and Bias in Non-White Collar Crime Cases

For Warren-Court era justices Brennan and Marshall, and their sometimes Burger/Rehnquist-Court allies Justices Stevens and Blackmun, there does appear, in the non-white collar context, to be an implicit and even explicit class (and race) bias.[261] As noted above, in the non-white collar context, the pro-defense dissents often emphasize that the Court's pro-government decisions disfavor the uneducated,[262] the poor and urban,[263] and the non-white.[264] Class and race issues are rarely, if ever, raised explicitly in the Court's white collar cases; nonetheless, the perception is that most white collar defendants do not fall into the groups that the liberal-dissenters seek to protect in the non-white collar cases.[265]

A race/class-based explanation of criminal case voting patterns has been proffered by a number of commentators. One study of the Warren Court's criminal cases, for example, concluded that those cases "project a consistent image of the defendant as an impressionable and vulnerable young adult, poor and uneducated, in need of protection from an overbearing police force. Special

260. Kelman, *supra* note 257, at 670 (emphasis in original).

261. One commentator noted that "Justice Marshall voted very consistently in favor of defendants.... Yet he occasionally made exceptions, usually when the defendant was accused of a white collar crime.... [T]o Justice Marshall, the distinction between violent crime and white collar crime may have appeared quite consistent with his own ideological system." Robert E. Riggs, *When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900-90*, 21 HOFSTRA L. REV. 603, 693 (1993). This commentator, however, does not describe the "ideological system" that produced the voting dichotomy. Presumably, he was speaking of an ideology focusing on the need to protect members of lower socio-economic and minority racial groups from abuse of governmental power.

262. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting) (criticizing the majority holding as "confin[ing] the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few").

263. *See* Maryland v. Garrison, 480 U.S. 79, 97 (1987) (Blackmun, J., dissenting, joined by Justices Brennan and Marshall) ("Approximately 4.1 million of those [apartment] units are in central cities or metropolitan areas. Such units are home to a large number of lower-income families and disproportionate number of minority families.").

264. *See* Florida v. Bostick, 501 U.S. 429, 450 (1991) (Marshall, J., dissenting, joined by Justices Blackmun and Stevens) (*see supra* note 102).

265. *See supra* at Part III. Whether this perception conforms with reality is discussed *infra* at Part IV.A.2.

emphasis is almost always placed on the traits that render the defendant disadvantaged: poverty, race, lack of education, youth or mental deficiency."[266] This imagery is consistent throughout the Warren Court's criminal cases,[267] and is used frequently by Warren Court members Justices Brennan and Marshall in their dissents from pro-government Burger/Rehnquist Court decisions.

Conversely, conservatives tend to portray defendants in non-white collar cases as brutish and frightening, not as weak and sympathetic.[268] The conservatives thus focus on the nature of the defendants' conduct, and its impact upon victims, rather than upon the defendants. Consider, for example, Chief Justice Burger's dissent from the Court's five-to-four decision in *Brewer v. Williams*,[269] in which the majority reversed a conviction on the ground that a confession obtained in violation of the Sixth Amendment right to counsel had been introduced at trial. Burger's dissent began, "The result in this case ought to be intolerable in any society which purports to call itself an organized society.... Williams is guilty of the savage murder of a small child; no member of this Court contends he is not."[270] Or consider Chief Justice Rehnquist's dissent from the Court's six-to-three decision in *Payton v. New York*, which required a search warrant for entry into a home. Rehnquist wrote: "I... cannot refrain from commenting on the social implications of the result reached by the Court. Payton was arrested for the murder of the manager of a gas station; [the other defendant] was arrested for two

266. Harcourt, supra *note 78,* 1192. Scholars have debated whether it is more likely that imagery produces ideology, or whether the reverse is true. *See id.* at 1170-1176, *citing* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197 (1990); and J.M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991). For the purposes of this paper, this theoretical debate is largely beside the point; rather, assuming that imagery and ideology correlate—irrespective of which comes first—the question here is whether class- (and/or race-) based imagery/ideology correlate to the voting in the Supreme Court's white collar and non-white collar cases.

267. Harcourt, *supra* note 78, at 1196; for discussions of the effect of race and class in the Warren Court's criminal justice jurisprudence, see Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L. J. 39, 69, 80 (1991); Bruce A. Green & Daniel Richman, *Of Laws and Men: An Essay on Justice Marshall's View of Criminal Procedure*, 26 ARIZ. ST. L.J. 369, 372 & n. 23 (1994); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 63-66 (1996); Tracey Matlin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 723, 812 (1992); Gary Peller, *Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties*, 67 TUL. L. REV. 2231, 2234 (1993).

268. *See* Harcourt, *supra* note 78, at 1199-1204 (discussing images of defendants in Rehnquist Court opinions).

269. 430 U.S. 387 (1977).

270. *Id.* at 416.

armed robberies. [S]urely something is amiss in the process of the administration of justice whereby these convictions are now set aside by this Court . . . ."[271]

Finally, consider the rhetoric in *Callins v. Collins*,[272] in which Justice Blackmun—shortly before his retirement—announced his position that the death penalty is unconstitutional. In response, Justice Scalia wrote:

> Justice Blackmun begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as the case in which to make that statement, one of the less brutal of the murders that regularly come before us—the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us . . .—for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that![273]

In all these cases, the conservatives focus upon the crimes' effects upon society, not upon the need of the criminal justice system to protect defendants' rights. The difference in rhetoric and imagery from the liberals' opinions could hardly be clearer.

(2) Imagery and Bias in White Collar Crime Cases

Why the different approaches in the white collar cases? Why do liberals suddenly seem unconcerned with defendants' rights, while conservatives suddenly seem unconcerned with crime's effects upon society? It may be that the "liberals" are simply more philosophically inclined to hold the relatively wealthy and powerful to the highest standards in the white collar cases; these may not be the sorts of people who, the liberals believe, need the Court's protection. It may also be, as the common wisdom would have it, that the conservatives identify with the white collar defendant.

There is not much in the way of explicit rhetoric or imagery in the white collar cases' descriptions of the defendants to support this conclusion. That imagery does, however, emerge in the sentencing process, and there invites comparison to the imagery in the non-white collar cases. In their 1988 study of white collar sentencing, Professor

271. Payton v. New York, 445 U.S. 573, 603 (1980) (Rehnquist, C.J., dissenting).
272. Callins v. Collins, 510 U.S. 1141 (1994).
273. *Id.* at 1141 (1994) (Scalia, J., concurring in denial of certiorari) (citation omitted).

Stanton Wheeler and his colleagues interviewed fifty-one federal judges concerning the white collar sentencing process.[274] One factor in sentencing was the judges' tendency to relate to the white collar defendant, who they perceived to be of similar socio-economic status as themselves.[275] As one judge said, avoiding bias was difficult "where people like you are standing in front of you."[276] Commentators likewise have concluded that socio-economic factors traditionally lead judges to be "soft" on white collar criminals. One author, for example, examined the treatment of defendants in the savings and loan scandals, and concluded that "higher-class crooks are treated leniently."[277]

But, if we extrapolate these observations in the sentencing context to the outcome of Supreme Court cases, why—as the traditional explanation for the white collar paradox would have it—do the conservative justices appear to feel this empathy, while the liberals do not?[278] Perhaps it is the justices' political philosophies and value systems themselves that produce this apparent empathy. On

274. Wheeler, *supra* note 12. Of course, in the world of the Federal Sentencing Guidelines, judges today have far less sentencing discretion than they did at the time of this study. *See* KATHLEEN BRICKEY, CORPORATE AND WHITE COLLAR CRIME 740-42 (1995).

275. Wheeler, *supra* note 12, at 107, 161. *See* Donald Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 882 (1995)("The act of judging others often necessarily involves implicit self-comparison."); Deborah Young, *Federal Sentencing: Looking Back to Move Forward*, 60 U. CIN. L. REV. 135, 140 (1991)(book review of Wheeler, *et al.*)(noting that the interviews "point out the potential bias of judges who identify with white-collar criminals and not with other criminals").

