PUBLIC PERCEPTIONS OF WHITE COLLAR CRIME CULPABILITY: BRIBERY, PERJURY, AND FRAUD

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We are accustomed to thinking of "crime" as involving the most blameworthy and antisocial sorts of conduct in which citizens can engage, conduct that is clearly and unambiguously more wrongful than conduct that is not criminal. But the reality is more complex, especially when we look at certain kinds of "white collar" behavior. One of us (Green) has previously undertaken an in-depth investigation of the underlying moral concepts that distinguish white collar crime from "merely aggressive behavior."[1] This work attempted to differentiate, for example, between criminal fraud and "sharp dealing," insider trading and "savvy investing," bribery and "horse trading," tax evasion and "tax avoidance," extortion and "hard bargaining," witness tampering and "witness preparation," and perjury and "wiliness on the witness stand."[2]

Such analysis often depended on fairly fine-grained distinctions in moral reasoning. The problem is that the ability of criminal law to stigmatize, to achieve legitimacy, and to gain compliance ultimately depends on the extent to which it enjoys moral credibility and recognition in the broader lay community.[3]

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1. *See* STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME (2006). We recognize that the concept of "white collar" crime has been highly contested in the academic literature, and that its use varies significantly even in common discourse. For present purposes, we adhere to the "moral" conception of white collar crime previously developed by Green, *id.* 9–29, according to which the term "white collar crime" refers to a loose collection of criminal offenses and related conduct distinguished by distinctive forms of harm and victimization, distinctive forms of wrongfulness, and a distinctive role for mens rea.

2. *See id*.

3. We have previously discussed this point in Stuart P. Green & Matthew B. Kugler, *Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation*, 7 J. EMPIRICAL LEGAL STUDIES 511, 515–17 (2010). *See also* Stuart P. Green, *Taking it to the Streets*, 89 TEX. L. REV. SEE ALSO 61 (2011), http://www.texaslrev.com/seealso/vol/89/responses/green.

If legally significant distinctions between fraud and non-fraud—or perjury and non-perjury—can be discerned only through abstract philosophical reasoning, it is reasonable to wonder whether the public will lend these distinctions the moral weight required for the law to be effective and legitimate.

This paper seeks to determine the extent to which the lay public's moral intuitions parallel the law in distinguishing between white collar crime and related non-crime by focusing on three domains of conduct: (1) bribery and gratuities; (2) perjury and false statements; and (3) fraud. These types of conduct are of practical significance and reflect the kind of moral ambiguity that is characteristic of white collar crime. This paper examines each category to determine where the lay public would draw the line between criminality and non-criminality; and, where such conduct is regarded as criminal, how it would be graded. The analysis aims to identify the extent to which public perceptions are consistent or inconsistent with current law.

Our studies found that lay persons, in general, are comfortable making fairly fine-grained distinctions regarding the law of white collar crime. In some cases, the distinctions made by our respondents were consistent with current law; this should lend weight to the view that the law in these areas draws distinctions in the appropriate places. Participants in the fraud study, for example, were comfortable distinguishing between misrepresentations that went to the heart of the bargain and those that were extraneous. Elsewhere, however, we found significant divergence between the views of our lay subjects and current law. In the case of perjury, for example, lay participants were less likely than the law to distinguish between lying in court under oath and lying to police while not under oath, and between literally false statements and literally true but misleading statements. Similarly, with respect to bribery, participants' views diverged significantly from current law. For example, respondents sought to criminalize both commercial bribery and payments accepted by an office-holder in return for performing a non-official act, despite the fact that neither form of conduct is a crime under current American federal law.

I
PREVIOUS STUDIES OF COMMUNITY ATTITUDES REGARDING WHITE COLLAR CRIME

It is often said that those who commit white collar crimes are subject to less severe punishments than those who commit street offenses.[4] The usual implication seems to be that such disparities are somehow unjust.[5] But, on reflection, it should be clear that treating a white collar crime less severely than a street crime would be unjust only if the white collar crime in question was no

4. *See, e.g.*, Ilene H. Nagel & John L. Hagan, *The Sentencing of White-Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity*, 80 MICH. L. REV. 1427 (1982).

5. *E.g.*, JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE 126–29, 141–42 (8th ed. 2006).

less blameworthy than the corresponding street crime. The problem is assessing the relative blameworthiness of white collar crime.

A handful of recent studies have sought to measure the blameworthiness of white collar crime in the eyes of the lay community. The data contained in this literature can be divided into three general categories: (1) data concerning perceptions of the relative seriousness of white collar crime compared to "street" crime; (2) data concerning perceptions of the relative seriousness of otherwise unrelated forms of white collar crime; and (3) data concerning perceptions of where the line should be drawn between white collar conduct that is treated as a crime and related white collar conduct that is not, and how the punishment for such related forms of white collar crime should be graded.

One of the more carefully controlled studies of the first type was conducted by Kristy Holtfreter and colleagues.[6] Subjects were asked, "[w]ho do you think should be punished more severely," a person who commits a "street crime like robbery and steals $1,000," or a person who commits a "white-collar crime like fraud and steals $1,000?" Subjects could also respond that the two crimes should "receive equal punishment."[7] The study reported that "65.4 percent of the sample felt violent offenders should receive harsher punishments."[8] Unfortunately, the Holtfreter study has several significant limitations. One is that it seems to treat "fraud" as a proxy for white collar crime generally.[9] Although fraud is certainly an important white collar offense, it is only one of a collection of offenses typically designated as such, and no explanation is given for why attitudes about fraud seriousness should be regarded as an adequate stand-in for attitudes regarding white collar crime more broadly. A second limitation is that the study did not specify exactly what occurred during each offense. For example, robbery implies the use of force or violence and is often perpetrated by means of a weapon. It is therefore possible that subjects compounded the offense. It seems obvious, in any event, that robbery involves more serious wrongs and more serious harms than theft by means of deceit.[10] Thus, it is not surprising that a white collar offense, with no potential for

6. Kristy Holtfreter, Shanna Van Slyke, Jason Bratton & Marc Gertz, *Public Perceptions of White-Collar Crime and Punishment*, 36 J. CRIM. JUST. 50 (2008). For studies employing a similar approach, see Francis T. Cullen, Jennifer L. Hartman & Cheryl Lero Johnson, *Bad Guys: Why the Public Supports Punishing White-Collar Offenders*, 51 CRIME, L. & SOC. CHANGE 31 (2008); Francis T. Cullen, Richard A. Mathers, Gregory A. Clark & John B. Cullen, *Public Support for Punishing White-Collar Crime: Blaming the Victim Revisited?*, 11 J. CRIM. JUST. 481 (1983). Some of this literature also focuses on differences in community attitudes towards white collar crime based on demographic factors, such as race, gender, income, political orientation, and the like.

7. Holtfreter et al., *supra* note 6, at 53.

8. *Id*. (emphasis removed).

9. *Id*. at 57. Though, to be fair, the study does suggest that "future research" should "includ[e] several different types of offenses."

10. This point is discussed in a prior study conducted by the present authors, in which subjects were asked to compare the seriousness of twelve different means of committing a theft of a $350 bicycle. Green & Kugler, *supra* note 3. The two forms of robbery (armed robbery and simple robbery) were ranked first and fourth in terms of seriousness, respectively. The two forms of fraud (passing a bad check and false pretenses) were ranked ninth and tenth in terms of seriousness, respectively.

physical harm, would attract lesser condemnation than a potentially violent blue collar offense. Unfortunately, that does not tell us as much as we would like to know about the distinction between white collar and blue collar crime per se; there are too many other relevant factors.[11]

The literature on community attitudes toward white collar crime also contains data concerning how people rate the comparative seriousness of essentially unrelated white collar crime behavior. The *National Public Survey on White Collar Crime*, conducted by the National White Collar Crime Center (NWCCC) in 2000 and again in 2005, is representative here. The study found, for example, that respondents rated an insurance agent's fraud as more serious than a corporation's reporting false quarterly earnings to increase the value of its stock, but less serious than a pharmaceutical company's releasing a new drug while hiding information revealing important health and safety issues for consumers.[12] Such findings, while interesting and relevant to policymakers in deciding how to enforce and punish various white collar crimes, do not directly address the kinds of concerns identified above regarding the distinction between closely related forms of white collar conduct.

