Hell Hath No Fury Like an Investor Scorned:[1] Retribution, Deterrence, Restoration, and the Criminalization of Securities Fraud under Rule 10b-5

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Society has a well established need to see bad guys punished for their wrongful conduct.[3] We want to throw the bums (or, in the case of organizational bums, their management) in jail. And if we cannot do that, we want to make them pay some other way (often from their liberty, wallets, or pocketbooks) until it hurts. Even if society cannot exact an eye for an eye or a tooth for a tooth, it wants to do something significant to swiftly, surely, and proportionally penalize those who commit crimes. The criminal laws and penalties effectuating these societal impulses are labeled "retributive."[4]

Moreover, society desires that criminal enforcement both dissuade violators from committing further illegal acts and forestall violations by others. These aims are broadly and collectively labeled using the term "deterrence."[5] For deterrence to be effective,

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[1] This is an obvious play on words based on the proverb, "Hell hath no fury like a woman scorned." This proverb apparently "is adapted from a line in the play *The Mourning Bride*, by William Congreve, an English author of the late seventeenth and early eighteenth centuries." THE NEW DICTIONARY OF CULTURAL LITERACY 51-52 (E.D. Hirsch, Jr. et al. eds., 3d ed. 2002).

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[3] This spare statement is, of course, a gross oversimplification. The desire to punish is socially, culturally, politically, and temporally bounded and difficult to assess. *See generally* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. R. 307 (2004) (theorizing, in a political framework, the legitimacy of current criminal punishment practices, including most prominently incarceration); Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 990-991 (1985) ("what constitutes appropriate punishment is both morally and culturally determined"). The generalized observations made here refer to resilient retributive and utilitarian currents in existing U.S. society. *See, e.g.*, Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1314 (2000) ("The repeated resort to unorthodox measures to accomplish the restoration of retribution suggests the intensity of its support.").

[4] *See generally* C.L. TEN, CRIME, GUILT, AND PUNISHMENT: A PHILOSOPHICAL INTRODUCTION 38-65 (1987). These impulses may manifest, for example, in a desire to balance harm against harm by paying back the wrongdoer or in a desire to achieve vengeance. The concept of retribution is used in this essay in a broad, practical (rather than narrow, theoretical) sense to incorporate punishment under a wide variety of theories relying on a connection between criminal transgressions and criminal penalties . *See* TEN, *supra*, at 71-81 (describing and critiquing a variety of retributive theories); *infra* note 22 and accompanying text.

[5] TEN, *supra* note 4, at 7("Punishment deters the offender who is punished from committing similar offenses in [the] future, and it also deters potential offenders."); Douglas M. Branson, *Statutory Securities Fraud in the Post-Hochfelder Era: The Continued Viability of Modes of Flexible Analysis*, 52 TUL. L. REV. 50, 103 (1977) ("Deterrence has two aims: First, to avoid harm to persons by enjoining and thereby deterring the defendant from ongoing practices or from acts about to take place; second, and more broadly,

punishment must be perceived by actual and potential future perpetrators as being rapid, sure, and severe.[6]

This essay focuses attention on the ineffectual nature of current prosecutions of corporations and their insiders—generally, officers and directors—for securities fraud under Section 10(b) ("Section 10(b)") of the Securities Exchange Act of 1934, as amended (the "1934 Act"),[7] and Rule 10b-5, adopted by the Securities and Exchange Commission ("SEC") under Section 10(b) ("Rule 10b-5).[8] Specifically, the essay begins by briefly summarizing the nature of enforcement actions and related penalties under Rule 10b-5. Next, the essay argues that, as currently conceived and executed, criminal enforcement actions under Rule 10b-5 are ineffective as a means of achieving retribution, as deterrents of undesirable behavior, and as enforcement vehicles that vindicate the policies underlying Rule 10b-5. The essay then suggests possible enhancements to Rule 10b-5 prosecutions, rooted in victims' rights initiatives and restorative justice principles, that may better serve societal and regulatory aims. Finally, the essay offers a brief, summary conclusion.

I. ENFORCEMENT ACTIONS AND RELATED PENALTIES UNDER RULE 10B-5

Market-based securities fraud of the Enron ilk typically is actionable as a violation of Section 10(b) and Rule 10b-5. Section 10(b) and Rule 10b-5 are hybrid provisions, allowing for administrative, civil (private and public), and criminal enforcement.[9] The core elements of proof (manipulation or deception, in connection with a purchase or sale of securities, with scienter) are the same for administrative, public civil, and criminal enforcement actions,[10] except that criminal violations must be willful (or, in the case of false or misleading statements of material fact in 1934 Act applications,

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to deter persons other than the defendant from the same or similar acts."). *See infra* note 23 and accompanying text.

[6] *See* G. Robert Blakey, *Mandatory Minimums: Fine in Principle, Inexcusable When Mindless*, 18 ND J. L. ETHICS & PUB POL'Y 329, 330 (2004) ("Deterrence equals swift, sure, and severe punishment."); *see also* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 64 (2002) (offering that "[t]he problem is not in showing that deterrence can occur when punishment is certain, swift, and severe, but in determining when and to what extent it occurs under real-world conditions, under which punishment is never certain, rarely swift, and only sometimes severe."); Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U.L. REV. 335, 357-58 (2005) (noting that swiftness and sureness of justice are "two hallmarks for criminal punishment to have the greatest deterrent effect."); Thad A. Davis, *A New Model of Securities Law Enforcement*, 32 CUMB. L. REV. 69, 75-76 (2001/2002) (noting a study of investors that assertedly "points out the need for swift, high profile, and harsh punishment of violators in order to deter their abuses directed towards a largely unsuspecting, nave, and badly informed public."); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1322 (2003) (noting that "[t]he most common view among scholars is that punishment certainty has a greater marginal deterrent effect than punishment severity.").

[7] 15 U.S.C. § 78j(b) (2000).

[8] 17 C.F.R. § 240.10b-5 (2006).

[9] *See generally* Margaret V. Sachs, *Harmonizing Civil and Criminal Enforcement of Federal Regulatory Statutes: The Case of the Securities Exchange Act of 1934*, 2001 U. ILL. L. REV. 1025 (2001) (describing and rationalizing the hybrid enforcement system under Rule 10b-5).

[10] MARC I. STEINBERG, SECURITIES REGULATION 524 (4th ed. 2004).

reports, or other documents, willful and knowing).[11] Also, the burden of proof in criminal actions (including those under Rule 10b-5) is the higher "beyond a reasonable doubt" standard.[12] Plaintiffs in private actions under Rule 10b-5 must meet additional jurisdictional requirements and satisfy additional burdens of pleading and proof.[13]

A key difference between civil enforcement and criminal enforcement under Rule 10b-5, however, is the nature and extent of the penalty imposed on a wrongful actor. Private civil enforcement generally results in damages being assessed against a defendant found liable for violating Rule 10b-5.[14] These damages are limited to "actual damages,"[15] and where damages are based on market prices of the subject security, they are capped in amount under the Private Securities Litigation reform Act of 1995.[16] Less frequently, injunctive relief may be sought and obtained.[17] Administrative or public civil enforcement by the SEC may result in numerous different types of remedies, including injunctions, disgorgement, and other equitable relief, orders barring individuals from serving as officers or directors of a public company, and monetary penalties.[18] Potential criminal penalties for violations of Rule 10b-5 by individuals include fines of up to $5,000,000 or imprisonment for up to 20 years, or both.[19] Corporate criminal violators may be fined up to $25,000,000.[20]

II. RULE 10B-5 PROSECUTIONS OF CORPORATIONS AND CORPORATE INSIDERS FAIL TO ACHIEVE CONSISTENT, EFFECTIVE RETRIBUTION AND DETERRENCE

Retribution and deterrence are two acknowledged objectives of criminal punishment.[21] The former addresses just punishment for societal wrongs (often referred to as "just deserts") or a perceived need for public vengeance,[22] and the latter aspires to