276. *Id.* at 161.

277. JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE vi (1998). Professor Reiman goes on to conclude, "[T]here is considerable evidence that the American criminal justice system has been used throughout its history in rather unsubtle ways to protect the interests of the powerful against the lower classes and political dissenters." *Id.* at 166. As the Supreme Court itself noted in upholding the constitutionality of the federal sentencing guidelines, the guidelines sought to correct the "too lenient" treatment afforded "major white-collar criminals." Mistretta v. United States, 488 U.S. 361, 376 (1989).

278. Certainly, the socio-economic backgrounds of the individual justices do not explain this disparity, for those backgrounds simply do not correspond to the justices' political views. Among the liberals, some have come from privileged backgrounds (*e.g.*, Justices Breyer and Stevens), while others have come from modest backgrounds (*e.g.*, Justices Brennan, Ginsburg, and Marshall). Some conservatives have likewise come from privileged backgrounds (*e.g.*, Justices Powell and O'Connor), while others decidedly have not (*e.g.*, Justices Rehnquist, Thomas, and Burger). *See* CLARE CUSHMAN, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789 - 1995 476-80, 501-04, 531-34 (1995); LEON FRIEDMAN & FRED L. ISRAEL, JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS, VOL. 5, 1875-77 (1997); WILLIAM D. PEDERSON & NORMAN W. PROVIZER, THE GREAT JUSTICES OF THE U.S. SUPREME COURT: RATINGS AND CASE STUDIES 281-83 (1993).

the most obvious level, the argument goes, conservatives identify with dominant racial and social groups, and are averse to criminalizing activities primarily associated with these groups.[279] More subtly, for the conservative justices, economically successful defendants may seem to be more morally deserving than other defendants.[280] According to one commentator, Justice Scalia's moral view, for example, leads him to be "deferential toward society's subornation of its underdogs but not its entrepreneurs."[281] Thus, a conservative justice might wish to scrutinize carefully society's punishment of a "successful" defendant with whom that justice identifies.

For the liberals, on the other hand, the white collar defendant is simply not a member of the group that needs protecting from overreaching and abusive government practices. Moreover, as Professor Coffee has written, in response to claims that the typical white collar statute is unfairly vague and overbroad, "liberals may claim that the traditionally limited use of the criminal sanction was class-biased and that a more pervasive use of it simply corrects the imbalance."[282] Thus, not only do liberals perceive the white collar defendant as undeserving of the Court's protection, but they may also see enforcement of white collar criminal statutes as a way to help correct societal inequities.

(3) Evaluating the Traditional Explanation

I must admit that there is much in the foregoing explanations that is appealing. It is undeniable that class- and race-based inequities have existed and continue to exist throughout the criminal justice process. One sympathetic to efforts to rid the system of bias might find comfort in placing upon the personal, philosophical biases of judges the blame for those judges' apparently hypocritical applications of the criminal law. The class-based explanation, however, depends upon the validity of Sutherland's understanding of the nature of white collar crime. As shown above, Sutherland's definition—which focuses upon the high social status of the defendant[283]—comports neither with the class of persons charged

279. *See* G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutorial Discretion*, 46 HASTINGS L.J. 1175, 1190-91 (1995) ("Many conservatives do not speak of [white collar crime] because they might have to attack members of their own socioeconomic class or race").

280. Stephen E. Gottlieb, *Three Justices in Search of a Character: The Moral Agendas of Justices O'Connor, Scalia, and Kennedy*, 49 RUTGERS L. REV. 219, 235-36 (1996).

281. *Id.* at 235-36.

282. John C. Coffee, *"Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 220 (1991).

283. *See supra* Part I.A. & note 20.

under crimes universally deemed to be "white collar,"[284] nor with the white collar cases the Supreme Court has decided.[285]

The most comprehensive study to date of white collar criminals concludes that the typical white collar defendant is not of high socio-economic status but is decidedly "middle class."[286] In fact, as one commentator has noted, even this conclusion exaggerates the typical white collar defendant's status, for the statistics show that "a lot of white collar criminals have characteristics that are correlative of common criminality: They are poor, black, unemployed, male, or young offenders who are entrepreneurs of non-specialized criminal careers in large cities."[287] And other statistics undercut a socio-economic-based explanation for the white collar crime voting disparity. For example, most of the white collar defendants in the study referenced above were not represented by private attorneys, and nearly half had prior arrest records—the substantial majority of those for non-white collar crimes.[288] Moreover, several commentators have noted that higher-status defendants tend to be *more* likely to be targeted by prosecutors and, if charged and convicted, *more* likely to be sentenced to lengthy prison sentences than lower-status defendants.[289]

Of course, it is possible that Supreme Court justices' votes are affected by the status of the defendants before the Court, not by the overall sets of defendants who have been charged with that particular crime. But, as noted in more detail above, many of the "white collar" defendants in the cases the Court has decided simply do not fall within any definition of "high status."[290] An analysis of the cases thus does not support the class/race-based explanation of the white collar crime voting disparities. Nor do the demographics of these defendants support this conclusion.

B. Issue Definitions and the "Substance" of Statutory Construction

One explanation for the voting disparities is that they are the product of the types of narrow legal issues raised in the two sets of cases. Perhaps the types of issues commonly raised in white collar cases—rather than the characteristics of the white collar defendant—therefore drive the voting patterns. For example, as discussed in Part

284. *See supra* Part I.A.
285. *See supra* Part III.
286. *See* Weisburd, *supra* note 29.
287. John Braithwaite, *Crime and the Average American*, 27 LAW & SOC'Y REV. 215, 221 (1993).
288. Weisburd, *supra* note 29, at 67.
289. *Id.* at 143; Braithwaite, *supra* note 286, at 218.
290. *See supra* Part III.

III,[291] issues of statutory construction, including due process issues of vagueness and overbreadth, predominate in the white collar cases, perhaps reflecting a legislative tendency to overcriminalize in the area. On the other hand, non-white collar cases rarely turn on these issues, but focus on "procedural" issues. This section analyzes whether it is the type of specific issues common to the two sets of cases that drive the voting patterns.

(1) White Collar Crime and the "Substance" of Statutory Construction

In a broad array of areas, the Court has considered the construction of white collar criminal statutes. In each of these areas, we have seen both individual justices voting in ways that appear inconsistent with their individual criminal justice philosophies and alignments of justices rarely seen in non-white collar criminal cases. This pattern holds whether the issue involves invoking the doctrine of lenity in construing ambiguous statutes[292] or analyzing common law or Congressional intent.[293]

Often, the very nature of criminalizing white collar activities appears to invite these issues. In this area, Congress routinely enacts statutes the terms of which are vague and the application of which is subject to inconsistent and potentially unfair interpretation.[294] There are at least two possible reasons for this. First, activities that are primarily economic in nature are necessarily hard to define; as Sanford Kadish has observed, it is difficult for a criminal statute clearly to distinguish illegal behavior and "acceptable aggressive business behavior."[295] Certainly this has been true in the Court's

291. *See id.*

292. This is true, for example, in the securities fraud cases discussed *supra* at notes 151-84 and accompanying text.

293. *See, e.g., McNally*, 483 U.S. 350 (common law of fraud); *Evans*, 564 U.S. 255 (Congressional intent).

294. *See* Podgor, *supra* note 19, at 398-400 (discussing RICO and mail fraud statutes as examples of vague white collar criminal statutes). As Professor Podgor notes, Justice Scalia himself made this point in connection with the Court's definition of the RICO pattern requirement as "continuity plus relationship." H.J. Inc. v. Northwestern Bell Telephone, 492 U.S. 229, 239 (1989). Scalia, noting that the pattern requirement applies to both civil and criminal RICO cases, *id.* at 250-55 (Scalia, J., concurring), deemed the Court's definition to be "about as helpful [for lower courts] as 'life is a fountain.'" *Id.* at 251.

295. Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 425 (1963). A number of scholars have criticized Kadish's view of the criminalization of white collar activities. *See, e.g.*, Coffee, *supra* note 281, at 236 (questioning Kadish's assumptions about public attitudes towards the criminalization of economic activities); Harry V. Ball and Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 STAN. L. REV. 197. 200-96 (1965) (questioning Kadish's categorizations of the types of economic crimes and his conclusions that only some types

attempts to define insider trading.[296] And this difficulty extends beyond the purely economic arena. As noted above, for example, the Court has found it hard to distinguish legitimate from extortionate demands for campaign contributions,[297] and mail and fraud from mail fraud.[298]

Second, as Professor Stuntz has argued, it may be that the constraints the courts have placed on law enforcement in the criminal procedure context have led Congress to expand the scope of white collar criminal statutes.[299] According to this argument, the motivation for broadening the scope of the substantive criminal law is particularly strong where Congress may perceive that the defendants are wealthy and therefore that the government is at a comparative disadvantage.[300] Thus, "white collar offenses, unlike traditional street crimes such as burglary, robbery, or homicide, cover a vast range of conduct that neither Congress nor prosecutors could plausibly wish to punish."[301] Uncharacteristically, the liberal justices often approve of these efforts by a "law and order" Congress to get "tough" on crime.

In this light, the task of defining white collar crime is largely left to prosecutors and the courts. As to the former, concerns with vagueness and overcriminalization overlap with those relating to prosecutorial discretion. If white collar statutes often cover activity that neither Congress nor prosecutors would consider criminal, then those statutes by definition allocate a vast amount of discretion to prosecutors. The focus thus shifts from police conduct—the subject of the bulk of the Court's non-white collar criminal jurisprudence,[302] where conservatives tend to favor the government—to prosecutors.[303]

Prosecutors' broad readings of white collar statutes, particularly during the 1980s,[304] inevitably required the courts to assume a larger-than-usual role in setting the parameters of criminal statutes. As Professor Coffee has noted, "the federal law of 'white collar' crime

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are appropriately the subject of criminal sanction).

296. *See supra* at III.B.1.a (discussion of insider trading cases).

297. *See supra* note 213 and accompanying text (discussion of *Evans* and *McCormick*)

298. *See supra* note 229 and accompanying text. For an excellent discussion of the criminalization of fraud, see John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998).

299. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 56-58 (1997).

300. *Id.* at 56-57. As noted in the previous section, this perception is largely inaccurate. Nonetheless, if the perception is widely-held, then the conclusion is justified.

301. *Id.* at 57.

302. *See* Henning, *supra* note 133, at 408.

303. *See supra* note 213 and accompanying text (discussion of *Evans*, 504 U.S. 255, and Justice Thomas' focus on prosecutorial discretion).

304. *See* Robert G. Morvillo & Barry A. Bohrer, *Checking the Balance: Prosecutorial Power in an Age of Expansive Legislation*, 32 AM. CRIM. L. REV. 137 (1995).

now seems to be judge-made to an unprecedented degree, with courts deciding on a case-by-case, retrospective basis whether conduct falls within often vaguely defined legislative prohibitions."[305] Because the legislature is primarily responsible for defining crimes,[306] perhaps conservatives view narrow interpretations of vague white collar statutes as appropriate signals that Congress should do its job.[307]

(2) "Substance" vs. "Procedure" Revisited

The above view of the criminalization of white collar crime also dovetails with the "substance" vs. "procedure" distinction discussed in Part II.[308] If it is true that conservatives favor a jurisprudence that primarily values truth-seeking, while liberals favor a jurisprudence that focuses on fair treatment of defendants,[309] then the values that traditionally govern the justices' approach to criminal law issues do not always apply to issues focused solely on statutory construction.

Thus, in most cases, the conservatives' instincts will be to read white collar statutes narrowly. But if the truth-seeking process is at issue, the justices may well revert to their usual criminal justice philosophies, even in the white collar context. In one recent false statements case, for example, the Court adhered to its usual conservative/pro-government, liberal/pro-defense stance.[310] In *Brogan v. United States*, the majority declined to adopt an "exculpatory no" defense, and found that a defendant can be

305. *See* Coffee, *supra* note 281, at 198; John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1879-80 (1992) (discussing the law of insider trading and extortion by public officials).

306. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1302 (1998) ("If criminal law truly is and shall remain a community practice, and a flexible and dynamic one at that, then the competent forum for that practice must be the legislature, not a constitutional court whose judgments are manifestly less representative, ostensibly final and authoritative, and, thus, difficult to undo").

307. *See* H.J. Inc. v. Northwestern Bell Telephone, 492 U.S. 229, 255 (1989) (Scalia, J., concurring, joined by Justices Rehnquist, O'Connor, and Kennedy) ("No constitutional [vagueness] challenge to [RICO] has been raised in the present case, and so that issue is not before us. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented.").

308. *See supra* Part II.

309. *See supra* Part II (discussion of *Leon*, 468 U.S. 897).

310. Brogan v. United States, 118 S. Ct. 805 (1998). Justice Scalia wrote the *Brogan* majority opinion, which was joined in full by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Thomas—the usual conservative alignment. Concerned about the decision's implications, Justices Souter, *id.* at 812 (Souter, J., concurring in part and concurring in the judgment), and Ginsburg, *id.* at 812 (Ginsburg, J., concurring in the judgment), joined in part and concurred in the judgment, respectively, while Justices Stevens and Breyer dissented, *id.* at 817 (Stevens, J., dissenting).

convicted simply for denying guilt to a government agent.[311] Justice Scalia's majority opinion focused upon the statute's truth-seeking function: "We cannot imagine how it could be true that falsely denying guilt in a Government investigation does not pervert a governmental function."[312] The *Brogan* majority also rejected an argument based on the Fifth Amendment: "Whether or not the predicament of the wrongdoer run to ground tugs at the heart strings, neither the text nor the spirit of the Fifth Amendment confers a privilege to lie." This biting language is rarely invoked by conservative justices in the white collar crime cases. Both the rhetoric and the voting thus appear to be a product of the "truth-seeking" context of this case,[313] rather than the white collar context.

(3) Evaluating the Issue-Based Explanation

Explanations for the voting dichotomy that turn on a "micro" analysis of the types of issues the cases raise are helpful, but, I believe, really prove too much. As to cases turning on statutory construction, there are few if any non-white collar criminal contexts where the conservatives and liberals uniformly flip sides,[314] as they do regularly when construing white collar crimes.[315] As to the white collar statutes' vagueness and the leeway thus granted prosecutors, the Court's conservatives have shown little concern, outside the white collar context,[316] for the vagaries of prosecutors' discretion.[317] Finally, as to the Court's arguable concern for the proper role of the governmental branches, one of the ironies of the white collar cases is that the conservatives in so many of these cases interpret statutes in

311. In so holding, the majority rejected the decisions of at least seven circuit courts. *Id.* at 808, citing Moser v. United States, 18 F. 3d. 469 (7th Cir. 1994); United States v. Taylor, 907 F. 2d. 801 (4th Cir. 1990); United States v. Equihua-Juarez, 851 F.2d 1222 (9th Cir. 1988); United States v. Cogdell, 844 F. 2d. 179 (4th Cir. 1988); United States v. Tabor, 788 F. 2d. 714 (11th Cir. 1986); United States v. Fitzgibbon, 619 F. 2d. 874 (10th Cir. 1980); United States v. Chevoor, 526 F. 2d. 178 (1st Cir. 1986).

312. *Id.* at 808.

313. Contrast, for example, Scalia's opinion in *Brogan* from his dissenting opinion in *O'Hagan*, 117 S. Ct. at 2220 (Scalia, J., dissenting), in which he criticized the majority for its unduly broad reading of the securities fraud statute. *See supra* notes 181-84 and accompanying text.