Only a handful of studies address the issue considered here—namely, where to draw the line between closely related white collar criminal and non-criminal acts. One is a study of community attitudes regarding "cartel behavior" conducted at the University of Melbourne Law School by Caron Beaton-Wells

11. In 2000, the National White Collar Crime Center took a similar, but less controlled, approach when it asked participants to compare the seriousness of twelve crimes, including a street crime that caused or threatened injury and two white collar crimes that caused injury. NAT'L WHITE COLLAR CRIME CTR., THE NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME (2000). Comparing armed robbery with selling tainted meat, forty-five percent of respondents said that selling tainted meat was more serious, thirty-six percent said that armed robbery was more serious, and nineteen percent said that they were equal in seriousness. *Id*. at 12. Comparing armed robbery with failing to recall a defective vehicle, forty-eight percent said that armed robbery was more serious, thirty-eight percent said that failing to recall a defective vehicle was more serious, and thirteen percent said that they were equal in seriousness. *Id*.

In 2005, the NWCCC conducted another study using a different set of twelve scenarios, some of which were presumed by the authors to be white collar crimes. NAT'L WHITE COLLAR CRIME CTR., THE 2005 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME (2005). The scenarios included: (1) a corporation falsely reports its quarterly earnings, (2) a pharmaceutical company hides safety information about a new drug, (3) an insurance agent misrepresents coverage and grossly inflates costs, (4) a group of hackers steals patient information from a hospital and then sells it, and (5) a physician files false claims with an insurance company. One representative finding displays the limitations of this data: It was found that a bank teller's embezzling $10,000 from a customer was more serious than a robbery of $100, and less serious than an offender's attacking another person during a bar room fight and causing serious injury. Here we have three offenses, one presumably white collar, two not. The white collar offense falls between the two non-white collar offenses in terms of perceived seriousness. The three offenses, however, have virtually nothing in common. It is therefore inappropriate to draw any broad conclusions about the seriousness of white collar crime in general from comparing embezzlement to either of the other two offenses. For another study following a similar approach, see Nicole Leeper Piquero, Stephanie Carmichael & Alex R. Piquero, *Assessing the Perceived Seriousness of White-Collar and Street Crimes*, 54 CRIME & DELINQUENCY 291 (2008).

12. THE 2005 NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME, *supra* note 11, at 15.

and colleagues.[13] The Melbourne study focuses on three key forms of antitrust misconduct: price fixing, market allocation, and output restrictions. Subjects were asked to rank the seriousness of these three forms of conduct in comparison to each other, to others forms of white collar-type conduct, and to other forms of crime.[14] The 2000 NWCCC study also addresses this sort of comparison between closely related white collar conduct. Respondents were asked to compare the seriousness of a bribe accepted by a public official to a bribe offered by a private citizen—an issue further considered below.[15] In our view, the Melbourne and NWCCC studies reflect a useful approach to measuring community attitudes on several difficult issues in white collar crime. However, we think the studies would have been more useful if the scenarios had been pitched at a lower level of generality.

II
EMPIRICAL STUDIES OF ISSUES IN WHITE COLLAR CRIME

To examine the distinctions between criminal and non-criminal activities within three domains of white collar offenses (bribery and gratuities; perjury and false statements; and fraud), we conducted four surveys. For each domain, we outline the legal standards by which the conduct is evaluated, describe potentially liminal cases, and present our empirical assessment of the views of lay participants toward these cases. This analysis aims to compare and contrast lay views and current legal standards.

Respondents were recruited from Amazon's Mechanical Turk service, which allowed for a diverse sample of American adults. Each study had a target sample of fifty respondents. Data were discarded if the respondent had an abnormally fast completion time (less than half of the median) or incorrectly answered a question intended to screen inattentive participants.[16] Each study

13. Caron Beaton-Wells, Fiona Haines, Christine Parker & Chris Platania-Phung, *Survey of Public Opinion on Cartel Criminalisation in Australia: Report of Preliminary Findings* (2001), http://cartel.law.unimelb.edu.au/go/project-news/project-survey.

14. Among the white collar offenses included were an insurance company denies a valid claim to save money; a company director uses his position dishonestly to gain personal advantage; a company misleads consumers about the safety of goods; a company fails to ensure worker safety; a company evades government income taxes; a person uses inside information in deciding to buy or sell shares. *Id*.

15. THE NATIONAL PUBLIC SURVEY ON WHITE COLLAR CRIME, *supra* note 11, at 7. Seventy-four percent of respondents said it was more serious for a public official to accept a bribe, 12% said it was more serious for a private citizen to give a bribe, and 14% said they were equally serious. As indicated *supra* text accompanying note 11, our findings on this issue were similar.

16. *Cf*. Daniel Oppenheimer, Tom Meyvis & Nicolas Davidenko, *Instructional Manipulation Checks: Detecting Satisficing to Increase Statistical Power*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 867 (2009). A question early in the study asked participants to rate three movies on a deliberately nonsensical scale. If participants read the directions immediately above the question, they would know to bypass it. If participants did answer the question, however, they were prompted to reread the directions and check their response. Those who did not then correct their response were marked as inattentive. Oppenheimer and colleagues show that those who miss such checks fail to notice subtle distinctions in survey materials whereas those who pass the check (either initially or after being prompted) are sensitive to such variations.

began with a brief description of its procedure. Participants were told that the study evaluated how people act in various social situations. After giving their consent, participants were asked a question that instructed them to bypass, rather than answer it. Those who recorded an answer were marked as inattentive. Then, respondents completed a page of individual difference questions.[17]

Following the individual difference measures, participants were given instructions describing the format of the scenarios. Participants were told they would view a core "story" with multiple possible "endings" and that it was for them to determine which distinctions, if any, were relevant. After each scenario, participants were asked three questions. First, they were asked to rate the moral blameworthiness of the described act on a scale ranging from 1-Not at All Blameworthy to 7-Very Blameworthy. Second, they were asked whether the act should be treated as criminal (Yes or No). Third, they were asked how severely, if at all, the person should be punished on a scale ranging from 1-No Punishment to 7-Severely Punished.

Basic demographics (age, sex, occupation, educational attainment, state of residence) were collected at the end of the study. Participants were also asked a series of questions related to the set of scenarios presented in the study. For example, in the bribery study they were asked whether they had ever run for public office, held a position of responsibility at a larger firm, worked at a company with a gifts policy, been involved in lobbying, or given money to a political candidate.

A. Studies on Bribery and Gratuities

Since ancient times, virtually all systems of criminal law have criminalized bribery.[18] Bribery corrupts institutions by inviting inappropriate grounds for decisionmaking. It creates political instability, distorts markets, undermines legitimacy, retards development, and leads to injustice, unfairness, and inefficiency.[19] Traditionally, the offense has required a government official to accept a cash payment in return for agreeing to perform some official act.[20] Variations on the prototypical case raise numerous questions about the public's attitudes towards bribery.