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[11] 15 U.S.C. § 78ff(a) (Supp. 2002).
[12] *See, e.g.*, Apprendi v. N.J., 530 U.S. 466, 476-477 (2000); United States v. Gaudin, 515 U.S. 506, 510 (1995).
[13] *See* STEINBERG, *supra* note 10, at 523-24.
[14] John Finnerty & George Pushner, *An Improved Two-Trader Model for Measuring Damages in Securities Fraud Class Actions*, 8 STAN. J.L. BUS. & FIN. 213, 216 (2003) (noting that damages are the "usual remedy in 10b-5 cases").
[15] 15 U.S.C. § 78bb(a) (2000).
[16] 15 U.S.C. § 78u-4(e) (2000).
[17] *See, e.g.*, Cowin v. Bresler, 741 F.2d 410 (D.C. Cir. 1984).
[18] DONNA M. NAGY, ET AL., SECURITIES LITIGATION AND ENFORCEMENT 658-59 (2003).
[19] 15 U.S.C. § 78ff(a) (Supp. 2002).
[20] *Id.*
[21] Notably, this essay does not concern itself with other punishment objectives, including incapacitation (arguably a narrow form of specific deterrence) and rehabilitation, both of which also may be factors in criminal justice under Rule 10b-5. *See* Michael L. Corrado, *The Abolition of Punishment*, 35 SUFFOLK U. L. REV. 257, 260 (2001) ("To aim at incapacitation is to aim at putting someone dangerous out of commission, so he cannot do any harm. To aim at rehabilitation is to provide treatment for the purpose of curing an illness.").
[22] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 319 (2002) (defining retribution as "the interest in seeing that the offender gets his 'just deserts'"); Corrado, *supra* note 21, at 260 ("To aim at retribution means somehow or other to aim at paying the offender back for what he or she has done."); Marie Gottschalk, Book Review, *Black Flower: Prisons and the Future of Incarceration*, 582 ANNALS 195, 207 (2002) ("Retribution means punishment for wrongdoing, pure and simple. It is rooted in the belief that the guilty must pay a penalty for their crimes."); Steven F. Huefner, *Reservations About Retribution in Secular*

prevent future violations of law by either one who already has violated the law (known as "specific deterrence") or other prospective wrongful actors (known as "general deterrence").[23] The achievement of both objectives depends on an understanding of victims, wrongdoers, and U.S. society. Moreover, both objectives depend to some extent on rapid, definite, meaningful punishment.[24]

Criminal enforcement under Rule 10b-5 consistently offers neither effectual retribution nor effective deterrence. Prosecutions under Rule 10b-5 are perceived as being too slow, too uncertain, and, perhaps even after the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"),[25] too tame to satisfy any societal desire for justice or vengeance.[26] Moreover, the seeming lack of speed, certainty, and penal severity in criminal

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Society, 2003 B.Y.U.L. REV. 973, 975-76 (noting various meanings of the term "retribution"); Edward Rubin, *Sentencing: Just Say No to Retribution*, 7 BUFF. CRIM. L. R. 17, 27 (2003) ("What does retribution mean, as a principle of criminal punishment? Like so many other terms used in political theory, it possesses a multitude of meanings, but the two primary ones are probably repayment and desert."); Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1406 (2003) (defining retribution as "the harm imposed on wrongdoers because they have committed morally blameworthy acts" and noting that "From a retributive point of view, . . . punishing wrongdoers is good in itself."). Scholars and other commentators have identified numerous other definitions of retribution. *See*, *e.g.*, TEN, *supra* note 4, at 38 ("There is no general agreement about what sorts of theories are retributive except that all such theories try to establish an essential link between punishment and moral wrongdoing."); Hugo Adam Bedau, *Feinberg's Liberal Theory of Punishment*, 5 BUFF. CRIM. L. R. 103, 119-26 (2001); Rubin, *supra*, at 35-36. To a great extent, these varied definitions come down to "just desert," which also is a broadly and variously defined concept. Paul H. Robinson, Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical, *available at* http://lsr.nellco.org/upenn/wps/papers/104 (outlining three types of desert—vengeful, deontological, and empirical—and showing how each has distinct advantages and disadvantages). In this essay, the type of desert referenced most often is vengeful desert, with a focus on the victim. *See* Robinson, *supra*, at 4-5. Interestingly, vengeance can be seen as a consequential or utilitarian, rather than retributive, justification for punishment. *See* Sherwin, *supra* ("From a utilitarian point of view, the infliction of pain on wrongdoers is justified only to the extent that it produces good consequences, such as deterrence and possibly vengeful enjoyment, which outweigh the various forms of disutility it entails.").

[23] *See*, *e.g.*, Atkins, 536 U.S. at 319 (defining deterrence as "the interest in preventing capital crimes by prospective offenders"); TEN, *supra* note 4, at 7 (describing specific (individual) and general deterrence within the context of an overall utilitarian theory of punishment); Ronald L. Akers, *Criminology: Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken*, 81 J. CRIM. L. & CRIMINOLOGY 653, 654 (1990) ("According to the deterrence theory, the rational calculus of the pain of legal punishment offsets the motivation for the crime (presumed to be constant across offenders but not across offenses), thereby deterring criminal activity."); Corrado, *supra* note 21, at 260 ("To aim at deterrence means to aim at preventing crime in the future, through a kind of terror."); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 26 (2005) (defining deterrence "to encompass all sanctions sponsored or imposed directly or indirectly by the state that systematically and inherently prevent prospective violations of a prohibited act, by the defendant or by any observers, through restraint or threat of punishment. As such, it encompasses specific deterrence and general deterrence . . . ."); Gottschalk, *supra* note 22 at 207 ("Deterrence is the idea that the promise of swift, certain, and serious punishment reduces crimes by persuading offenders not to violate the law.").

[24] *See* sources cited *supra* note 6.

[25] Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 765 (2002).

[26] *See* Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002--03: On Sideshow Prosecutions, Spitzer's Clash With Donaldson Over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 443-45 (2004); Michael D. Silberfarb, Note, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95 (2003).

prosecutions under Rule 10b-5 negatively impacts the potential deterrent force of those prosecutions.[27] Violations of Rule 10b-5 often involve complex fact patterns where the evidence has been well hidden.[28] These violations are hard to catch, and when they are caught, they often make difficult criminal cases, given ambiguities in meaning of each of the elements of proof, a willfulness requirement, and a tough burden of proof.[29] As a result, it may take many years to investigate and prosecute a Rule 10b-5 claim.[30] Moreover, despite recent highly publicized prosecutorial triumphs, the historic success rate for criminal prosecutions under Rule 10b-5 has been mixed (although it now may be improving[31]); and some well known big fish have gotten away.[32] Society has a basis to believe that enforcement is not readily or consistently forthcoming. Retribution and deterrence both are frustrated.

Plea bargaining may be further reducing the retributive and deterrent value of criminal securities fraud prosecutions under Rule 10b-5.[33] In our post-Enron, post-

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[27] NEAL SHOVER & ANDY HOCHSTETLER, CHOOSING WHITE COLLAR CRIME 1-4, 167-68 (2006).

> White-collar crime is difficult to detect, time-consuming to investigate, and costly to prosecute, all resulting in less certainty of punishment. If the government meets its burden of proving every element of the crime beyond a reasonable doubt and the defendant is convicted, low rates of imprisonment or meager terms, as a result of departures, undermine the message of deterrence directed at those who willingly and knowingly have participated in similar activities but were not criminally charged.

Mary Kreiner Ramirez, *Just in Crime: Guiding Economic Crime Reform After the Sarbanes-Oxley Act of 2002*, 34 LOY. U. CHI. L.J. 359, 415 (2003) (footnotes omitted). Of course, not all actual or potential violators are disposed to specific deterrence. *See* Aukerman, *supra* note 6, at 65 ("[T]he offender and the crime must be deterrable; that is, they must be rational. . . . Deterrence, then, only works in relation to some crimes and some offenders.").

[28] *See* Oesterle, *supra* note 26, at 446 (2004) ("Prosecutors investigating financial business scandals face a daunting task. These are high--risk cases. The scandals are complex, involve many individuals, and the defendants are wealthy and, generally, clever.").