314. This does occur in some of the firearms cases the Court has considered. *See infra* note 323.

315. *See, e.g., Dirks*, 463 U.S. 646; *O'Hagan*, 117 S. Ct. 2199; *Cheek*, 498 U.S. 192; *Evans*, 504 U.S. 255.

316. *See Evans*, 504 U.S. 255; *Williams*, 504 U.S. 36.

317. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (in rejecting a challenge to the death penalty as racially-biased, the conservative majority noted that "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law'") (quoting 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 160 (1984)).

ways that favor the defendant, even in the face of the clear weight of long-established precedent.[318] Such judicial activism hardly seems to comport with a traditional conservative's view of the Court's proper role, either with respect to the Court's relationship with Congress or the Court's deference to precedent.

Nor does the substance/procedure distinction provide much in the way of a broadly-applicable explanation. As noted in Part III, even in the procedural arena, the Court generally does not hew to its usual criminal case voting patterns when the context is white collar crime. In cases involving grand juries and the corporate Fifth Amendment privilege,[319] liberals and conservatives have joined in alignments we rarely see in the non-white collar procedure cases. Moreover, the substance/procedure distinction is hardly pristine, and there are a number of cases that do not fall clearly within either category.[320] The distinction may be marginally useful in analyzing cases such as *Brogan*[321]—a "substantive" case that raises themes usually addressed in the "procedural" cases— but hardly seems to explain the voting dichotomy in any larger sense.

It may be that these jurisprudential concerns, relating to the proper role of the criminal law (truth-seeking vs. due process) and to the vagaries of statutory construction, are simply too narrowly focused to provide much insight into the Supreme Court's white collar crime cases. If we move from the "micro" level of individual issues to the "macro" level of the political system itself, however, the underpinnings of the white collar voting dichotomy begin to come into focus.

C. The Politics of Limiting Federal Power

Two political dynamics, each of which operates to restrict the role of the federal government, appear to be at work in the white collar arena. First, a number of the white collar cases involve, directly or indirectly, the role of the federal government vis-a-vis the states. Second, a number of the cases also involve the federal government's power to regulate economic activities. Each of these dynamics would appear, at least on its face, to transform the usual criminal justice philosophies in the white collar arena.

(1) The State/Federal Dichotomy

Issues of federalism, and in particular the federalization of crime,

318. *E.g.*, *McNally*, 483 U.S. 350; *O'Hagan*, 117 S. Ct. 2199.

319. *See supra* note 243.

320. *See supra* Part I.C. (discussing *Dotterweich*, 320 U.S. 277, *Braswell*, 487 U.S. 99, and *R. Enterprises*, 498 U.S. 292).

321. 118 S. Ct. 805, discussed *supra* at note 309.

are certainly enjoying a new vogue among the Court and among commentators.[322] In fact, Chief Justice Rehnquist has spoken loudly and clearly on the issue, most recently invoking "the traditional principle of federalism" to conclude that criminal matters "that can be adequately handled by the states should be left to them. . . ."[323] And the Court's 1995 decision in *United States v. Lopez*,[324] in which a five-member conservative majority invalidated a criminal statute under the Commerce Clause, signaled to many the Court's new focus on federalism.[325]

The Court's increased attention to federalism comes after more than two decades of expanding federal jurisdiction over white collar crime.[326] Such broad-ranging statutes as the RICO and money-laundering statutes federally criminalize vast ranges of activities; indeed, a federal RICO case can be based not only upon such crimes

322. *See, e.g.*, Gerald Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789 (1996); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995); Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); Sanford H. Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995). One author recently noted that "more of the current Justices spend more time in opinions talking about federalism . . . than has been so since the 'nine old men' of the 1920's and early 30's." Francis X. Beytagh, *Commentary on 'Perspectives on a Divided Court' by Judge Louis H. Pollak*, 25 CAP. U. L. REV. 307, 313 (1996).

323. CHIEF JUSTICE CRITICIZES TREND TOWARD FEDERALIZATION OF CRIME, 66 U.S.L.W. 2722 (May 26, 1998).

324. 115 S. Ct. 1624 (1995) (invalidating the Gun-Free School Zones Act of 1990).

325. Chief Justice Rehnquist's majority opinion was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. In fact, the conservatives' hostility to the federalization of crime seems not to be limited to constitutional arguments but also to extend to ordinary statutory construction cases. *See* Muscarello v. United States, 118 S. Ct. 1911, 1920 (1998) (Ginsburg, J., dissenting) (the Rehnquist/Scalia/Thomas conservative triumvirate joined in a dissent from the majority's broad reading of a federal firearms statute).

326. Professor Stuntz argues that constitutional limitations on law enforcement have led Congress to federalize crime in areas where the defendants can afford to litigate constitutional claims. *See* Stuntz, *supra* note 298, at 56. Some aspects of white collar crime, however, tend not to support this conclusion. First, as noted in Part I.A.2 *supra*, the white collar defendant often does not have any more resources than the common crime defendant. Further, search and seizure law is largely irrelevant to white collar investigations. *See supra* note 97 (noting that most evidence in white collar cases is developed through the use of subpoenas). Finally, to the extent that the white collar defendant *can* afford private counsel, that defendant is also unlikely to raise Fifth and Sixth Amendment claims relating to confessions because the attorney is likely to advise the client not to talk with investigators. Still, if Congress shares Professor Stuntz's perception, then that perception may have produced the described result. I tend to believe, however, that the vagueness and breadth of many white collar statutes are more likely the result of legislative laziness than of the sort of deliberate calculation Professor Stuntz describes.

as mail fraud, securities fraud, and bank fraud, but also upon the commission of state law crimes such as bribery and extortion.[327] Although enacted in 1970,[328] RICO began to be expansively used by prosecutors in white collar cases only in the 1980s.[329] Likewise, the federal money laundering statute covers a vast array of activities, but is of recent provenance; the statute was enacted in 1986,[330] and expanded in 1988[331] and 1992.[332]

It is not clear, however, just how far this argument will take us, for the issue of over-federalization often seems beside the point in the white collar context. In his critique of the federalization of crime, the Chief Justice has focused not on white collar crime but on common crime.[333] Indeed, the former is an area that often seems ripe for federalization. For example, the regulation of the national securities laws, to quote the Chief Justice, is precisely the sort of matter "that cannot [be adequately handled by the states and] should be undertaken by the federal government."[334] To some extent, the same can be said of the RICO and money laundering statutes, neither of which has been substantially narrowed by the Court.

On the other hand, some white collar cases explicitly raise the federalism issue in areas that arguably *are* plainly unsuited to federalization.[335] For example, as discussed in Part III above,[336] the Court has acted to narrow the federal mail fraud statute, which

327. *See* 18 U.S.C. § 1961. For an example of a criminal RICO case built upon state white collar offenses, see *United States v. Eisen*, 974 F.2d 246 (2d Cir. 1992). For an overview of the RICO statute's applicability to white collar cases, see Paul Vizcarrondo, Jr., RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO), IN WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES 11-1 (Obermaier & Morvillo, eds. 1998).

328. Pub. L. No. 91-452, 84 Stat. 922 (1970).

329. *See* William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 790 (1988); T. Todd Tumbelson, *Tax Fraud and Civil RICO: Implications for Business and Governmental Entities*, 21 U.C. DAVIS L. REV. 1233, 1274 (1988). By 1987, prosecutors had gone so far as to bring a federal tax case under the RICO statute. *See* United States v. Regan, 858 F.2d 115 (1988). For criticism of the government for bringing this case, see Sherry R. Sontag, *Princeton/Newport Case: RICO Stretched Too Far?*, NAT'L L. J., NOV. 20, 1989, at 3; Marcia Chambers, *Sua Sponte*, NAT'L L. J., Feb. 10, 1992, at 15; and Sherry Sontag, *RICO Fades Away on Wall Street*, NAT'L L. J., Sept. 28, 1992, at 3.