First, in some of the most infamous cases of bribery, a briber is caught on tape offering or giving a bribee a briefcase full of cash in return for some official

17. C.G. Sibley & J. Duckitt, *Big-Five Personality, Social Worldviews, and Ideological Attitudes: Further Tests of a Dual Process Cognitive-motivational Model*, 149 J. SOC. PSYCHOL. 545 (2009). These included self-rated political orientation (1-Very Conservative to 7-Very Liberal), faith in various public institutions (government, courts, defense attorneys; 1-Not much faith to 7-A lot of faith), and eight items from the Competitive World Beliefs scale (a measure of support for dog-eat-dog social Darwinist beliefs).

18. For a historical perspective, see generally JOHN T. NOONAN, BRIBES (1984).

19. GREEN, *supra* note 1, at 202.

20. *See, e.g.*, 18 U.S.C. § 201 (2006) (leading American bribery statute).

act. Although this is arguably the paradigmatic case, modern statutes typically define bribery more broadly to include offering "anything of value" to a public official with the intent of influencing an official act. The term "thing of value" has been read broadly to refer to a range of tangible and intangible things, such as offers of future employment, unsecured short-term (and subsequently repaid) loans, restaurant meals, tickets for athletic events, ostensibly valuable (but actually worthless) stock certificates, and sexual favors.[21] Under current federal law, a defendant who accepts something of value other than cash or tangible property would be subject to the same potential punishment as someone who accepts cash or tangible property.[22] One issue, then, is whether the public would agree that the acceptance of other kinds of things of value—such as services, political endorsements, and contributions to a political campaign—should be regarded as equivalent to the acceptance of cash or tangible property.

Second, bribery law has traditionally made it a crime to give something of value for the purpose of influencing an "official act." Therefore, payments given to influence an unofficial act presumably do not constitute a bribe. But courts have disagreed about what constitutes an "official act." Some courts have broadly construed the term to include acts that were not within the defendant's official duties.[23] Others have read the statute narrowly and excluded acts that were not sufficiently specific and pending.[24] This raises the issue of the extent to which the lay public would regard as wrongful the payment of money to influence what we take to be an unofficial act, such as the giving of a political endorsement.

Third, there may be a difference between soliciting or accepting a bribe, on the one hand, and offering or giving of a bribe, on the other. As Green has previously argued, soliciting or accepting a bribe involves a kind of disloyalty.[25] Public officials are supposed to work in the best interests of their constituents or institutions, rather than in the interests of third parties who tempt them. Offering or giving a bribe, by contrast, involves a different dynamic: The briber (in contrast to the bribee) normally does not have a duty of loyalty. Rather, he induces another person to be disloyal. As such, he acts as an accomplice by influencing, soliciting, inciting, or persuading another to do wrong. Other things being equal, it is arguably less wrongful to induce another to do a wrongful act

21. GREEN, *supra* note 1, at 199.

22. *See, e.g.*, United States v. Williams, 705 F.2d 603 (2d Cir. 1983) (interpreting 18 U.S.C. § 201(c)).

23. *E.g.*, United States v. Parker, 133 F.3d 322 (5th Cir. 1998) (holding Social Security Administration employee's use of computer to fraudulently create documents was official act though outside her official duties); United States v. Jefferson, 562 F. Supp. 2d 687 (E.D. Va. 2008) (finding congressman's meeting with foreign and U.S. government officials to promote interests of companies with business interests in Africa constituted "official acts" within meaning of bribery statute).

24. *E.g.*, Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007) (finding police officer's use of computer to search police database was not official act because it did not involve any matter then pending before the police department).

25. GREEN, *supra* note 1, at 203.

than to do the wrongful act oneself.[26] For purposes of punishment, current law does not distinguish between taking and giving a bribe. Would the lay public nevertheless recognize such a distinction?

Fourth, as traditionally understood, bribery consists of a bilateral agreement or quid pro quo in which the bribee solicits or accepts something of value from the briber *in exchange for* the bribee's acting, or agreeing to act, on the briber's behalf. This exchange requires a meeting of the minds, with the bribee agreeing to "be influenced" in the performance of an official act. Sometimes, however, people give money and other things to public officials not in return for something specific, but merely as a gift or gratuity. Sometimes, the gift-giver is trying to obtain goodwill. Other times, she is genuinely trying to say "thank you" to the official for an unsolicited favorable act (and perhaps to buy continued goodwill). Federal law distinguishes between giving or offering something of value "for the purpose of influencing" an official act and doing so "for or because of any official act."[27] The first act involves a quid pro quo and constitutes true bribery. Under federal law, it can result in a sentence of up to fifteen years in prison. The second act is a mere gratuity. The convicted defendant faces a maximum penalty of only two years. One issue, then, is whether the lay public accepts the distinction made by the federal statute.

Finally, bribery has traditionally involved the offer or payment of money to a "public official," defined under the leading federal statute as a member of Congress, or official or employee of any branch of the federal government.[28] The statute also applies to jurors, witnesses, and non-government employees who occupy a position of trust with federal responsibilities, as in the case of an employee of a private nonprofit organization that administered a sub-grant of a municipality's federal block grant.[29] Yet there is a noticeable trend toward criminalizing bribery in the commercial context. For example, federal law now criminalizes bribes accepted by investment advisors, contestants in television game shows, bank employees, sellers of alcoholic beverages, labor union officials, railroad employees, and radio disc jockeys.[30] Several states have bribery statutes that apply to commercial contexts more generally.[31] The recently passed United Kingdom Bribery Act makes bribery a crime not only for government officials, but also for persons in business.[32] This raises the issue

26. *Id.* at 209.

27. 18 U.S.C. § 201(c)(1)(A) (2006).

28. *Id.* § 201(a)(1).

29. *Id.* § 201(b)(3), (4); Dixson v. United States, 465 U.S. 482, 496 (1984).

30. *Id.* § 215; *id.* § 205(c); 29 U.S.C. § 186 (2006); 49 U.S.C. § 11907 (2006).

31. For example, Texas law makes it a felony for a fiduciary, such as an agent, employee, trustee, guardian, lawyer, physician, officer, director, partner, or manager to accept or agree to accept any benefit from another person "on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary." TEX. PENAL CODE ANN. § 32.43 (West 2011).

32. U.K. Bribery Act, 2010, c. 23, § 3(2)(b) (Eng.).

of the extent to which the public regards a bribe paid to a private employee in a commercial context as comparable to a bribe paid to a government official in the public context.

The above-discussed legal distinctions provide a large number of bribery-related questions to consider. Therefore, we address bribery in two separate data collections. In the first, we address the first and second issues identified above. In the second, we address issues three through five.

1. Bribery and Gratuities Study #1: Methods

The first set of scenarios concerned two issues: the wrongfulness of a bribee's accepting a direct payment of cash or other tangible property compared to the bribee's accepting a non-property-related thing of value or receiving a thing of value only indirectly; and the blameworthiness of accepting things of value in exchange for official acts versus accepting things of value in exchange for unofficial acts.

Given that the leading American statute makes it a crime for a public official to accept "anything of value" with intent to be influenced in an official act,[33] we wanted to know how respondents' culpability determinations would change if we varied the nature of the thing of value. Thus, in one scenario, the putative briber, a company chief executive officer (CEO) named Reeves, wants the putative bribee, a state legislator named Smith, to vote against legislation that would hurt Reeves' firm. In one variation, Reeves offered Smith $20,000 cash; in a second, Reeves offered $20,000 worth of renovations to Smith's home; in a third, Reeves offered an (otherwise legal) $20,000 campaign contribution; and in a fourth, Reeves promised an endorsement in the next campaign. We predicted that subjects would view the payment of cash as most wrongful, with the in-kind home renovations a close second. A campaign contribution seemed more likely to fall outside the scope of bribery. The American political system, for better or worse, runs on campaign contributions, and although such contributions are not technically supposed to be given in return for specific promises, we anticipated that many subjects would not distinguish between campaign contributions given with and without strings. Additionally, we predicted that subjects would assume that the campaign contribution would not personally benefit the would-be bribee, but would instead be used to run his campaign. We thought that the promised endorsement would not be viewed as bribery, but rather as merely "politics as usual," an example of "you scratch my back, and I'll scratch yours."