[29] *See supra* notes 10-12 and accompanying text.

[30] Kathleen F. Brickey, *In Enron's Wake: Corporate Executives on Trial*, 96 J. CRIM. & CRIMINOLOGY 397, 399 (2006) (noting, in commenting on the prosecutions stemming from the recent wave of corporate fraud, that "executives on trial have been relatively few and far between. It has taken roughly three years for these prosecutions to reach the trial stage and yield enough trial-related data to report and analyze.").

[31] *See* Brickey, *supra* note 30, at 419 (concluding, based on her recent study, that "the government enjoys a respectable, if not spectacular, conviction rate").

[32] *See* Brickey, *supra* note 30, at 407 ("The trials . . . have produced surprisingly mixed results. Juries have convicted eighteen defendants, acquitted eleven, and deadlocked on charges against fifteen others. Thus, at first blush, the government's trial record does not reflect overwhelming success"). Richard Scrushy, former Chief Executive Officer of HealthSouth Corporation, Martha Stewart, former Chief Executive Officer of Martha Stewart Living Omnimedia, Inc., and Frank P. Quattrone come to mind here as fish who may have gotten away, although each already has been, or may still be, held responsible for illegal conduct. *See, e.g.*, Carrie Johnson, *U.S. Ends Prosecution Of Arthur Andersen; Former Partner Moves to Withdraw 2002 Guilty Plea*, WASH. POST, Nov. 23, 2005, at D1. Certain commentators, however, are optimistic about the overall prospects of enhanced prosecutorial success in the high profile cases of corporate fraud from the late 1990s and early 2000s. *See, e.g.*, KENNETH R. GRAY ET AL., CORPORATE SCANDALS: THE MANY FACES OF GREED 80-81, 91 (2005).

[33] Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 118-34 (2003) (describing the relationship between retributive justice and bargain justice, including plea bargains); Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795, 807 (2002) ("[A]llowing the government's need for information to

WorldCom prosecutorial world, the government has traded reduced sentences for cooperation, including testimony, in a number of high-profile cases.[34] Although these plea bargains may bring certain selected perpetrators to justice more surely and rapidly,[35] they also may give society and prospective fraudsters reason to think some participants in fraudulent schemes are getting off too easy.[36] These perceptions, more than the reality that plea bargains may lead to criminal justice, limit the retributive and deterrent force of criminal prosecutions under Rule 10b-5.

Finally, even where white collar criminal defendants are found guilty at trial and that verdict is upheld on appeal, the sentencing of these individuals often does not adequately exact retribution or achieve specific or general deterrence. The U.S. Federal Sentencing Guidelines, with their somewhat formulaic retributive response to establishing penalties, contribute to a failure of individualized retribution.[37] This one-size-fits-all approach also weakens the specific deterrent value of any punishment that can be meted out, because the defendant's own capacity for deterrence is not taken into account.[38] (It is important to note that some of these effects may be lessened in the wake

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control in determining whether parties will be rewarded with cooperator status fails to correlate with punishment's goals of deterrence, rehabilitation or retribution."). One scholar notes:

> The bottom line regarding the deterrent effects of plea bargaining is not certain. Plea bargaining may increase deterrence by trading certainty of punishment against severity. However, plea bargaining also raises the possibility of convicting the innocent. Depending on the decisions prosecutors make in investing the additional resources that plea bargaining frees up, discrimination between the guilty and the innocent in charging could be enhanced. However, there is also a strong possibility that plea bargaining has the same anti-deterrent effects as reducing the standard of proof for conviction.

Strandburg, *supra* note 6, at 1338. *See also* John S. Baker, Jr., *Reforming Corporations through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 337-38 (2004).

[34] Brickey, *supra* note 30, at 398-99 (noting, e.g., the plea bargains of Richard Causey and Andrew Fastow of Enron); *id.* at 403.

[35] GRAY ET AL., *supra* note 32, at 91-92.

[36] As noted by one commentator,

> [t]he nearly universal predominance of plea bargaining is one strategy that is intended to raise the probability of conviction--most notably by permitting more cases to be processed through the criminal justice system. Depending on the jurisdiction, somewhere between 85% and 95% of all criminal cases are resolved by plea bargains. Plea bargaining has, however, been somewhat controversial both among the general public, who tend to regard it as allowing guilty defendants to "get away with something" and from legal academics who have criticized its lack of procedural protections for the innocent.

Strandburg, *supra* note 6, at 1331. *See also* Carrie Johnson & Brooke A. Masters, *Cook the Books, Get Life in Prison: Is Justice Served?*, WASH. POST, Sept. 25, 2006, at A1 (describing adverse reactions to Andrew Fastow's plea bargain, including from counsel to Ken Lay and Jeffrey Skilling).

[37] Joshua Dressler, *The Wisdom and Morality of Present--Day Criminal Sentencing*, 38 AKRON L. REV. 853, 855 (2005) ("[T]he essence of retribution, the expression of moral condemnation, has been largely lost because of the Guidelines."); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 415 (2002) ("[T]he Sentencing Guidelines do not pursue a genuine retributive philosophy.").

[38] Deborah Young, Book Review, *Federal Sentencing: Looking Back To Move Forward*, 60 U. CIN. L. REV. 135, 148 (1991) (reviewing STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS (1988)) ("[C]alculation of a sentence under the guidelines has not been interpreted to require specific consideration of the deterrent effect of a sentence."); Joseph L. Barloon, Note, *An Economic Analysis of Group Crime and the Federal Sentencing Guidelines*, 4 GEO. L.J. 2261, 2281 (1996) ("[T]he Sentencing Guidelines' punishment rationale does not focus on deterrence"). Of

of the U.S. Supreme Court's decision in *United States v. Booker*,[39] which renders the Federal Sentencing Guidelines largely advisory.) Among other things, "[a]side from the anger and embarrassment it may cause, punishment generally fails to instill in convicted white-collar criminals acceptance of the immorality of their conduct."[40] A noted pair of social scientists therefore suggests increased use of and increased terms of imprisonment for white collar offenders.

> There is reason to suppose . . . that white-collar offenders may be positioned ideally for learning the lessons of imprisonment. Prison is painful for them in ways that differ from the pains of the typical street offender. . . . Their ties to conventional work trajectories are not as fragile and few serve sentences so long that it destroys all they have achieved. Their resources aid them in navigating the difficulties of reintegration and postrelease supervision. . . . [M]any white-collar offenders could be humbled and turned from crime by experiencing more certain and marginally more severe punishment. Imprisonment should be used more often in the battle against white-collar predators. If nothing else, it shocks and forces them to confront the fact that many people take their crime seriously.[41]

Sarbanes-Oxley *did* increase the available sentencing maximums for violations of Rule 10b-5, including by increasing the maximum term of imprisonment from ten years to twenty years.[42] Yet, imprisonment alone may not always be enough of a shock or confrontation to achieve desired retributive and deterrent effects.

III. RULE 10B-5 PROSECUTIONS OF CORPORATIONS AND CORPORATE INSIDERS FAIL TO SERVE APPLICABLE UNDERLYING POLICY OBJECTIVES

Enforcement must be both theoretically and contextually sound in order to be effectual. Accordingly, criminal prosecution and punishment for violations of Rule 10b-5 ideally should achieve retribution and deterrence while, at the same time, supporting and promoting the policies underlying Rule 10b-5. The key policy bases for Rule 10b-5 are described below. Currently, the retributive and deterrent features of our criminal justice system offer only limited support for and promotion of those policies.

Rule 10b-5 exists to protect investors from deception and market manipulation. Specifically, Rule 10b-5 supplements the mandatory disclosure scheme in the federal

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course, specific deterrence may be difficult to achieve and measure. Michael Edmund O'Neill, *Irrationality and the Criminal Sanction*, 12 S. CT. ECON. REV. 139, 156-57 (2004); *see supra* note 27.