330. Pub. L. No. 99-570, 100 Stat. 3207 (1986), codified at 18 U.S.C. §§ 1956-57.

331. Pub. L. No. 100-690, 102 Stat. 4181, 4354 (1988).

332. Pub. L. No. 102-550, 106 Stat. 3678, 4055 (1992).

333. *See supra* note 322.

334. *Id.*

335. *See* Norman Abrams, *Assessing the Federal Government's 'War' on White-Collar Crime*, 53 TEMPLE L. Q. 984, 1004 (1980) ("the federal government's efforts may also encompass more localized crimes, such as domestic commercial bribery and large-scale local embezzlements or frauds. One can fairly ask whether such cases should not be left to state and local law enforcement").

336. *See supra* Part III.

prosecutors have used in both run-of-the-mill fraud[337] and local political corruption[338] cases. Thus, in *McNally*, the majority wrote,

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[339]

Even more pointedly, the conservative dissenters later criticized the Court's *Evans* holding, which expanded the reach of the federal extortion statute into local corruption cases:

> The Court's construction of the Hobbs Act is repugnant... to basic tenets of federalism. Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials.[340]

Indeed, this deference to local law enforcement prerogatives complements the conservatives' tendency, in criminal procedure cases, to limit federal constitutional restrictions on law enforcement practices.[341]

In contrast, for liberals, the federal government can and should play a role in enforcing the criminal law so as to protect society. As one commentator has noted, it is appropriate for the national government to step in when the states have failed to take appropriate action; moreover, it is not appropriate—according to this argument—for the Court to substitute its own judgment for that of the political branches when it comes to issues of federalism: "Returning more power to the States, especially through an instrumentality as ill-equipped to make such policy judgments as the Supreme Court, provides no assurance that the issues of interest to most Americans will be addressed effectively."[342]

The white collar cases thus show that principles of federalism can explain some, but far from all, of the voting anomalies in those cases. A desire to return power to the states is applicable to fraud and local corruption cases, for example, but is largely irrelevant to cases in such areas as federal tax and securities fraud, where state enforcement would be nonsensical.

337. *See, e.g., Maze*, 414 U.S. 395.

338. *See, e.g., McNally*, 483 U.S. 350.

339. 483 U.S. at 360.

340. 504 U.S. at 290 (Thomas, J., dissenting).

341. *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 247 (1983).

342. Beytagh, *supra* note 321, at 314.

(2) Protection of the Market Economy

Perhaps another traditional liberal/conservative political policy split, that relating to the federal government's proper role in regulating economic activities, may also help explain the white collar case voting patterns. In analyzing the Commerce Clause in the context of the political system itself, one commentator has noted that, "[i]n addition to establishing a national government with enumerated powers, constrained by the doctrine of federalism, the Constitution also provides for the operation of a national market economy. This is done largely by allowing for the free flow of commerce among the states and by protecting the institution of private property."[343] In this light, just as the conservative justices' political instincts may lead them to seek to restrict the federal government's intrusion into areas of state criminal law enforcement, so may those instincts lead them to seek to restrict the federal government's intrusion into the functioning of the market economy.[344] Likewise, the liberals may tend to perceive the federal role in both of the these areas as both appropriate and desirable.

When it comes to securities regulation, for example, it thus makes sense that the conservatives would seek to restrict criminalization by invoking the doctrine of lenity and narrowly reading statutory provisions, as Justice Scalia did when rejecting the misappropriation theory as a basis for insider trading liability.[345] In this view, the market economy by its nature functions most efficiently when left to self-regulation; government interference, even by way of white collar criminal prosecutions, simply promotes inefficiency. It thus also makes sense in *O'Hagan* that Justice Thomas and Chief Justice Rehnquist would chastise the majority for adopting a statutory interpretation that "fails to provide a coherent and consistent interpretation" of liability.[346] Incoherent statutory interpretations could, so the argument goes, produce uncertainty and inefficiency in

343. Richard A. Champagne, *The Problem of Integrity, Tradition, and Text in Constitutional Interpretation*, 72 NEB. L. REV. 78, 85-86 (1993).

344. *See* generally Stephen F. Gottlieb, *The Moral Agendas of Justices O'Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 229 (1996) (noting that some Supreme Court cases illustrate these justices' "support for economic conservatism which stresses free markets and official noninterference"). Likewise, the conservative justices may believe that the policing of some white collar activities is better left to civil enforcement mechanisms. For a discussion of the overlap between the civil and criminal law in this context, see Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models, supra* note 304, at 1879-80; and Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

345. United States v. O'Hagan, 117 S. Ct. at 2220 (Scalia, J., dissenting in part); *see supra* note 181.

346. *Id.* at 2221 (Thomas, J., dissenting in part).

the operation of the securities markets in particular, and the market economy in general. Finally, in the tax context, it also makes sense that the conservatives would vote to impose on the government an onerous willfulness requirement, thus seeking to ensure that the government's power to criminalize tax fraud would be limited to only the most egregious cases.[347]

The more liberal interpretation of the securities laws, on the other, evinces an entirely different perspective. In *Dirks*, for example, the Blackmun/Brennan/Marshall dissent criticized the pro-defendant conservative majority for "tak[ing] still another step to limit the protections provided investors . . . ."[348] Likewise, the liberal/moderate *O'Hagan* majority turned to policy arguments when approving the misappropriation theory: "The theory is . . . well-tuned to an animating purpose of the Exchange Act: to insure honest securities markets and thereby promote investor confidence."[349] A federal government actively seeking to regulate the economy—and to broadly enforce its criminal tax laws[350]—is just the sort of image over which the traditional liberal/conservative political debate is cast.

(3) Evaluating the Federal/Political Explanation

It thus appears that political views over the federal government's role vis-a-vis the states and the market economy may do much to explain the white collar voting dichotomy. But it is not clear how far this explanation can take us. A desire to return power to the states is applicable to fraud and local corruption cases, for example, but is largely irrelevant to cases in such areas as federal tax and securities fraud, where state enforcement would be inappropriate. Although the market economy focus *is* relevant to the latter areas, it is not relevant to such issues as the scope of grand juries' powers.

Nor does federalism explain the broader philosophical inconsistencies displayed in the range of criminal cases. First, something is amiss in a universe in which conservatives, under the guise of obeisance to federalism, adopt a *laissez faire* philosophy in cases involving the government's role in the market economy, while at the same time voting (in the Fourth Amendment context) to expand state and *federal* law enforcement's power based upon "the public interest in preventing drug traffic"[351]—which is the product of market demand, after all—and to support (in the substantive due process context) the criminalization of private, noncommercial,

347. *See Cheek*, 498 U.S. 192, discussed *supra* note 188 and accompanying text.
348. 463 U.S. at 667. *See supra* note 162 and accompanying text.
349. 117 S. Ct. at 2210.
350. *See* 117 S. Ct. at 2212 (Blackmun and Marshall, JJ., dissenting).
351. United States v. Mendenhall, 446 U.S. 544, 560 (1980) (Powell, J., concurring).

consensual sex—a direct governmental intrusion into the private sphere.[352] Conversely, it still seems inconsistent for liberals instinctively to support *federal* prosecution of corrupt local officials, for example, while at the same time placing substantial constraints on law enforcement evidence-gathering efforts. Concededly, the distinction between the liberal/"fairness of the process" and conservative/"truth-seeking" approaches may explain some of these apparent inconsistencies, but I suspect something deeper, and more profound, is at work in these cases.

D. Criminalization and the Weighing of "Harm"

As Professor Henry Hart noted over thirty years ago, courts consistently face issues of criminalization, and yet rarely if ever clearly articulate the boundaries beyond which the state may not invoke the criminal sanction.[353] In the classic terms of the debate between H.L.A. Hart and Lord Devlin (the "Hart-Devlin Debate"), the contest is between "liberalism" (the view that preventing harm to others is the proper basis of criminalization), and "legal moralism" (the view that inherently immoral acts can be criminalized irrespective of the harm caused).[354] Under the latter approach, criminal laws may be justified by their roles in maintaining social order; in a sense, the "harm" to be prevented is the harm to society rather than to an identifiable victim. If, along Hart-Devlin lines, liberals and conservatives have opposing (albeit seldom explicitly stated) views of the proper bases of criminalization, then perhaps those views lead the groups to perceive—consistent with each group's ideology—common crime and white collar crime as fundamentally different.