As described earlier, only money given in return for the performance of an "official act" counts as bribery under federal law.[34] We wanted to know the extent, if any, to which our subjects would also think it was wrongful to give money in return for the performance of an unofficial act. To this end, we formulated a set of scenarios in which Smith, still a member of the state

33. 18 U.S.C. § 201 (2006).
34. *Id.* § 201(a)(3).

legislature, is approached by Johnson, a CEO who wants to run for mayor. Johnson seeks Smith's endorsement, which we assume is not an official act (though we should say that we have not found any law directly on point). In return for Smith's endorsement, Johnson offers the same list of inducements as in the previous scenario: cash, in-kind home renovations, a campaign contribution, and a mutual political endorsement. We predicted that, other things being equal, our subjects would rank the payment in return for an unofficial act as considerably less wrongful than payment for an official act.

Fifty participants were recruited for this study from Amazon's Mechanical Turk service. Data from one participant were discarded due to an abnormally fast completion time (less than half the median).[35] Of the remaining forty-nine participants (twenty male, twenty-nine female), the median age was thirty-six. Fifty-three percent of participants had college degrees. The procedures followed were as described above. The official and unofficial act stories were presented on separate pages in counterbalanced order. The scenarios and their various endings were not labeled.

2. Bribery and Gratuities Study #1: Results

Table 1 summarizes the study results, including the mean scores for the blameworthiness and punishment measures and the percentage of participants indicating that each act should be a criminal offense. Blameworthiness and punishment were both higher when the offer was made for an official act than for an unofficial one.[36] A high percentage of respondents (approximately ninety percent) said that offering money for a vote on legislation (an official act) should be treated as a crime. A similarly high percentage said that offering money for a political endorsement (which we regarded as an unofficial act) should be treated as a crime. This was surprising and seemingly inconsistent with current law, which does not treat payment for what we assume to be a non-official act, such as a political endorsement, as a bribe.

35. *Cf.* Oppenheimer et al., *supra* note 16, at 867.

36. The data on blameworthiness and punishment severity were analyzed using a repeated-measures ANOVA, with a two (official vs. unofficial act) by four (various means) design. The main effect of official versus unofficial act was significant for both blameworthiness $F(1, 48) = 32.18$, $p < .001$ and punishment $F(1, 48) = 60.09$, $p < .001$.

Table 1: Ratings of Official versus Unofficial Act Scenarios in Terms of Blameworthiness, Deserved Punishment, and Percentage of the Sample Criminalizing the Activity

Agreeing to Give	In Exchange for Accepting	Blameworthiness	Punishment	Percent Criminalizing
A Vote on Bill (an official act)	Money	6.41_a (0.91)	5.71_a (1.37)	$95.9\%_a$
	Home Renovations	5.88_b (1.42)	4.92_b (1.54)	$91.8\%_a$
	Campaign Contribution	5.43_c (1.34)	3.98_c (1.80)	$73.5\%_b$
	Endorsement	4.80_d (1.77)	2.94_d (1.88)	$36.7\%_c$
An Endorsement (an unofficial act)	Money	6.12_a (1.20)	5.08_a (1.74)	$89.8\%_a$
	Home Renovations	5.49_b (1.65)	4.18_b (1.79)	$77.6\%_a$
	Campaign Contribution	4.69_c (1.70)	2.61_c (1.64)	$42.9\%_b$
	Endorsement	3.16_d (1.74)	1.45_d (0.84)	$8.2\%_c$

Note: For each type of act (official vs. unofficial), scores for a given dependent variable that do not share subscripts are significantly different from each other. Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from one to seven.

The percentage of the sample criminalizing an activity and the blameworthiness and punishment ratings varied as a function of the means by which the act was solicited. Judgments of criminality followed the same pattern, so they will be discussed together.[37] When the bribee accepted an offer of cash, over ninety percent of our subjects said that the act should be treated as a crime, regardless of whether it was an official or (presumably) unofficial act. When an offer of home renovations was accepted, a similarly large percentage said that it should be a crime to agree to perform an official act; significantly fewer (about seventy-eight percent) said that it should be a crime when the agreement was for an endorsement.[38] Over seventy percent said that accepting a campaign contribution in return for performing an official act should be treated as a crime, but only slightly more than forty percent said that accepting a campaign contribution in return for giving an endorsement should be treated as

37. The effect of bribery means was also significant for both blameworthiness $F(2.2, 106) = 60.98$, $p < .001$ and punishment $F(2.1, 102) = 91.70$, $p < .001$. Due to a sphericity violation, the Greenhouse–Geisser correction was used for the relevant blameworthiness and punishment analyses.

38. Responses to the yes or no question asking whether the act should be treated as a crime were analyzed using a repeated measures chi-squared in all studies.

a crime (perhaps because both acts involved an explicitly political process). When the bribee accepted the offer of an endorsement, thirty-five percent said that it should be a crime if an official act was requested, and less than ten percent said it should be a crime if an unofficial act was requested.

We also investigated the role of individual difference factors in shaping bribery attitudes. We created separate composite variables for the criminality, blameworthiness, and punishment ratings for the official and unofficial acts. For example, we averaged the four blameworthiness scores for each of the public act cases to create an overall public blameworthiness score. In the case of the criminality data, we scored a scenario marked as a crime as a one and a scenario marked as no crime as a zero. Thus, the criminality averages reflect the proportion of scenarios marked as crimes.

We then probed the relationship between individual difference measures and each of the six composites (three for each act type) in a two-step process. First, we examined the simple bi-variate correlations between the composites and measures of educational attainment, sex, competitive world beliefs, political orientation, and faith in various institutions. The individual difference items that correlated with any of the dependent measures were then used as predictors in a multiple regression. Predictors that were not significant in the initial regression were removed from the final regression model.[39] As was also seen in subsequent studies, there were remarkably few significant effects. In this study, the only variable that predicted views of either set of scenarios was whether the participant had ever worked at a company that had a gift policy. If the participant had, then they were more likely to criminalize ($\beta = .42$, $p < .01$), and more severely blame ($\beta = .34$, $p < .05$), and punish ($\beta = .32$, $p < .05$) attempts to influence the unofficial act. There was no such effect on attempts to influence public actors. That the presence of a gift policy affected judgments for the unofficial act but not the official act may in part be due to the relative lack of ambivalence in responses to the official act. The overwhelming majority of the sample was highly critical of attempts to influence a vote on a bill, which sharply limited the potential role of individual differences.

Previous research has sometimes found that differences in punitiveness toward white collar offenders depended on the gender, race, or educational attainment of the participant.[40] In these studies, we did not find differences based on gender or educational attainment. Given our comparatively small sample size, we cannot assume that such differences do not exist, rather only that, if they do exist, the differences are likely small. The samples were not large

39. The use of multiple regression analysis was intended to deal with the conceptual overlap of some of the individual difference measures. For example, in the fraud study, both social and economic conservatism correlated with ratings of criminality, but only economic conservatism was a significant predictor in the multiple regression; social conservatism only affected judgments of criminality to the extent that it reflected economic conservatism.

40. For a useful summary, see Holtfreter et al., *supra* note 6, at 52; *see also* James D. Unnever, Michael L. Benson & Francis T. Cullen, *Public Support for Getting Tough on Corporate Crime: Racial and Political Divides*, 45 J. RESEARCH IN CRIME & DELINQUENCY 163 (2008).

enough to test meaningfully for ethnic differences.