[39] 543 U.S. 220 (2005). *See also* Paul J. Hofer, *Immediate and Long-Term Effects of* United States v. Booker*: More Discretion, More Disparity, or Better Reasoned Sentences?*, 38 ARIZ. ST. L.J. 425, 425 (2006) ("Since the United States Supreme Court's decision in United States v. Booker, the percentage of federal sentences falling within the range recommended by the federal sentencing guidelines has decreased." (footnote omitted)).

[40] SHOVER & HOCHSTETLER, *supra* note 27, at 149.

[41] *Id.* at 172-73 (citation omitted). *See also* Dan M. Kahan, *Punishment Incommensurability*, 1 BUFF. CRIM. L. R. 691, 697-701 (1998).

[42] Sarbanes-Oxley Act of 2002, Pub. L. No. 107- 204, 116 Stat. 765, § 1106 (2002) (codified at 15 U.S.C. § 78ff(a)). *See also* Oesterle, *supra* note 26, at 454-56.

securities laws by requiring, among other things, that public corporate disclosures in connection with purchases and sales of securities be not misleading (by way of material inaccuracy or material incompleteness). Rule 10b-5 is an important part—a highly flexible part—of our federal securities regulation system. That overall system, including Section 10(b) and Rule 10b-5, is designed to both protect investors and help to ensure the overall integrity of our securities markets. It serves these two key underlying policies—investor protection and market integrity promotion—through mandatory disclosure and fraud prevention (including through Section 10(b) and Rule 10b-5). Slow, uncertain, weak responses to perceived violations ill serve those policy objectives.

In this policy environment, perceptions may be more important than reality. Enforcement must be perceived as being effective in order to foster investor confidence. When Rule 10b-5 prosecutions are not imminent or are not overwhelmingly successful or do not result in suitably harsh punishment, investors are likely to perceive that *they are not protected* and that *the market is unsafe* for investment.[43] It is not enough to know that corporations and those who act on behalf of corporations are subject to appropriately stringent mandatory disclosure and fraud-prevention rules. Investors also must understand that these rules are both enforceable and appropriately, consistently, and effectively enforced.

Accordingly, to best serve the policies underlying Rule 10b-5, in determining whether to seek indictments, how to prosecute a case, and which punishments to request upon a guilty plea or verdict, federal prosecutors should evaluate the possible and probably effect of an indictment, acquittal, or conviction, or any related punishment, on the policies underlying Rule 10b-5. Criminal prosecution may not always be the desired approach, when viewed from a policy-oriented perspective; civil or administrative enforcement may best protect investors and promote market integrity.[44] If investors

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[43] *See* Troy A. Paredes, *Blinded by the Light: Information Overload and its Consequences for Securities Regulation*, 81 WASH. U. L. Q. 417, 468 (2003) ("[A] demanding mandatory disclosure system with active enforcement and severe civil and criminal penalties can promote investor confidence. In short, a stringent regulatory regime shows the investing public, as well as market professionals, that there is a cop on the beat . . . ." (footnote omitted)).

[44] *See, e.g.*, Jeffrey S. Huang, Note: *Are Investors Listening When Politicians Speak? Assessing the Securities Fraud Liability of Political Officials Who Manage Large Civic Works Projects*, 39 AM. CRIM. L. REV. 147, 166 (2002) ("If investor protection is indeed the chief concern, SEC civil actions and cease-and-desist actions already may be an effective means to achieving this end. Thus, the pursuit of criminal prosecutions may be of questionable value if the ultimate objective is investor protection."). One noted white collar crime scholar observes that

> [r]elying on criminal law as the chief means to prevent business misconduct is like relying on honor codes to prevent student cheating. Criminal laws, like harshly punished honor codes, are not sufficient in and of themselves to prevent bad conduct. Like a college, we need structural support for the values reflected in criminal laws. That support is provided when the law works in concert with other regulatory devices, namely private suits and government regulatory actions. Criminal law plays an important role in regulating business conduct, but it is not the only player.

Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 975 (2003). The *Principles of Federal Prosecution*, found in Title 9 of the U.S. ATTORNEYS' MANUAL, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam [hereinafter U.S. ATTORNEYS' MANUAL], permit a federal prosecutor to decline prosecution where prosecution would serve no substantial federal interest or where an adequate non-criminal enforcement

perceive that the government either is not enforcing established rules or is attempting to criminalize behavior that does not violate the letter of or policy underlying Rule 10b-5 in a criminal context (a claim espoused by a number of recent commentators in alleging that the government is "overcriminalizing" securities fraud[45]), investors may lose faith that the regulatory system offers them adequate protection or assurance that the market is fair and honest.[46] Although many investors keep the faith through significant adverse market conditions[47] and (as others have noted) the stock market did rebound after initial revelations of widespread corporate scandals died down,[48] there is fear—and some evidence—of a loss of investor faith, even in the wake of post-Enron reforms.[49]

IV. A BETTER WAY?

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alternative exists. U.S. ATTORNEYS' MANUAL 9-27.220. Either reason (or both reasons) for declination could be applicable where the policies underlying Rule 10b-5 are not well served by prosecution of an alleged violation. *See* U.S. ATTORNEYS' MANUAL 9-27.230 & 9-27.250 (providing detail on the two cited declination principles).

[45] In a recent report, The U.S. Chamber of Commerce raised concerns about the conflation of criminal and civil liabilities. Among other things, this report recommends that

> [t]he Commission should work to ensure that the line between civil actions and appropriate criminal prosecutions is not blurred, and that criminal referrals for securities violations are reserved for clearly egregious cases. The Commissioners should be actively involved and have a significant role in the decision-making process before the DOJ pursues an investigation or initiates a prosecution of possible federal securities law violations, and in referrals to criminal prosecutors.

U.S. Chamber of Commerce, *Report on the Current Enforcement Program of the Securities and Exchange Commission*, March 2006, at 7, *available at* http://www.uschamber.com/publications/reports/0603sec.htm.

[46] *See* John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57, 110-11 (2005); Johnson, *supra* note 32, at D1.

[47] Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 170-72 (2006).

[48] *See, e.g.*, David Boies, *Integrity in the Capital Markets*, 28 NOVA L. REV. 261, 264 (2004) (referencing "the beginning of the mitigation of the so called 'Enron Effect.'"); Troy A. Paredes, *Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't the Answer*, 45 WM AND MARY L. REV. 1055, 1102 (2004) ("U.S. stock markets have rebounded following the major sell-off after the wave of scandals broke starting with Enron."); *id.* at 1141 (referencing the rebound in the U.S. stock markets). Ongoing investigations relating to executive stock option backdating have fueled recent investor worries. *See* Bloomberg News, *More than 100 firms afflicted with options woes*, CHIC. TRIB., Aug. 11, 2006, at C5; Susan Harrigan, *Q&A: Why Backdating Matters*, NEWSDAY, Aug. 9, 2006, at A39; Carrie Johnson, *3 Charged As Probe Into Options Widens; FBI Pursuing Cases of Illegal Stock Profits*, WASH. POST, Aug. 10, 2006, at A1. *But see* Kathleen Pender, *Options scandal? Ho-hum*, SAN FRAN. CHRON., Aug. 17, 2006, at C1.

[49] *See, e.g.*, Roland Hefendehl, *Enron, WorldCom, and the Consequences: Business Criminal Law Between Doctrinal Requirements and the Hopes of Crime Policy*, 8 BUFF. CRIM. L. R. 51, 53 (2004). A recent news article notes:

> Public revulsion over financial crimes that cost small investors billions of dollars has barely waned since prosecutors began to investigate a string of corporate scandals in late 2001. The death of convicted Enron founder Kenneth L. Lay in July induced profanity-laden outrage from shareholders who felt they had been "cheated" out of seeing Lay sent to prison. Federal prosecutors seized the mood, imploring Congress this month to pass legislation that would make it easier for them to recover $43.5 million from Lay's estate, a process that has been seriously complicated by his death.

Johnson & Masters, *supra* note 36, at A1.