(1) The Perceived Harm in Non-White Collar Crime Cases

In non-white collar cases, the rhetoric and imagery vividly illustrate these divergent conceptions of the notion of harm. First, as

352. *See Hardwick*, 478 U.S. 186, discussed *supra* note 134 and accompanying text.

353. *See* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958). As Hart wrote,

> If one were to judge from the notions apparently underlying many judicial opinions, and the overt language even of some of them, . . . a crime is anything which is *called* a crime, and a criminal penalty is simply the penalty provided for doing anything which has been given that name. So vacant a concept is a betrayal of intellectual bankruptcy.

Id. at 404 (citation omitted).

354. *See* Jeffrie G. Murphy, *Symposium Issues in the Philosophy of Law: Participant Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 75 (1995) (quoting Joel Feinberg, *Some Unswept Debris from the Hart-Devlin Debate*, 72 SYNTHESE 249 (1987)). Of course, the subject of the Hart-Devlin debate was the criminalization of sodomy in Britain.

discussed in detail above,[355] in cases involving violent crime, there is a stark distinction between the conservative focus on the harm to the victim and society, and the liberal focus on the fairness to the defendant. This is clear through a wide range of "procedural" cases. Second, the pattern repeats itself, in a slightly different guise, in substantive due process cases and in Eighth Amendment cases not involving violent crime. I will focus on one example of the former, *Bowers v. Hardwick*,[356] and one of the latter, *Harmelin v. Michigan*[357]—both hotly-contested, highly-politicized cases decided by five-to-four margins, in which the liberal and conservative blocs appear to view the nature of criminalization quite differently.

In the Eighth Amendment context, first consider Justice Kennedy's *Harmelin* opinion, joined by Justices O'Connor and Souter,[358] in which he concurred with Justice Scalia and Chief Justice Rehnquist in upholding a life sentence without parole for a first-time narcotics offense. To justify a finding that the crime was sufficiently serious to merit the punishment, Kennedy wrote, "Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent, is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave *harm to society*."[359]

Justice White's dissent in *Harmelin*, joined in whole or part by Justices Blackmun, Stevens, and Marshall, represents a different conception of the "harm" that may justify punishment. In assessing the validity of the sentence under the Eighth Amendment, Justice White noted that, "Unlike crimes directed against persons and property of others, possession of drugs affects the criminal who uses the drugs most directly."[360] Because the crime involved no direct victim, White suggested, the defendant's "moral guilt" was less than

355. *See supra* Part II.A.

356. 478 U.S. 186 (1986).

357. 501 U.S. 957 (1991).

358. This opinion was issued during Justice Souter's second term on the Court. Since then Souter's voting record in criminal cases has grown substantially more liberal. In 1990 Souter voted for the government in state criminal cases 68% of the time; in 1992, 55% of the time; in 1994, 41.7% of the time; and in 1995, 22% of the time. Richard G. Wilkins, Matthew K. Richards, Scott Worthington, *Supreme Court Voting Behavior: 1995 Term*, 24 HASTINGS CONST. L. Q. 1, 15 (1996).

359. 501 U.S. at 1002 (emphasis added; citation omitted). Kennedy proceeds with a litany of harms he believes are caused by narcotics. *See id.* Apparently, the conservatives do not recognize societal harm from weapons, given their tendency to void, *see* Lopez, 514 U.S. 549, or read narrowly, federal firearms statutes, *see, e.g.*, Caron v. United States, 118 S. Ct. 2007, 2012, (1998)(Thomas, J., dissenting) (the rule of lenity applies to firearms sentence enhancement statute); Bryan v. United States, 118 S. Ct. 1939, 1949 (1998) (Scalia, J., dissenting) (government should have to prove elevated level of willfulness in firearms prosecution).

360. *See* Harmelin v. Michigan. 501 U.S. 957, 1022 (1991) (White, J., dissenting).

that of violent criminals.[361] In this debate, the conservative/pro-punishment argument focuses not on specific harm to individuals, but on harm to society; the moderate-liberal/restrict-punishment argument focuses on the lack of a direct victim.

Next, consider the implicit and explicit debate over the nature of "harm" and the role of harm in justifying criminalization in *Hardwick*—the rare case directly addressing such issues. In that case, the Court split along predictable conservative/liberal lines. The four-member liberal dissent articulated H.L.A. Hart's classic justification for criminalization[362]—harm to persons or property—and found the Georgia sodomy statute wholly lacking.[363] On the other hand, both the majority opinion[364] and Chief Justice Burger's[365] concurring opinion articulated the classic justification offered by Lord Devlin for criminalization—the enforcement of majoritarian morality—which in turn protects society as a whole.[366]

The *Harmelin* and *Hardwick* justifications can be seen as two sides of the same coin; as Lord Devlin argued, it is the moral fabric of society itself that the criminal law seeks to protect.[367] But in his *Hardwick* dissent, Justice Blackmun disagreed that an invocation of morality alone can justify criminalization: "This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, let alone an interest that can justify invading the houses, hearts, and minds of citizens...."[368] Why Justice White was more inclined to find absence of harm in *Harmelin* than he was in *Hardwick* is not clear (though we could speculate); but the fact remains that the pro- defendant, liberal approach in each case seeks to restrict the government's power (either to criminalize or to punish) based upon the complete (*Hardwick*), or relative (*Harmelin*), absence of perceived harm the defendant caused.

(2) The Perceived "Harm" in White Collar Crime Cases

Commentators from Sutherland on have taken note of the vast

361. *Id.* at 1023.

362. H. L. A. Hart, IMMORALITY AND TREASON, reprinted in THE LAW AS LITERATURE 220, 225 (1961).

363. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting).

364. *Id.* at 196.

365. *Id.* at 196. (Burger, C.J., concurring) (concluding that "millennia of moral teaching" justify the result).

366. *See* Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for Hidden Determinates of* Bowers v. Hardwick, 97 YALE L. J. 1073, 1093-96 (1988).

367. ROBERT M. BAIRD AND STUART E. ROSENBAUM, PATRICK DEVLIN, THE ENFORCEMENT OF MORALS AND THE LAW, 15, 19-20 (1988).

368. *See Bowers*, 478 U.S. at 213 (Blackmun, J., dissenting).

economic consequences of white collar crime. Many of these commentators' conclusions, including the observation that white collar crime produces greater total harm than non-white collar crime, seem indisputable.[369] Moreover, judges take note of the consequences of white collar crime, particularly in sentencing.[370]

But the perceived harm from white collar crime is subject to at least two qualifications. First, with respect to the criminal enforcement of some economic regulations, there is substantial debate over whether the criminal activities cause any harm. Most obviously, judges and commentators have long-debated whether insider trading harms, or rather benefits, the securities markets and their investors.[371] Second, with respect to some other white collar crimes, there may be general agreement that the activity is harmful, but identifying a particular victim or class of victims is difficult. Bribery, for example, typically involves "victims" only in the sense that the defendant has violated the larger public trust.[372] Likewise, with respect to violations of currency reporting statutes, the Supreme Court itself recently noted that the crime causes little harm: "Failure to report [defendant's] currency affected only one party, the Government, and in a relatively minor way. There was no fraud on

369. *See* Abrams, *supra* note 334, at 1001 (noting that losses from white collar crime exceed those from non-white collar crime); Blakey, *supra* note 278, at 1193 ("Although white collar offenses are less visible than crimes such as burglary and robbery, their overall economic impact may be considerably greater"); Braithwaite, *supra* note 33, at 743 (concluding that the "financial cost of white-collar crime is probably several times as great as the financial cost of all the crimes which are customarily regarded as the 'crime problem'"); Sutherland, *supra* note 23; Reiman, *supra* note 276, at 111-16. Note, however, that white collar prosecutions themselves are costly, both in terms of the vast amounts of prosecutorial resources required, *see* Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models, supra* note 304, at 1889, and the potential interference with and impact upon the market economy, *see* notes 344-46 *supra* and accompanying text.