3. Bribery and Gratuities Study #2: Methods

The second set of scenarios concerned three issues: the wrongfulness of accepting money or other things of value as a quid pro quo versus accepting money or other things of value as a mere gift; the wrongfulness of a bribe accepted by a public official versus a bribe accepted by an official of a private company; and the wrongfulness of soliciting or accepting a bribe versus offering or giving a bribe.

Federal law draws a significant distinction between giving or offering something of value "for the purpose of influencing" an official act and giving or offering something of value "for or because of any official act."[41] The first act involves a quid pro quo and constitutes true bribery; it can result in a sentence of up to fifteen years in prison. The second act is a mere gratuity with a maximum penalty of two years. We wanted to see if our subjects would make a similar distinction. We devised a set of scenarios in which the gift-giver (CEO Larson) either has or has not had contact with the gift-recipient (state legislator Jones) prior to the recipient's official act (a vote on the location of a new government office building). The scenario with prior contact describes a direct bribe: money is offered in advance as a quid pro quo. In the scenario without prior contact, the gift-giver gives a "thank you" gift of $20,000 after the vote. The gift giver did not have a direct expectation of future services. We tested two variations of the gratuity scenario. In one, the recipient has announced that he will soon be retiring from office, which largely removes the possibility of future inappropriate influence from the gratuity. In the other variation, the recipient has no plans to retire and the gift giver is said to hope that his gift will "help his company maintain good relations" with the recipient. We predicted that our subjects would rate accepting a gratuity as less blameworthy than accepting a bribe, and would rate the case in which the gift recipient would remain in office as more blameworthy than that in which the recipient was about to retire.

Although bribery has traditionally involved the acceptance of money by a "public official," there has been a trend toward criminalizing bribery in the commercial context. To determine how our subjects would view the wrongfulness of commercial bribery, we formulated a set of parallel scenarios in which CEO Larson is interacting with Heller, a board member of another company. Heller is voting on the location of a new office building, but this time, it is a private office building and the government is not involved. There were three variants: a bribe, a gratuity to the retiring employee, and a gratuity to the employee with no plans of retiring.

In all of these scenarios, the focus was on the culpability of the person receiving the bribe or gratuity. But most statutes also make it a crime to offer or give a bribe or gratuity, and, for purposes of punishment, do not distinguish between the two acts. Thus, we posed an additional set of questions that asked

41. 18 U.S.C. § 201(b), (c) (2006).

subjects to assess the wrongfulness of Larson's offering the bribe to the state legislator. We expected most subjects to view accepting a bribe as more wrongful than giving a bribe since only the former typically involves a breach of loyalty; the latter presumably involves the aiding and abetting of another in his wrongful act.

The methodology for the second bribery study paralleled the first study. Fifty-two participants were recruited from Amazon's Mechanical Turk service. Data from three were discarded due to abnormally fast completion times (less than half the median) or incorrectly answering a question intended to screen inattentive participants. Of the remaining forty-nine participants (fifteen male, thirty-four female), the median age was thirty-three. Fifty-one percent of participants had college degrees.

Participants were told they would view a core "story" with multiple possible "endings," and that they should determine which distinctions, if any, were relevant. The stories about the government official (Legislator Jones) and corporate employee (Heller) were presented on separate pages in counterbalanced order. The questions about the wrongfulness of offering the bribe to the state legislator were always last.

4. Bribery and Gratuities Study #2: Results

Table 2 summarizes the results of the study. The government official was judged to be more blameworthy and deserving of more punishment than the corporate employee.[42] The distinction between bribes in the government context and bribes in the commercial context was less significant than expected. When the bribe was accepted by a board member of a large company, nearly eighty percent of our subjects said that this should be treated as a crime. Although this was slightly less than in the context of the bribe accepted by a public official, eighty percent is still substantial. This was a striking finding given that federal law does not make such conduct a crime at all, at least not under a bribery statue.[43] Attitudes of the American lay public were more consistent with United Kingdom law, which, under the Bribery Act of 2010, treats commercial bribery as indistinguishable from bribery in the public realm.[44] It is also worth noting that a significant number of respondents (about thirty-five percent) believed that gratuities given in the commercial realm should be regarded as criminal.

42. The data on blameworthiness and punishment severity were again analyzed using a repeated-measures ANOVA, this time with a two (government official versus corporate employee) by three (various means) design. The case of the briber was set aside for this analysis. Blameworthiness $F(1, 48) = 9.38$, $p < .01$ and punishment $F(1, 48) = 21.18$, $p < .001$ varied as a function of whether the official worked for the government or a private corporation. Blameworthiness $F(1.5, 73) = 50.14$, $p < .001$ and punishment $F(1, 72) = 78.36$, $p < .001$ also varied depending on whether the exchange between giver and taker constituted a bribe or merely a gratuity. Greenhouse–Geisser was used in these analyses.

43. If a private official makes a decision that runs against the best interests of his company in return for taking money for his own benefit, he may have breached a fiduciary duty to the company's shareholders, and thus be potentially liable for a different offense.

44. U.K. Bribery Act, 2010, c. 23 (Eng.).

Table 2: Ratings of Public versus Private Scenarios in Terms of Blameworthiness, Deserved Punishment, and Percentage of the Sample Criminalizing the Activity

		Blameworthiness	**Punishment**	**Percent Criminalizing**
Payment Accepted by Public Official	Payment given as quid pro quo	6.67_a (1.05)	5.90_a (1.37)	$95.9\%_a$
	Payment given as gift, recipient not retiring	5.12_b (2.00)	4.02_b (2.15)	$63.3\%_b$
	Payment given as gift, recipient retiring	4.57_c (2.15)	3.29_c (2.08)	$51.0\%_b$
Offering Payment to Public Official	Payment given as quid pro quo	6.45_a (1.32)	5.57_a (1.73)	$93.9\%_a$
Payment Accepted by Corporate Employee	Payment given as quid pro quo	6.06_a (1.72)	4.88_a (1.88)	$79.6\%_a$
	Payment given as gift, recipient not retiring	4.27_b (2.22)	3.06_b (2.01)	$36.7\%_b$
	Payment given as gift, recipient retiring	3.76_c (2.20)	2.35_c (1.75)	$22.4\%_c$

Note: For each type of official, scores for a given dependent variable that do not share subscripts are significantly different from each other. Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from one to seven.

All else being equal, respondents always rated the acceptance of a quid pro quo payment as significantly more blameworthy than the acceptance of a gift. Indeed, the difference between a quid pro quo and a gift was greater than the difference between a quid pro quo accepted by a government official and one accepted by a corporate employee. Distinguishing between quid pro quo payments and gifts is consistent with current federal law.

Finally, there were no significant differences between how respondents viewed the blameworthiness of bribers compared to bribees. This is consistent with current U.S. law, but runs counter to our hypothesis: We expected the bribee to be judged more harshly than the briber because the bribee is the one betraying a trust whereas the briber is merely inducing the bribee to do so. Such judgments might have been counter-balanced, however, by the fact that the briber showed "initiative" that the bribee arguably did not.

To analyze individual differences for this study, we created separate composites for the private and public bribee cases and combined the bribery and gratuity cases for each. Two individual difference factors were significant.

When the receiver of funds was a private employee, a subject who had worked at a company with a gift policy was more likely to criminalize the private official's actions ($\beta = .27$, $p = .05$), rate them as blameworthy ($\beta = .36$, $p < .05$), and assign harsher punishments ($\beta = .37$, $p < .05$). Subjects with a high score in competitive world beliefs were somewhat less likely to criminalize a private official accepting money ($\beta = .27$, $p = .05$), but competitive world beliefs did not have an effect on the other measures. When the receiver of funds was a public official, the same two factors were relevant. Subjects who had worked at a company with a gift policy were more likely to criminalize the official's actions ($\beta = .32$, $p < .05$) and rate them as highly blameworthy ($\beta = .34$, $p < .05$). Participants high in competitive world beliefs were again less likely to criminalize the official's actions ($\beta = .39$, $p < .01$) or rate them as highly blameworthy ($\beta = .39$, $p < .01$). Gift policies and competitiveness did not significantly affect preferred punishment for the public official.