A number of scholars and other commentators suggest that retribution or deterrence may be better served by harsher monetary penalties or (as earlier noted) longer terms of imprisonment for white collar offenders, including those who violate Rule 10b-5.[50] Other scholars argue that shaming may be a more effective means of punishment for white collar offenders.[51] This essay does not take issue with the views of any of those commentators or with Sarbanes-Oxley's imposition of increased maximum criminal penalties.[52] However, I admit to some skepticism that these adjustments will have long-term retributive and deterrent effects on all offenders, especially if not accompanied by more rapid and certain detection and prosecution. Indeed, more research and analysis must be done to determine both (a) the extent to which higher fines and more jail time will better achieve retributive and deterrent punitive objectives and (b) the circumstances under which different kinds of white collar criminals will be effectively deterred by various forms of penalties.[53]

Accordingly, this essay argues that the increased involvement of Rule 10b-5 victims in Rule 10b-5 prosecutions, as an adjunct to existing processes and penalties, may better help to satisfy societal needs for justice and vengeance, achieve desired deterrence, and effectuate investor confidence and market integrity.[54] Who are these victims? The

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[50] *See, e.g.*, Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1041-42 (2004) (favorably noting Federal Sentencing Guidelines designed to increase penalties for economic crimes); Michelle S. Jacobs, *Loyalty's Reward -- A Felony Conviction: Recent Prosecutions of High-Status Female Offenders*, 33 FORDHAM URB. L.J. 843, 871 (2006) ("[S]trict penalties are needed to ensure that white-collar defendants receive tougher sentences."); Silberfarb, *supra* note 26 (contending that the increased criminal penalties under Sarbanes-Oxley do not go far enough in criminally punishing corporate crime); *supra* note 41 and accompanying text. *But see* Johnson & Masters, *supra* note 36, at A1 (questioning the value of lengthy prison terms for white collar offenders). One student commentator summarizes the views of many in this regard.

> White-collar and corporate criminals cause so much damage that they deserve harsher punishments than they have enjoyed in the past. Only harsher punishments, which entail a substantial prison term and financial penalties more severe than their economic gains, will sufficiently deter others, restore equity, properly incapacitate and rehabilitate the offenders, and increase the overall happiness in our society by effecting a positive change in corporate culture. Moreover, only harsher punishments will truly fit the heinous and devastating nature of white-collar and corporate crime by serving offenders their just desserts.

J. Scott Dutcher, Comment and Note: *From the Boardroom to the Cellblock: The Justifications for Harsher Punishment of White-Collar and Corporate Crime*, 37 ARIZ. ST. L.J. 1295, 1319 (2005).

[51] *See, e.g.*, Jayne W. Barnard, *Reintegrative Shaming in Corporate Sentencing*, 72 S. CAL. L. REV. 959 (1999); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J.L. & ECON. 365 (1999); David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001). It should be noted here that Professor Dan Kahan, formerly a key advocate of shaming penalties, recently has backed off on advocating shaming. *See* Dan M. Kahan, What's Really Wrong with Shaming Sanctions (July 1, 2006), *available at* SSRN: http://ssrn.com/abstract=914503.

[52] *See supra* note 42 and accompanying text.

[53] *See* Hefendehl, *supra* note 49, at 63 ("In the field of white collar crime, . . . short prison sentences have been said to serve a deterrent function. . . . [H]owever, all surveys in this field have dealt with limited areas of white collar crime without having a comparative analysis of effects.").

[54] *Cf.* JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 62-66 (2002) (making a similar point in other corporate liability contexts). *But cf.* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L.

principle victims of Rule 10b-5 violators are those who buy and sell securities in connection with the Rule 10b-5 violation—a/k/a investors.[55] Direct, public confrontation between Rule 10b-5 perpetrators and their investor victims seemingly better satisfies societal desires that these defendants receive their "just deserts" and societal desires for vengeance. The public at large and individual victims are more likely to be satisfied that the defendant has gotten what he or she deserves if they can participate meaningfully in the criminal justice process. Moreover, the direct involvement of investors in criminal proceedings under Rule 10b-5 more closely ties these proceedings to investor protection and more powerfully signals the restoration and maintenance of market integrity. Although this approach does not envision treatment of investors as "ends," rather than "means," of criminal justice under Rule 10b-5,[56] it does envision giving victims a more active, individual presence in the proceedings by giving them the opportunity to tell their own stories. In effect, this essay calls for increased personalization of criminal proceedings under Rule 10b-5.

While investors, as victims, are at the heart of both retributive justice and the investor protection policy underlying Rule 10b-5, until recently, they have been largely forgotten in the contemporary criminal enforcement process. Victim testimony is rarely solicited in public company prosecutions[57] for corporate fraud under Rule 10b-5.[58] Moreover, although investors are implicated in the elements of proof under Rule 10b-5 (notably in the standard for materiality and in gauging the connection between the defendant's conduct and transactions and securities), analyses of these elements generally are objective or broadly contextual (and therefore do not rely on the testimony of, or effects of the defendant's conduct on, specific, individual investors). The absence of the

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REV. 407, 452-57 (2005) (noting some disadvantages, as well as advantages, to involving victims in criminal sentencing).

[55] The public at large also is injured by violations of Rule 10b-5.

> [T]he broader social injury needs to be recognized; that is, the victims are not just the shareholders . . . [of the subject corporation], but shareholders in all other public corporations whose share prices have also been discounted because investors no longer trust the credibility of reported financial results. Indeed, viewed more generally, the victims include not only investors, but employees, creditors, other stakeholders, and citizens generally -- all of who suffer a loss when securities fraud erodes investor confidence and thereby produces an increase in the cost of capital.
>
> This last point cannot be overemphasized: securities fraud has macro-economic consequences. It injures not only investors, but the public generally by raising the cost of capital for all corporations and thereby retarding economic growth, increasing interest rates, and producing inevitable layoffs.

John C. Coffee, *Are We Really Getting Tough on White Collar Crime?*, 15 FED. SENT. R. 245 (2003).

[56] *See generally* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U.L. REV. 843 (2002) (arguing, among other things, that retributivists treat crime victims as mere means, rather than ends, in criminal punishment).

[57] Public company prosecutions, as referenced here, include prosecutions of the corporation and its officers and directors.

[58] Testimony more often may be sought where omissions or misrepresentations are not made in Securities and Exchange Commission filings or where affected investors are more limited in number. *See, e.g.*, United States v. Tarallo, 2005 U.S. App. LEXIS 12903, at *8, *14 (9th Cir. 2005) (referencing victim testimony); United States v. Zanghi, 189 F.3d 71, 83-83 (1st Cir. 1999) (same); United States v. Blitz, 533 F.2d 1329, 1335 (2d Cir. 1976) (same); United States v. Aloi, 511 F.2d 585, 600-01 (2d Cir. 1975) (same); United States v. Earls, 2004 U.S. Dist. LEXIS 12295, at *7-*8 (S.D.N.Y. 2004) (same),

victim in Rule 10b-5 prosecutions is not an anomaly, but rather part of a larger picture of victim noninvolvement in contemporary criminal proceedings.[59]

In recent years, a widening group of scholars and policy makers has focused attention on the marginalization of the victim in modern criminal proceedings.[60] Arguing that victims should have greater, more direct rights in criminal proceedings or, more specifically, that a focus of our criminal laws should be the restoration of crime victims (rather than mere retribution against or deterrence of violators), these scholars and policy makers advocate varying types of victim involvement in the criminal enforcement process. So-called "victims' rights" initiatives fall squarely into this category. Victim's rights initiatives undertake, in various ways, to give crime victims a greater role and specified privileges in the criminal enforcement process.[61] There also are other victim-oriented criminal justice projects, however. For example, programs that focus on the therapeutic value of criminal law and processes to crime victims are known as "therapeutic justice" initiatives.[62] Programs that endeavor to more broadly address the needs of crime victims (generally through a nonjudicial or prejudicial dispute resolution process in which the victim and perpetrator both participate) commonly are labeled using the term "restorative justice."[63] Restorative justice typically is seen as an alternative to,

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[59] *See generally* JAMES DIGNAN, UNDERSTANDING VICTIMS AND RESTORATIVE JUSTICE 62-65 (2005) (documenting victim noninvolvement in the criminal process); HEATHER STRANG, VICTIMS AND RESTORATIVE JUSTICE 5-24 (2002) (providing a short history of the role of the victim in modern criminal justice).