370. *See* Wheeler, *supra* note 12, at 62-80 (amount of financial loss is key factor in sentencing). For an analysis of how loss is taken into account under the federal sentencing guidelines, see Mark A. Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, 1988-1990, 71 B.U. L. REV. 247 (1991); Ronald Cass, *Sentencing Corporations: The Guidelines' White Collar Blues,* 71 B.U.L. REV. 29 (1991).

371. *E.g., compare O'Hagan*, 117 S. Ct. at 2210 ("investors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law"), *with Dirks*, 463 U.S. at 677 n.14 (arguing that the majority position conforms to the "theory that insider trading should be permitted because it brings relevant information to the market"). *See generally* Richard W. Painter, *et al., Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 168 n.57 (1998) ("Whether insider trading actually harms investors has been much disputed.").

372. *See* Leo Katz, *Criminal Law, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 80, 90-93 (Dennis Patterson, ed., 1996); Andrew Von Hirsch, *supra* note 368, at 1174.

the United States, and respondent caused no loss to the public fisc."[373]

Further, even where the harm is certain and the victim identifiable, many judges in sentencing perceive that harm from white collar offenses may somehow be different from, and less serious than, harm from violent crime.[374] As one commentator has argued, "There is a considerable difference between convicting a corporation which takes money by fraud and convicting an individual who takes it at the point of a gun."[375] Indeed, in the Fourth Amendment context, the Supreme Court has concluded that white collar felonies are relatively less "dangerous" than many non-white collar misdemeanors.[376] "Danger," in this context, is clearly defined as danger of *physical*, rather than *economic*, harm.

It is precisely physical harm, in all its guises, that the conservative approach in non-white collar cases emphasizes.[377] Because this threat is absent from the white collar cases, conservative justices are freed to abandon their usual law-enforcement biases. Causing non-violent economic harm, however, seems to be a much more egregious offense to the liberals, who view the defendants in such cases as both morally lacking and as undeserving of the procedural protections so important to non-white collar defendants.

E. Reevaluating White Collar Criminalization

What this all suggests, I believe, is that the white collar paradox is rooted, ultimately, in the justices' views of the proper role of criminal law. And at this point we come full-circle, for these perspectives are likely rooted in socio-economic biases that parallel the justices' political philosophies. As Mark Kelman has argued, "The most basic task of a dominant group is to identify criminality with disruption, with incidents that break the ordinary flow of distribution of burdens and benefits."[378] There is substantial evidence that conservative justices believe that the criminal law primarily should be designed to protect against physical injury to individuals (violent crimes) and general injury to society (narcotics offenses, sodomy).[379] For conservatives, then, "disruption" means threats to

373. United States v. Bajakajian, 118 S. Ct. 2028, 2039 (1998).

374. *See* Wheeler, *et al.*, *supra* note 12.

375. Braithwaite, *supra* note 33, at 748.

376. Tennessee v. Garner, 471 U.S. 1, 14 & n.12 (1984).

377. *See supra* note 78 (discussion of rhetoric and imagery in non-white collar cases). The only exception to this emphasis seems to arise in cases where conservatives perceive that the moral fabric of society is threatened. *See supra* notes 356-68 and accompanying text.

378. Kelman, *supra* note 257, at 671.

379. Perhaps all-too-predictably in light of the surrounding political debate, firearms offenses appear not to threaten the sort of harm that arouses the conservative justices'

"law and order" as measured by the physical safety of society (or at least its middle and upper classes), or by the security of its moral structure; criminalization is or should be constructed to minimize such threats. Correspondingly, criminalization of white collar activities—which do not involve threats to individuals' physical safety or society's moral fabric[380] – itself threatens different kinds of disruption: that of the free flow of the market economy, and that of the appropriate allocation of state and federal powers.

The liberal justices, on the other hand, are inclined to view non-violent crimes far more seriously than conservatives, and to be willing to broadly sanction those acts, particularly where an individual of status has abused a position of wealth or power. Violent crime may be, to these jurists, largely a product of the defendants' socio-economic environments.[381] But with the white collar criminal, who has an advantageous socio-economic position and has abused it, there is little need to restrict the government's ability to prosecute and punish.

If I am right, then we have a solution to the white collar paradox, but one that is more unsettling than the "traditional," socio-economic explanation. Rather than simply identifying with – or not identifying with – the white collar defendants, the justices seem to lose their philosophical bearings in these cases. The result is cases in which the rhetoric is both hypocritical and result-driven.

The solution is for the Court to forego its hesitation to squarely address appropriate limitations on the government's power to criminalize. Surely, all the justices agree that there is *some* limit to criminalization; those who argue that society deems acts to be "wrong" because they are crimes[382] have the cart before the horse. But, I suggest, the Court has placed itself in an untenable position by not confronting the issue, except in the rare case, like *Hardwick*, where it is unavoidable.[383] The result of not facing the criminalization issue is that the justices, in the white collar cases, vote in ways that appear inconsistent and hypocritical when compared to their voting in

concern. *See supra* note 324.

380. *See supra* note 37.

381. The liberal/conservative criminal law debate is often cast in terms of "determinism" (a defendant's acts are caused by preceding factors) vs. "intentionalism" (a defendant's acts are the product of free will). *See* Kelman, *supra* note 257, at 597.

382. *See, e.g.*, Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L. J. 1533 (1997).

383. That is not to say that the criminalization discussion in Hardwick evinced intellectual honesty; in the majority and concurring opinions, the contrary is true. *See, e.g.*, Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988).

non-white collar cases. Consistency will require that the justices apply their individual conceptions of criminal law to both white collar and non-white collar cases.

In practical terms, facing the white collar criminalization issue will often mean declining to rewrite a facially inadequate criminal statute. When a legislature attempts to criminalize activities the margins of which will be difficult to define, the body should give the matter the deliberation it requires. When the *Court* undertakes that task, the outcome is poorly-reasoned decisions not based upon sound jurisprudence. Thus, for example, the *O'Hagan* Court might have squarely faced the impropriety of choosing to interpret a statutory scheme in a way that effectively required the justices to write the law.[384] A conservative justice might admit that the scope of harm that insider trading causes is difficult to identify, and require Congress to draw the boundaries of criminalization carefully. A liberal justice might admit, in the same context, that economic harm is just as important as physical harm, and encourage Congress to provide the courts with guidance in enforcing the securities laws. The same analysis applies, for example, to the political corruption cases. In *McCormick* and *Evans,* the Court might thus have concluded that the defendants' acts were not within the clear language of the statute and declined to attempt to concoct its own language, particularly when that language turned out to be well-nigh incomprehensible.[385]

In this context, the Court would do well to heed Justice Scalia's warning, in the RICO context, that Court-defined, vague statutory terms are constitutionally suspect.[386] It is no response to rely upon prosecutorial discretion to limit the reach of such expansive statutory interpretations, for prosecutors are human, and human nature is all too-often to use power to the fullest extent granted.[387] At root is a political question for the Court—at what point must it decline to compensate for Congress' failure to consider rationally and carefully statutory prescriptions of white collar criminal activity. It may be, as Professor Bilionis has written in response to Henry Hart, that "[c]riminal law choices are controvertible, fundamentally political, and thus best left to the political departments."[388] But concepts of

384. *See supra,* text at notes 181-184.

385. *See supra,* text at notes 209-216.

386. *See supra* note 232.