B. Study on Perjury and False Statements

Under U.S. federal and analogous state law, two main offenses involve lying in the context of government procedures. The first, perjury, consists of willfully making a false material statement while under oath, typically in a judicial or legislative proceeding.[45] Case law makes it clear that in order to qualify as perjury, a statement must be literally false rather than merely misleading.[46] Under the federal perjury statute, the punishment is a maximum of five years in prison. The second offense, false statements, consists of making a false statement in a matter within the jurisdiction of a government agency, including in the context of a law enforcement investigation.[47] The defendant need not be under oath. Although the Supreme Court has never ruled on the issue, a majority of lower courts have held that, as in the case of perjury, a false statement must be literally false;[48] a minority of lower courts have held to the contrary.[49] Under the leading federal statute, 18 U.S.C. § 1001, the punishment for false statements is also a maximum of five years (unless it involves terrorism, in which case the maximum sentence is eight years).[50] We wanted to know how, other things being equal, the public would regard the wrongfulness of lying in court under oath compared with lying to law enforcement officials while not under oath. In addition, we wanted to know the extent to which our subjects would, if all else were equal, distinguish between literally false statements and literally true but misleading statements.

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45. The federal statute is 18 U.S.C. § 1621 (2006).

46. Bronston v. United States, 409 U.S. 352 (1973).

47. 18 U.S.C. § 1001 (2006). Under federal law, the false statement is typically made to a government entity or official, such as an FBI, IRS, or SEC agent; under analogous state law, it is typically made to a state or local entity or official, such as a police officer.

48. United States v. Gahagan, 881 F.2d 1380, 1383 (6th Cir. 1990); United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978); United States v. Lozano, 511 F.2d 1, 5 (7th Cir. 1975).

49. *E.g.*, United States v. Stephenson, 895 F.2d 867, 873 (2d Cir. 1990).

50. 18 U.S.C. § 1001 (2006).

We were also interested in the effect of the perjury or false statements: Specifically, should it matter whether a witness's lie leads to a third party being falsely inculpated (and therefore unjustly convicted) or, conversely, to a third party being falsely exculpated (and therefore unjustly acquitted)? Our legal culture traditionally views wrongful conviction as worse than wrongful acquittal.[51] In the past, federal law treated certain kinds of falsely exculpatory statements as exempt from criminal prosecution.[52] But, under current federal law, false statements that have the effect of unjustly exculpating are treated no less harshly than false statements that have the effect of unjustly inculpating. We wanted to see whether lay subjects would recognize the inculpation–exculpation distinction.

To test the three key questions concerning perjury and false statements, we formulated a range of related scenarios. In all of them, a man named Walt witnessed an automobile theft near his home. At the time of the theft, Walt would normally have been at work. His company has a strict attendance policy and he risked being terminated were it known that he had been late on the day in question. Walt was therefore motivated to conceal his whereabouts on the day of the crime and not cooperate with authorities. In all cases, the main suspect in the crime was Dave, a man Walt did not know.

We wished to explore the distinction between making a literally false statement and making a literally true (though misleading) statement. Accordingly, in one variation, Walt was called as a witness by the prosecution in a criminal trial, and offered (exculpatory) testimony that was literally false: he said he was not at home and did not witness the crime. In actuality, he did see Dave commit it. In the other variation, Walt offered testimony that, though misleading, was literally true: he said that he normally left for work by the time the theft occurred. The prosecutor took that to mean that he did not witness the theft. In each case, we stated that Dave was acquitted despite his guilt. We predicted that, other things being equal, subjects would rate the literally false statement as more wrongful than the merely misleading one. Green has previously characterized this as the principle of *caveat auditor*: In certain circumstances, a listener is responsible or partly responsible for ascertaining a statement's truth before believing it. This principle applies to cases of merely misleading statements but not to lying.[53] When *A* lies to *B*, *A* is telling *B* that *A* believes what *A* is saying. If *A* is mistaken about her own assertion or is lying,

51. *See* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173 (1997). The Hebrew Bible says that a witness who falsely inculpates is to receive the same punishment as that which would have been given to the falsely accused; no such similar punishment is applicable for statements that are falsely exculpating. *Deuteronomy* 19:18–19.

52. *See* Brogan v. United States, 522 U.S. 398 (1998) (repudiating judicially created "exculpatory no" doctrine, under which a statement that would otherwise violate 18 U.S.C. § 1001 was exempt from prosecution if it conveyed false information in a situation in which a truthful reply would have incriminated the interrogee, and if it was limited to simple words of denial rather than more elaborate fabrications).

53. See GREEN, *supra* note 1, at 78.

then *A* is wholly responsible for *B*'s false belief. But if *A* merely misleads *B* without making an assertion, *A* has not told *B* that *A* believes what *A* is saying (since what *A* is saying is neither true nor false). Thus, it is partially *B*'s fault for relying on an assertion that *A* has not made. The underlying idea, as explained by Jonathan Adler, is "that each individual is a rational, autonomous being and so fully responsible for the inferences he draws, just as he is for his acts. It is deception, but not lies, that require mistaken inferences and so the hearer's responsibility."[54] We also wanted to know how the subjects would regard the wrongfulness of lying in court under oath compared with lying to the police while not under oath. As a baseline, we used the aforementioned scenario in which Walt is called as a witness by the prosecution. Walt was explicitly described as swearing to tell the truth and then lying. We also created a variation in which the police questioned Walt at the initial stage of the investigation. He again lies, but this time he is not under oath. Because of his lie, the police do not pursue an investigation of Dave; the guilty man is free of suspicion. We predicted that all else being equal, subjects would rate lying under oath in a court proceeding as more wrongful than lying to police when not under oath. We surmised that violating a sworn oath would add to the wrongfulness of the act.

Finally, we explored the difference between testimony that is falsely exculpatory and that which is falsely inculpatory. In all of the previous scenarios, Walt's various statements had the effect of helping to unjustly acquit or divert suspicion from a guilty man. An additional variant placed Walt in a courtroom under oath, but this time, he made a literally false statement. The statement had the effect of allowing an innocent man to be convicted (he testified that he did not witness the crime when, in fact, he saw someone other than Dave commit it). We predicted that false statements that were falsely inculpatory would be rated as significantly more wrongful than false statements that were exculpatory. We thought that our subjects' judgments would be informed by the common maxim that "it is better that [five, ten, twenty, or a hundred] guilty men go free than that one innocent man be convicted."

1. Perjury and False Statements Study: Methods

The method for the perjury and false statements study closely paralleled the method for the prior studies. Fifty-one participants were recruited from Amazon's Mechanical Turk service. Data from two were discarded due to abnormally fast completion times (less than the median) or incorrectly answering a question intended to screen inattentive participants. Of the remaining forty-nine (twenty male, twenty-nine female), the median age was thirty-three. Forty-nine percent of participants had college degrees.

Participants were told they would view a core "story" with multiple possible "endings" and that they should determine which distinctions, if any, were

54. Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHILOSOPHY 435, 437 (1997).

relevant. The demographics page for this study also asked participants whether they had ever testified in court or been questioned by the police.