[60] *See* STRANG, *supra* note 59, at 43.

[61] *See, e.g.*, Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 B.Y.U.L. REV. 835, 841 ("The crime victims' rights movement developed in the 1970s because of a perceived imbalance in the criminal justice system. . . . [V]ictims' advocates argued that the criminal justice system had become preoccupied with defendants' rights to the exclusion of crime victims' legitimate interests."); Jon Kyl et al., *On the Wings of their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, 9 LEWIS & CLARK L. REV. 581, 583 (2005) ("Believing that crimes are committed against individuals just as much as they are against the community, the crime victims' rights movement has sought to guarantee rights to crime victims through the state and federal legislative process."); Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1385 (2005) ("Not only does the victims' rights movement seek more involvement by victims at trials, but also at plea hearings and sentencing hearings."); Jessie K. Liu, *Victimhood*, 71 MO. L. REV. 115, 175 (2006) ("[T]he victims' rights movement . . . seeks to guarantee victims of crime everything from social, emotional, and pecuniary support to a role in criminal pre-trial, trial and sentencing proceedings"); Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357, 386-387 (1998/1999) (defining the victims' rights movement, in general as "a campaign to generally enhance the role of crime victims within the criminal justice system.").

> Recent years have seen an outpouring of popular concern for what has come to be known as 'victims' rights' -- a phrase that describes what its proponents feel is the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society.

Booth v. Maryland, 482 U.S. 496, 520 (1987) (Scalia, J., dissenting).

[62] *See generally* Mae C. Quinn, *An RSVP to Professor David Wexler's Warm TJ Invitation: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 BOSTON COL. L. REV. __ (2007) (describing and critiquing the value of therapeutic justice).

[63] BRAITHWAITE, *supra* note 54, at 3-27 (2002) (providing a history of restorative justice concepts and indicating the scope of restorative justice initiatives); DIGNAN, *supra* note 59, at 2-5, 94-105 (describing and categorizing restorative justice); STRANG, *supra* note 59, at 43-49 (describing and illustrating different forms of restorative justice); John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic*

rather than a means of achieving, retributive justice,[64] although a few scholars have begun to view restorative justice and retributive justice as less distinct.[65] Despite differences in the victims' rights and restorative justice movements, "[v]ictims' rights laws and restorative justice theory seem to intersect in their mutual concern for reforming our criminal justice system to include the people most affected by any given crime."[66]

Accounts, 25 CRIME & JUST. 1, 4-7 (1999) (defining and describing restorative justice); Cait Clarke & James Neuhard, *Making the Case: Therapeutic Jurisprudence and Problem Solving Practices Positively Impact Clients, The Justice Systems and Communities They Serve*, 17 ST. THOMAS L. REV. 781, 810 n.8 (2005) ("restorative justice involves the victim, offender and community reaching reconciliation. Often defined as the opposite of retributive justice, restorative justice defines crime as a violation of people and relationships as opposed to a violation of the state."); Kathleen Daly, *Restorative justice: The real story*, 4 PUNISHMENT & SOCIETY 55, 57-58 (2002) (collecting various definitions of restorative justice). There are many disagreements about the necessary or sufficient components of a restorative justice program. The nature and substance of these disagreements is beyond the scope of this essay. This essay conceptualizes restorative justice simply and pragmatically within the context of the current criminal justice paradigm. *Cf.* Declan Roche, *Dimensions of Restorative Justice*, 62 J. SOCIAL ISSUES 217, 217-18 (2006).

[64] *See, e.g.*, BRAITHWAITE, *supra* note 54, at 10 (noting that "[r]estorative justice is most commonly defined by what it is an alternative to."); Gordon Bazemore, *Will the Juvenile Court System Survive?: The Fork in the Road to Juvenile Court Reform*, 564 ANNALS 81, 93 (1999) (highlighting, in chart form, differences between retributive and restorative justice); R.A. Duff, *Restorative punishment and punitive restoration*, *in* RESTORATIVE JUSTICE AND THE LAW 83 (Lode Walgrave ed., 2002) ("There is an obvious incompatibility between existing restorative practices and existing penal practices, and between the conceptions of 'restoration' favoured by many restorative theorists and the conceptions of punishment held by many advocates of punitive or retributive justice."). This is because retribution, in a narrow definitional sense, looks to balance overall justice rather than address the needs of a particular victim. *See, e.g.*, Christopher, *supra* note 56, at 938 ("Taking into account the interests of victims who want to see their victimizers suffer is not retributive justice. According to Moore, that is 'corrective justice and not retributive justice.'"); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C.L. REV. 1345, 1350-55 (2004) (describing various views on retributive justice consistent with this statement).

> Retributivism is not the view that punishment of offenders satisfies the desires for vengeance of their victims. In this view the harm that is punishment is justified by the good it does psychologically to the victims of crime, whose suffering is thought to have a special claim on the structuring of the criminal justice system. This is not retributivism. A retributivist can justify punishment as deserved even if the criminal's victims are indifferent (or even opposed) to punishing the one who hurt them. Indeed, a retributivist should urge punishment on all offenders who deserve it, even if no victims wanted it.

Christopher, *supra* note 56, at 937. However, as earlier noted, the retributivism decribed in this essay encompasses both societal justice and personal vengeance components. *See supra* note 4.

[65] *E.g.*, Jayne W. Barnard, *Allocution for Victims of Economic Crimes*, 77 NOTRE DAME L. REV. 39, 78-84 (2001) (noting retributive and restorative aspects of victim allocution); Braithwaite, *supra* note 63, at 7 (noting that "[t]here is a . . . view that a more rationalist conception of retribution can be reconciled with restoration, however, and indeed must be if restorative justice is to be a pragmatic program"); Kathleen Daly, *supra* note 63, at 60 (characterizing retributive and restorative justice as interdependent); Duff, *supra* note 64, at 82-100 (arguing for restoration through criminal punishment); Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 458-459 ("The societal goals of punishment and accountability and the individual desire for healing are not mutually exclusive. . . . [I]ncorporating recovery approaches from both the science of victimology and theories of restoration in the justice process allows a more encompassing perspective").

[66] Christa Obold-Eshleman, Note, *Victims' Rights and the Danger of Domestication of the Restorative Justice Paradigm*, 8 ND J. L. ETHICS & PUB POL'Y 571, 571 (2004).

This essay suggests that certain elements (but not necessarily the objectives) of the victims' rights and restorative justice agendas can be employed with success in our existing criminal justice system—a system principally based on retribution and deterrence.[67] In other words, victim involvement in Rule 10b-5 prosecutions could be structured to allow society and investors to (a) help punish Rule 10b-5 violators in a manner that befits the violator's conduct and satisfies retributive needs (by forcing direct, open communication between victims and perpetrators about the nature and effects of the harm caused by the perpetrator's conduct) and (b) achieve specific and general deterrence (by forcing the perpetrator to more directly and publicly experience the victim's anger, resentment, hostility, loss, and pain), while at the same time potentially allowing investors to heal the wounds suffered by them as a result of the perpetrator's conduct (through their public storytelling).[68] Although this is very different from what restorative justice scholars envision, some of these scholars do acknowledge that restorative and retributive models, taken together, may be an effective overall combination in dealing with corporate crime.[69] The very presence of investors in criminal proceedings under Rule 10b-5 has a better capacity to achieve social justice, positively impact Rule 10b-5 violators, and empower victims. This is because victim presence and storytelling will create a more direct, complete, and powerful connection among the public at large, the investor victim, and the offender stemming from the activity underlying the alleged or proven Rule 10b-5 violation.[70] Current federal prosecutorial efforts in Rule 10b-5 cases

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[67] Duff, *supra* note 64, at 83, 97-98 (acknowledging that restorative justice programs may "have a punitive dimension" and setting forth punitive aspects of restorative justice mediation programs); Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1162-70 (2004) (making similar claims by arguing for the incorporation of revenge into retribution and deterrence). *See also* Jim Dignan, *Restorative justice and the law: the case for an integrated, systemic approach in* RESTORATIVE JUSTICE AND THE LAW, supra note 64, at 169-70 (stating and citing to competing claims that restorative justice initiatives are/are not punitive). Kathy Elton & Michelle M. Roybal, *The Practice of Restorative Justice: Restoration, A Component of Justice*, 2003 UTAH L. REV. 43, 55-56 ("[I]nfusing restorative approaches into our current system will help communities and victims work more congruently and effectively with others in the legal system to achieve justice.").