387. *Cf.* John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime,* 21 AM. CRIM. L. REV. 1, 19 (1983) ("The mail fraud statute is one of several federal statutes whose recent expansion permits the prosecutor to exercise virtually unlimited discretion in defining the kind of behavior on which he intends to focus"). Coffee also characterizes RICO and the Hobbs Act as providing such discretion. *See id.* at n.83.

388. Bilionis, *supra* note 305, at 1294.

due process have meaning, and apply to the criminal law, however "political" the criminalization process may be. And indeed, invalidating an overbroad statute, or declining to construe a statute broadly, returns the issue to the political process by leaving it to Congress to redress the problem.[389]

Conclusion

I am not arguing for a return to the emphasis of Henry Hart and Sanford Kadish on the folly of criminalizing economic regulations. Rather, I suggest that Congress, the courts, and their observers acknowledge that many types of white collar "crimes" are different, in some basic way, from other types of crimes. The resultant harm, and the victims of the harm, are often difficult to identify; even where this is not so, the harm is of a different nature that the harm form non-white collar crimes. These crimes therefore require especially careful legislative deliberation and construction. When those processes have become dysfunctional, the Court should decline to provide the remedy. Instead of acting upon shifting and seemingly hypocritical criminal justice philosophies, the justices could consistently apply substantive constitutional limitations to white collar criminalization.

389. Indeed, Bilionis reaches the same conclusion. *Id.* at 1325 ("When the Court invalidates a vague statute, it in essence remands the statute to the legislature for further deliberation and the making of those basic [policy] choices . . . .")

APPENDIX

Table 1: Non-White Collar Crime Cases

Alabama v. White, 496 U.S. 325 (1990) (possession of marijuana and cocaine)

Andresen v. Maryland, 427 U.S. 463 (1976) (fraudulent misappropriation; false pretenses)

Arizona v. Hicks, 480 U.S. 321 (1987) (possession of stolen property)

Bowers v. Hardwick, 478 U.S. 186 (1986) (sodomy)

Butler v. McKellar, 494 U.S. 407 (1990) (murder)

California v. Acevedo, 500 U.S. 565 (1991) (possession of marijuana for sale)

California v. Carney, 471 U.S. 386 (1985) (possession of marijuana for sale)

California v. Ciraolo, 476 U.S. 207 (1983) (growing marijuana)

California v. Hodari D., 499 U.S. 621 (1991) (possession of cocaine)

Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (drug importation and distribution)

Colorado v. Spring, 479 U.S. 564 (1987) (murder)

Colorado v. Connelly, 479 U.S. 157 (1986) (murder)

Colorado v. Bertine, 479 U.S. 367 (1987) (possession of cocaine, cash & paraphernalia)

Florida v. Bostick, 501 U.S. 429 (1991) (possession of cocaine)

Furman v. Georgia, 408 U.S. 238 (1972) (murder; rape)

Gray v. United States, 118 U.S. 1151 (1998) (murder)

Gregg v. Georgia, 428 U.S. 153 (1976) (armed robbery; murder)

Harmelin v. Michigan, 501 U.S. 957 (1991) (possession of cocaine)

Hayes v. Florida, 470 U.S. 811 (1985) (burglary and rape)

Horton v. California, 498 U.S. 128 (1990) (robbery)

Illinois v. Rodriguez, 497 U.S. 177 (1990) (possession of narcotic with intent to deliver)

Illinois v. Gates, 462 U.S. 213 (1983) (possession of marijuana, weapons & other contraband)

Kuhlmann v. Wilson, 477 U.S. 436 (1986) (murder and weapons)

Maryland v. Garrison, 480 U.S. 79 (1987) (possession of heroin, hash, and paraphernalia)

Maryland v. Buie, 494 U.S. 325 (1990) (armed robbery)

Massachusetts v. Sheppard, 468 U.S. 981 (1984) (murder)

McCleskey v. Kemp, 481 U.S. 279 (1987) (murder; armed robbery)

Michigan v. Summers, 452 U.S. 692 (1981) (possession of heroin)
Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints)
Michigan v. Long, 463 U.S. 1032 (1983) (possession of marijuana)
Minnesota v. Dickerson, 508 U.S. 366 (1993) (possession of cocaine)
Minnick v. Mississippi, 498 U.S. 146 (1990) (murder)
Montana v. Egelhoff, 518 U.S. 37 (1996) (murder)
Murray v. United States, 487 U.S. 533 (1988) (conspiracy to possess and distribute drugs)
New York v. Belton, 453 U.S. 454 (1981) (possession of cocaine)
New Jersey v. T.L.O., 469 U.S. 325 (1985) (delinquency; possession of marijuana)
New York v. Quarles, 467 U.S. 649 (1984) (rape)
Nix v. Williams, 467 U.S. 431 (1984) (kidnapping and murder)
Oliver v. United States, 466 U.S. 170 (1984) (growing marijuana)
Oregon v. Elstad, 476 U.S. 298 (1985) (burglary)
Payton v. New York, 445 U.S. 573 (1980) (murder)
Rawlings v. Kentucky, 448 U.S. 98 (1980) (possession of drugs)
Rhode Island v. Innis, 446 U.S. 291 (1980) (kidnapping, robbery and murder)
Rummel v. Estelle, 445 U.S. 263 (1980) (obtaining money by false pretenses)
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (possessing a check with intent to defraud)
Steagald v. United States, 451 U.S. 204 (1981) (possession of cocaine)
Sumner v. Shuman, 483 U.S. 66 (1987) (murder)
Tennessee v. Garner, 471 U.S. 1 (1985) (burglary)
United States v. Monsanto, 491 U.S. 600 (1989) (RICO; firearm statute)
United States v. Sharpe, 470 U.S. 675 (1985) (possession of marijuana with intent to distribute)
United States v. Henry, 447 U.S. 264 (1980) (robbery)
United States v. Mendenhall, 446 U.S. 544 (1980) (possession of heroin)
United States v. Leon, 468 U.S. 897 (1984) (conspiracy to possess and distribute cocaine)
United States v. Robinson, 414 U.S. 218 (1973) (possession of heroin)
Woodson v. North Carolina, 428 U.S. 280 (1976) (murder)

Table 2: White Collar Crime Cases

Braswell v. United States, 487 U.S. 99 (1988) (5th Amendment/corporate records)

Carpenter v. United States, 484 U.S. 19 (1987) (mail and wire fraud)

Cheek v. United States, 498 U.S. 192 (1991) (tax fraud)

Chiarella v. United States, 445 U.S. 222 (1980) (insider trading)

Dirks v. Securities Exchange Commission, 463 U.S. 646 (1983) (insider trading)

Dixon v. United States, 465 U.S. 482 (1984) (bribery)

Evans v. United States, 504 U.S. 255 (1992) (extortion and tax fraud)

McCormick v. United States, 500 U.S. 257 (1991) (extortion and tax fraud)

McNally v. United States, 483 U.S. 350 (1987) (mail fraud)

Ratzlaf v. United States, 510 U.S. 135 (1994) (financial structuring to avoid currency reporting)

Schmuck v. United States, 489 U.S. 705 (1989) (mail fraud)

United States v. Williams, 504 U.S. 36 (1992) (false statements to federally insured institution)

United States v. Yermian, 468 U.S. 63 (1984) (false statements to federal agency)

United States v. O'Hagan, 117 S. Ct. 2199 (1997) (mail and securities fraud, money laundering)

United States v. Rodgers, 466 U.S. 475 (1984) (false statements to federal agency)

United States v. Woodward, 469 U.S. 105 (1985) (false statements to federal agency)

United States v. Apfelbaum, 445 U.S. 115 (1980) (false statements to grand jury)

United States v. Maze, 414 U.S. 395 (1974) (mail fraud)

United States v. Liparota, 471 U.S. 419 (1985) (food stamp fraud)

United States v. Halper, 490 U.S. 435 (1989) (filing false Medicare claims)

Upjohn Company v. United States, 449 U.S. 383 (1981) (corporate attorney-client privilege)