2. Perjury and False Statements Study: Results

Table 3 summarizes the results and shows that blameworthiness scores were high for all versions of the scenario. In all of the versions containing a direct lie, Walt was rated within one interval of the top of the scale. Thus, while some lies may have been seen as more blameworthy than others, all were viewed as sufficiently wrong to reach the ceiling of the scale, thereby obscuring potential differences between the lies. The version in which Walt merely misleads the court, however, was seen as less blameworthy than all of the others (including the parallel case in which he lied).[55]

Table 3: Ratings of Perjury and False Statements Scenarios in Terms of Blameworthiness, Deserved Punishment, and Percentage of the Sample Criminalizing the activity.

	Blameworthiness	**Punishment**	**Percent Criminalizing**
Lie to Court, Exculpatory	6.45_a (1.08)	4.12_b (1.39)	$93.9\%_a$
Lie to Court, Inculpatory	6.47_a (1.08)	4.63_a (1.58)	$89.8\%_{ab}$
Lie to Police, Exculpatory	6.14_a (1.15)	3.80_b (1.73)	$77.6\%_b$
Mislead Court, Exculpatory	5.39_b (1.71)	3.08_c (1.68)	$59.2\%_c$

Note: For each dependent variable, scores that do not share subscripts are significantly different from each other. Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from one to seven.

Punishment scores varied substantially more than blameworthiness scores. As expected, a lie to a court that had an unjustly inculpatory effect was seen as deserving greater punishment than a lie that had an unjustly exculpatory effect. Additionally, a misleading statement with an exculpatory effect was seen as deserving less punishment than a lie with an exculpatory effect. Contrary to predictions, there was not a significant difference between a lie to a court with an exculpatory effect and a lie to the police with the same exculpatory effect.

A majority of subjects thought that lying to police when not under oath should be treated as a crime, though less than those who wanted to see lying under oath treated as a crime. We think the distinction reflects the fact that, in the case of perjury, the defendant has sworn to tell the truth, and the perception that, other things being equal, lying in court might pose a greater potential for harm than lying to the police. Inasmuch as subjects regarded perjury as the more serious crime, their views were inconsistent with federal law, which

55. The data on blameworthiness and punishment severity were analyzed using a repeated measures ANOVA. Scores varied across condition for both blameworthiness $F(2, 116) = 14.79$, $p < .001$ and punishment $F(3, 144) = 17.58$, $p < .001$. Greenhouse–Geisser correction was used in the blameworthiness analyses.

regards false statements and perjury as equivalent in seriousness (both offenses have a maximum of penalty of five years in prison, except when false statements involves terrorism, in which case the maximum penalty is eight years).

The percentage of subjects who wanted to criminalize the conduct in each version of the scenario was revealing. More respondents wished to criminalize literally false statements to the court than wished to criminalize literally true though misleading statements to the court. This corresponds to the moral distinction between lying and merely misleading. Nevertheless, a majority of subjects wished to criminalize even misleading statements made under oath. This finding suggests a divergence between community attitudes and current law.

We examined the individual difference data in this study at the overall level by creating a single set of composites across all four scenarios, and at the individual level by looking at each scenario separately. Individual difference measures did not significantly relate to criminality, blameworthiness, or punishment judgments in either approach.

C. Study on Fraud

The term "fraud" has a wide range of meanings in Anglo-American criminal law. At its core, fraud consists of the misappropriation of money or property by means of deceit. But fraud is also often defined more broadly to include (1) acts aimed at objects other than the misappropriation of property (such as the deprivation of honest services, obstruction of governmental functions, and obtaining of unjust advantage), and (2) acts committed by means other than deception (such as breach of trust, conflicts of interest, and exploitation).[56] As a result, the concept of fraud is both ubiquitous and elusive.

We focused this study on what we took to be the core sense of fraud: theft by deception. Even within this core conception, the precise boundaries of fraud can be hard to pin down. Our free market system tends to respect and reward aggressive business practices. What constitutes true fraud can be difficult to distinguish from "sharp dealing," "puffing," or "seller's talk." The question, then, is how to distinguish between cases of misrepresentation that constitute criminal fraud and cases that do not.

The law has traditionally required that, to be fraudulent, a misleading statement or lie must be material, in that it concerns the price, quantity, effectiveness, or quality of the goods or services in question. The fraud must go to the nature of the bargain itself, rather than to the circumstances surrounding the bargain. For example, in a leading Second Circuit case, the defendants were in the business of selling stationery supplies through salesmen who solicited orders by telephone.[57] In order to "get past" the secretaries who answered the

56. Though the recent decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), has limited the scope of federal mail fraud, in holding that the honest services fraud criminalized by 18 U.S.C. § 1346 applies only to bribery or kickbacks and not to other fraudulent deprivations of intangible rights.

57. United States v. Regent Office Supply, 421 F.2d 1174 (2d. Cir. 1970).

phone and speak to the purchasing agents directly, the salesmen would make false representations by saying that they had been "referred" to the customer by a mutual friend or another customer, or that they were "stuck" with stationery ordered by a customer who had died. While not condoning the use of such misrepresentations as a matter of business ethics, the Second Circuit held that they did not constitute criminal fraud, since, crucially, there was no evidence that any of the misrepresentations had been "directed to the quality, adequacy or price of goods to be sold, or otherwise to the nature of the bargain."[58]

We wanted to see whether the public would agree that the line between criminal fraud and unethical business practices should be drawn where the Second Circuit and other courts have placed it.[59] We also wanted to know whether the distinction between material and non-material misrepresentations was sufficiently fine-grained. In particular, we were interested in seeing if our subjects would regard certain misrepresentations regarding the quality, adequacy, or price of goods as more serious than others.

Another issue in the law of fraud concerns the distinction between deceptive affirmative statements and deceptive omissions. A fraud can be premised on either, but a material omission is fraudulent only when there is a duty to disclose or when the omission has the effect of making an affirmative statement misleading by implication.[60] Once an omission has been determined to be fraudulent, however, it is treated the same as a deceptive affirmative statement. We wanted to know the extent to which the public would regard various kinds of omission as fraudulent and how they thought omissions should be punished.

Finally, under current law, the usual maximum penalty for mail fraud is twenty years in prison.[61] Theoretically, such penalties could apply regardless of the value of the property stolen, but in practice, the value of the property obtained is relevant under Sentencing Guidelines.[62] We investigated the extent to which, all else being equal, the value of property involved would affect judgments about the appropriate punishment.

We created two parallel sets of scenarios involving potentially fraudulent statements made in connection with the sale of a good. One set involved the sale of an $800 laptop computer. The other set involved the sale of a $40,000 automobile. We predicted that, other things being equal, subjects would rank fraud committed in connection with the more expensive item as more blameworthy than fraud committed in connection with the less expensive item.

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58. *Id*. at 1179.

59. United States v. Starr, 816 F.2d 94, 98 (2d Cir. 1989); United States v. Dinome, 86 F.3d 277, 284–85 (2d Cir. 1998).

60. *See, e.g.*, Starkman v. Marathon Oil Co., 772 F.2d 231 (6th Cir. 1985), *cert. denied*, 106 S. Ct. 1195 (1986).

61. 18 U.S.C. § 1341 (2006). If the fraud occurs in the context of a national emergency or affects a financial institution, the maximum penalty is thirty years.

62. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2011).

We expected scenarios involving misrepresentations of quality to be judged as most deserving of punishment. We distinguished between defects that involved the particular good being sold and defects that involved the model more generally. Thus, in one variation, the salesperson tells his would-be customer that the product (whether the laptop or automobile) is a new, brand name model, when it is really a refurbished model made with off-brand parts. In another variation, the salesperson knowingly sells a product with a defective part. In a third, the salesperson is directly asked whether the model (whether the laptop or automobile) is known to have a specific problem: a tendency to overheat (in the case of the laptop) or a tendency to burn oil (in the case of the car). The salesperson assures the customer that it does not, even though the salesperson knows that the model suffers from that problem. In a variation of this last scenario, we had a case in which the salesperson is not asked about the problem with the model and merely omits mentioning it. Here, we predicted that our subjects would rate the omission as deserving less punishment than the corresponding affirmative misstatements.