[68] Professor Braithwaite notes that there is evidence that restorative justice both satisfies societal needs for retribution and provides effective deterrence. *Id.* at 35-38 & 56-65. The retributive and deterrent benefits that may be realized through victim involvement in Rule 10b-5 prosecutions intuitively should be similar to those presumed to be associated with shaming sanctions or guilt punishments. *See, e.g.*, Kahan, *supra* note 51, at 635-49 (regarding shaming sanctions); Dan Markel, *Still Wrong? Professor Kahan on the Fall of Shaming anf the Rise of Restorative Justice*, 85 TEX. L. REV. __, __ n.73 (2007) (distinguishing guilt punishments from shaming punishments); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2229-32 (2001) (regarding guilt punishments).

[69] *See* Duff, *supra* note 64; Roche, *supra* note 63, at 228 (making this point and citing to others). Combining retributive and restorative justice elements in the criminal process in the manner suggested in this essay acknowledges a criminal justice reality that restorative justice supporters cannot deny: victims have some emotional needs that only may be satisfied if the offender is made to pay for his or her crime in some effective way. *See* SHARI TICKELL & KATE AKESTER, RESTORATIVE JUSTICE: THE WAY AHEAD (2004) ("Anger, resentment and hostility will not automatically wither away in the face of good intentions"). The key is to try to use the victims' emotions in a constructive, rather than destructive, way in criminal proceedings. *See, e.g.*, BRAITHWAITE, *supra* note 54, at 140-42, 146-48.

[70] *Cf.* Elton & Roybal, *supra* note 67, at 55 (noting that there may be restorative benefits to a mediated dialogue between victim and offender even after criminal liability and sentencing has been adjudicated).

rely largely on the news media and other published reports to inform investors and other elements of the general public about the case. Absent efforts made by victims to appear in court for the trial or to allocute at or after sentencing, published information becomes the only link between the wronged investors and the defendant.

Accordingly, we can and should involve victims of Rule 10b-5 violations in criminal prosecutions for those violations. The Crime Victims Rights Act gives victims of all crimes "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding" and, among other things, "[t]he reasonable right to confer with the attorney for the Government in the case."[71] This federal statutory right providing for victim testimony in specified federal court proceedings expands the more limited victim allocution rights in the Federal Rules of Criminal Procedure.[72] Broad-based victim allocution may be seen as having restorative justice foundations and components.[73] Accordingly, as one simple step toward victim involvement, the government may be able to harness and promote more targeted use of the existing victim allocution power conferred by Congress in the Crime Victims Rights Act. We also should give thought to expanding the current statutory allocution rules or at least providing guidance on their use.[74] For example, further research or experience may reveal that the benefits of victim participation in Rule 10b-5 prosecutions may be more achievable in certain cases than in others (based on the nature of the violation or facts particular to the investor, the subject corporation, or the defendant. In any case, however, reform that makes use of victim allocution at or after sentencing can be undertaken without a change in existing law and could address to some extent concerns about retribution, deterrence, investor protection, and market integrity with respect to the punishment of those who have pled guilty to or are found guilty of a criminal violation of Rule 10b-5.[75]

Further, attention should be given to more active involvement of investors in Rule 10b-5 prosecutions at earlier stages, e.g., in pretrial investigations, in grand jury proceedings, at plea bargaining, and at trial.[76] Some of this involvement could result in a

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[71] 18 U.S.C. § 3771(a)(4) & (5). As recently interpreted by the Ninth Circuit, this right ensures that a victim can speak at criminal sentencing hearings. Kenna v. U.S. Dist. Ct. for the C. Dist. of Cal., 435 F.3d 1011, 1013-17 (9th Cir. 2006).

[72] FED. R. CRIM. P. 32(i); United States v. Degenhardt, 405 F. Supp. 2d 1341, 1344-45 (D. Utah 2005).

[73] *See* Barnard, *supra* note 68, at 41-42.

[74] *See* Eisenstat, *supra* note 67, at 1168 (making similar suggestions). One aspect of restorative justice that may bear closer consideration in this regard is the use of sentencing circles. *See* TICKELL & AKESTER, *supra* note 69, at 23 ("Sentencing circles are strictly a part of the court process. . . . They are community-based interventions that seek to develop appropriate sentencing plans, using traditional circle ritual and structure.").

[75] *See supra* text accompanying notes 40-42. Professor Daly suggests a sequenced application of retributive and restorative justice elements that may be consistent with allowing victim allocaution at sentencing. *See* Daly, *supra* note 63, at 60 ("Retributive censure should ideally occur before reparative gestures (or a victim's interest movement to negotiate these) are possible in an ethical or psychological sense.").

[76] These reform efforts are synchronistic with the kind of "victim-centered prosecution" envisioned by Stacy Caplow in her essay entitled *What if There is No Client?: Prosecutors as "Counselors" of Crime Victims*, 5 CLINICAL L. REV. 1 (1998). *See also* David A. Starkweather, Note: *The Retributive Theory of*

pre-sentencing confrontation of the defendant by the victim, perhaps in a proceeding akin to restorative conferencing.[77] This is a more radical suggestion for reform that flies in the face of, among other things, the objective "reasonable investor" standard used in adjudicating the materiality element of Rule 10b-5 claims (because of the use of specific, subjective investor stories as evidence) and, perhaps to a lesser extent, the presumption of innocence absent proof of guilt beyond a reasonable doubt (because the identification of a "victim" assumes the existence of a "perpetrator" and because the confrontation of a defendant by an investor may be deemed a form of punishment for wrongdoing that occurs prior to an adjudication of guilt). However, victim involvement at these earlier stages in at least some cases may enhance the certainty or severity, if not the swiftness, of punishment for actual wrongdoers (addressing societal and investor perceptions about retribution and deterrence)[78] and attend to public concerns about investor protection and market integrity emanating from the failure to identify and prosecute alleged Rule 10b-5 offenders.[79]

The use of victim testimony at sentencing and at other stages of criminal proceedings is not without its perils.[80] Notably, involvement of investor testimony in criminal trials under Rule 10b-5 may result in ill-considered guilty pleas, biases toward guilt determinations, or unduly harsh punishments for convicted offenders.[81] Moreover, victim involvement may result in inequitable treatment as among alleged and convicted Rule 10b-5 offenders, because victims may be more willing to testify—or more effective in their testimony—in one case than they are in another.[82] Victim involvement in criminal proceedings under Rule 10b-5 also may have the undesirable effect of further

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"Just Deserts" and Victim Participation in Plea Bargaining, 67 IND. L.J. 853 (1992) (analyzing victim rights to participate in plea bargaining under a moral or a just deserts theory of retribution.).

[77] *See* DIGNAN, *supra* note 59, at 115-21 (describing and discussing different models of restorative conferencing); TICKELL & AKESTER, *supra* note 69, at 22 ("Restorative conferences are meetings for victims, offenders and their supporters . . . ."). Existing authority permits victim participation in pretrial proceedings; the Crime Victims Rights Act gives crime victims the right to be heard at plea proceedings. 18 U.S.C. § 3771.

[78] *See supra* text accompanying notes 25-36.

[79] In general, victims who participate in restorative justice practices have a sense that the process has been fair and restorative. *See, e.g.*,DIGNAN, *supra* note 59, at 163-66; STRANG, *supra* note 59, at 129-30. However, different victims may react to the process in different ways, and their reactions may depend on a number of factors, including the conduct of the process and the level of victim participation. *See* BRAITHWAITE, *supra* note 54, at 45-51; STRANG, *supra* note 59, at 152-54. Communities as a whole also may be more satisfied with restorative justice. *Id.* at 66-69. Both victim and community satisfaction are necessary to investor protection and the promotion of market integrity.

[80] *See* Barnard, *supra* note 68, at 65-78 (describing and addressing potential drawbacks of victim allocution).

[81] Restorative justice advocate Professor John Braithwaite acknowledges critiques that restorative justice may induce admissions of guilt or inequitable sentencing. Braithwaite, *supra* note 63, at 102-03.

[82] Of course, to a great extent, the Federal Sentencing Guidelines (especially pre-*Booker*) have homogenized the available punishments for federal criminal actors, including Rule 10b-5 violators. This homogeneity in sentencing helps to ensure equitable punishment as among like criminal defendants, but it may at the same time undercut the retributive and deterrent force of the punishment as to a particular defendant. *See supra* notes 37-39 and accompanying text. Because of these competing interactions, any implementation of victim participation in criminal proceedings under Rule 10b-5 necessitates a review of, and may require amendments to, applicable sentencing guidelines to ensure that the desired retributive, deterrent, and policy objectives can be met.

distancing the perpetrator from investors and society as a whole, rather than encouraging his or her honest, equal participation as a member of society.[83] Finally, implementation of any victim participation plan in the public company setting (over and above that already mandated by the Crime Victims Rights Act) will require additional prosecutorial and judicial resources, since the process of victim involvement will need to be carefully managed outside and inside the courtroom.[84] Criminal actions brought under Rule 10b-5 based on public company disclosures may have thousands of victims (although many of them may not be willing to spend the time and money to take part in the proceedings, decreasing the advantages realizable from victim participation) with different profiles, desires, and needs.[85] These drawbacks, left unaddressed, may be sufficient to offset any benefits associated with increased retributive, deterrent, and policy-supportive effects of victim participation in criminal actions under Rule 10b-5. Also, as hypothesized above, victim involvement may not be appropriate as a retributive or deterrent enhancement in every case.[86] For example, certain victims or violators may be resistant or immune to the potential positive effects of victim involvement.[87] Accordingly, efforts to integrate victims into Rule 10b-5 prosecutions should be designed to avoid these and other perceived pitfalls *and* best achieve retribution and deterrence.[88]

Admittedly, navigating this course will not be easy. Although increased involvement of victims in Rule 10b-5 prosecutions may be difficult to implement, it is worth more consideration. There seemingly is value in merging traditional retributive and deterrent penal objectives with victim-oriented approaches.[89] Certainly, absent new evidence that criminal prosecutions under Rule 10b-5 provide adequate retribution and

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[83] *See, e.g.*, Sherry F. Colb, *Oil and Water: Why Retribution and Repentance Do Not Mix*, 22 QUINNIPIAC L. REV. 59, 84 (2003) ("It may be that punishment communicates society's outrage, in the sense of informing the punished individual that society disapproves of what he has done, but this communication is bound to anger him and make him defensive rather than create a space in which he can truly repent.").

[84] My fear is that a criminal court process designed around victim participation would start looking like the shareholder class action process, a result that is costly and otherwise unpalatable.

[85] *Cf.* DIGNAN, *supra* note 59, at 184 (describing issues involved in using a "multi-victim perspective" in restorative justice programs). Moreover, victims that involve themselves in the process may not be representative of greater public concerns. *Cf. id.* at 185 (indicating that there may be conflicts of interest between victims and the community in restorative justice processes).

[86] *Cf.* John B. Owens, *Have We No Shame?: Thoughts on Shaming, "White Collar" Criminals, and the Federal Sentencing Guidelines*, 49 AM. U.L. REV. 1047, 1051-53 (2000) (making this point with respect to shaming penalties for white collar criminals).

[87] *See e.g.*, Jayne W. Barnard, Securities Fraud Professionals (unpublished paper, on file with author) (showing that recidivists are difficult to deter).

[88] Of course, victim allocution under the Crime Victims' Rights Act is mandatory. In enacting this provision, Congress had the opportunity to weigh the benefits of this form of victim involvement against the relevant costs. The best that we can do now in that regard is to decrease costs associated with using victim allocution in specific contexts without compromising the statutory right.

[89] I find myself agreeing with Professor Albert Alschuler when he writes:

> Although a retributivist must believe that the imposition of deserved punishment is an intrinsic good, she need not believe that it is the only intrinsic good. . . . She need not join Michael Moore in saying that the retributivist punishes only because the offender deserves it. She need not deny the legitimacy of other goals of punishment."

Albert W. Alschuler, *Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1, 15 (2003).

deterrence, *some* type of reform in the related criminal enforcement process would seem desirable, if not necessary.

V. CONCLUSION

Justice, in any form, involves balancing or equalizing. In rough terms, retributive justice balances by attempting to equalize the harm to the crime victim by penalizing the criminal offender. Restorative justice balances by attempting to offset the harm to the victim by affording benefits to the victim. The two balancing methods are not mutually exclusive; offender penalties may benefit victims, and victim benefits may penalize offenders.

Criminal fraud under Rule 10b-5 most often entails wrongful conduct involving inaccurate or incomplete information. Those who actually trade in the market affected by this wrongful conduct may suffer a loss of personal freedom and financial capacity that results in feelings of disempowerment. In theory, these harms to the investor victim can be balanced on a purely retributive basis by punishing the offender with some level of imprisonment (curtailing the offender's personal freedom) or monetary fine (restricting the defendant's financial capacity) or both. Moreover, investors of all kinds—actual and potential—suffer a lack of faith and confidence in our system of securities regulation and in our capital markets. Retributive penalties of incarceration and fines also may address these harms, to the extent that actual and potential investors believe that *ex post* penalties offer deterrence or otherwise protect them and indicate the integrity of our capital markets. These remedies are available in our existing criminal justice system, but their retributive effects have been inconsistent.

I theorize that all of these Rule 10b-5 harms can be better balanced in our existing retributive criminal justice system by offering wronged investors the opportunity to regain feelings of control, faith, and confidence through the same currency that the offender used to disempower investors and undercut investor faith and confidence: information. Victim involvement in criminal proceedings brought under Rule 10b-5 offers the opportunity to fight the defendant's inaccurate or incomplete information with the victim's accurate and complete information. Potential results, based on experiential wisdom from other victim-oriented criminal processes, include increased offender accountability and contrition. Accordingly, while victim involvement may not hasten the speed with which justice is pursued in criminal proceedings under Rule 10b-5, it may increase the certainty and severity of penalties imposed on transgressors, better serving retributive aims of criminal punishment.

Victim involvement in criminal proceedings under Rule 10b-5 also may constitute additional punishment for the offender (in the form of uncomfortable victim confrontation) that may provide enhanced deterrence (again, because of the potential for increased penal certainty and severity).

Finally, victim involvement in Rule 10b-5 prosecutions more closely connects criminal enforcement under Rule 10b-5 to the policies underlying Rule 10b-5—investor

protection and the promotion of market integrity. This connection holds the promise of better restoring investor empowerment and faith and confidence in securities regulation and securities markets.[90]

Retributive and restorative justice can peacefully and productively coexist in the criminal enforcement of Rule 10b-5. Moreover, taken together, they can foster increased deterrence and provide more direct support for underlying policy objectives. In short, by incorporating elements of restorative justice into criminal actions under Rule 10b-5 (principally by involving the victim and the victim's story in those proceedings), the criminal process may better serve retribution, deterrence. investor protection, and market integrity promotion than those objectives are served in current criminal Rule 10b-5 proceedings.

[90] *Cf.* Duff, *supra* note 64, at 84-91 (exploring the overall meaning of restoration, with a specific focus on repairing damaged relationships)