We predicted that scenarios involving two variants of "seller's talk" would be evaluated as substantially less serious. In one, the salesperson tells the customer that the actual price of the good in question is higher than the special sale price that he is offering to the customer ($1,000 versus $800 in the case of the computer; $45,000 versus $40,000 in the case of the car), when in fact, the lower price is the normal price. In the other, the salesperson tells his customer that the product in question is "very popular among important business people in New York City," even though he knows this is not true. Both of these statements are direct lies, but neither distorts the quality of the good in question; they are not relevant to the fundamental bargain. We expected that subjects would not believe them to be worthy of criminalization.

1. Fraud Study: Methods

The methodology for the fraud study closely paralleled the methodology for the prior studies. Fifty participants (sixteen male, thirty-four female) were recruited from Amazon's Mechanical Turk service. No participants had abnormally fast completion times (less than half the median) or incorrectly answered a question intended to screen inattentive participants. The median age was forty-one. Sixty percent of participants had college degrees.

Participants were told that they would be asked to rate the conduct of a salesperson in various cases and that they should decide whether the differences between the cases were important to their evaluations. The car and laptop scenarios were presented on separate pages, with accompanying questions, in counterbalanced order. The scenarios were not labeled.

At the end of the study, participants were also asked whether they had worked in sales, had ever bought a laptop or computer after talking to a salesperson, or considered themselves to be very knowledgeable about cars or computers.

2. Fraud Study: Results

The twelve fraud scenarios were divided into two groups (car versus laptop) of six cases each (the various sales tactics). The primary data analysis on the blameworthiness and punishment data took the form of a two by six repeated measures ANOVA. The type of good did not have an effect on either measure, so the more expensive good did not lead to perceptions that the sales tactics were more blameworthy or deserving of more punishment. There was, however, an interaction between sales tactic and type of good on the punishment measure. When the salesperson falsely claimed the product was new, there was elevated punishment in the car case relative to the computer case (see Table 4).[63] For the other sales tactics, there were not differences between the computer and car cases. Notably, falsely claiming that the product was new was the only sales tactic that an overwhelming majority of participants rated as criminal, perhaps explaining why it alone shows this distinction. Overshadowing this interaction, however, was an effect of sales tactic on both blameworthiness and punishment.[64] Since these effects were highly consistent across both measures and goods, we discuss them together.

63. $F(5, 245) = 4.76$, $p < .001$

64. Blameworthiness $F(5, 245) = 48.43$, $p < .001$; punishment $F(5, 245) = 57.21$, $p < .001$.

Table 4: Ratings of Fraud Scenarios in Terms of Blameworthiness, Deserved Punishment, and Percentage of the Sample Criminalizing the Activity.

Type of Good		Blameworthiness	Punishment	Percent Criminalizing
Computer	Falsely Claiming Product is New	6.50_{a} (1.07)	4.28_{a} (1.50)	$80\%_{a}$
	Lying About a Problem w/ the Model	6.40_{a} (1.05)	3.96_{a} (1.77)	$58\%_{b}$
	Omitting a Problem w/ the Model	4.72_{cd} (1.76)	2.82_{bc} (1.76)	$28\%_{cd}$
	Selling a Product w/ Defective Part	5.46_{b} (1.63)	3.20_{b} (1.80)	$42\%_{bc}$
	Falsely Claiming Product is on Sale	4.80_{c} (1.78)	2.38_{c} (1.66)	$22\%_{d}$
	Falsely Claiming Product is Popular	4.20_{d} (1.83)	1.92_{d} (1.24)	$8\%_{e}$
Car	Falsely Claiming Product is New	6.74_{a} (0.63)	5.02_{a} (1.36)	$88\%_{a}$
	Lying About a Problem w/ the Model	6.30_{b} (1.02)	3.84_{b} (1.90)	$58\%_{b}$
	Omitting a Problem w/ the Model	4.58_{de} (1.81)	2.66_{d} (1.70)	$28\%_{cd}$
	Selling a Product w/ Defective Part	5.56_{c} (1.58)	3.38_{c} (1.95)	$44\%_{bc}$
	Falsely Claiming Product is on Sale	4.70_{d} (1.88)	2.40_{d} (1.54)	$26\%_{cd}$
	Falsely Claiming Product is Popular	3.98_{e} (2.04)	1.92_{e} (1.32)	$6\%_{e}$

Note: Within each good type, scores for a given dependent variable that do not share subscripts are significantly different from each other. Standard deviations are in parentheses. Blameworthiness and punishment scores are on scales ranging from one to seven.

The scenario judged to be the most worthy of criminalization (slightly less than ninety percent in the case of the car and eighty percent in the case of the laptop) involved a false claim that the particular item being sold was new and brand name. This finding is consistent with the notion that true fraud involves misrepresentations that fundamentally impact the nature of the bargain.

There was a significant drop-off from the scenario judged most worthy of criminalization to the scenario judged next most worthy of criminalization: when the salesperson explicitly lied about a problem with the model. Fifty-eight percent of participants rated this as deserving of criminalization. We expected this number to be higher because this misrepresentation also affects the nature of the bargain. One possible explanation is that a general problem with the model, rather than a problem with the particular unit, is something that the

customer could have independently investigated and verified. Some participants may have been holding the victim partially responsible in this case.

Less serious than the deliberate lie was selling a product with a known defective component (between forty-two and forty-four percent of participants criminalized). Again, this case is criminal fraud under law. But in this case, only a minority of respondents rated it as such. One explanation is that the parts in these cases (batteries for both products) were viewed as comparatively insignificant. Alternately, our subjects might have made an implicit assumption that such immediate failures would be covered by a warranty.

Our subjects made a clear distinction between affirmative statements and omissions. When the salesperson affirmatively lied about a problem with the models, close to sixty percent said it should be treated as a crime. When the salesperson merely failed to mention the very same problem, less than thirty percent said it should be treated as a crime.

The category rated least deserving of criminal sanctions included misrepresentations thought to consist of non-material "seller's talk." When the salesperson falsely claimed the product was "on sale," only twenty percent of respondents said the statement should be treated as a crime. When the salesperson falsely claimed the product was "popular with business people in New York City," less than ten percent of respondents said this should be treated as a crime. The difference between the two cases can likely be explained by the fact that the first statement at least involved a question of the product's "price," while the second was "puffing" in its purest form. To the extent that subjects distinguished between misrepresentations concerning material facts and misrepresentations concerning non-material facts, their judgment was consistent with current law. But our subjects did not reliably criminalize all material misrepresentations. In these cases, though, it is hard to say what unspoken assumptions may have guided subjects.

The relatively high assessments of moral blameworthiness are of interest. Although subjects seemed reluctant to brand these potentially fraudulent activities as criminal, they did register their moral aversion. While these sales strategies may be viewed as "lawful," they were clearly not entirely acceptable from subjects' ethical points of view.

We again assessed the role of individual difference factors in shaping criminal justice attitudes. In this case, we formed separate blameworthiness, punishment, and criminality composites for the car and computer scenarios. For both sets of scenarios, economic conservatism was the only significant predictor of views on criminality ($\beta_{computer} = -.55$, $p < .001$; $\beta_{car} = -.42$, $p < .01$) and punishment ($\beta_{computer} = -.39$, $p < .01$; $\beta_{car} = -.39$, $p < .01$). The more economically conservative a person was, the less likely he or she was to judge a given act as fraudulent and the less punishment imposed. Economic conservatism was measured on a seven-point scale. For each step on the scale, from liberal to conservative, a participant was 9.8% less likely to judge a computer scenario as a case of fraud and 7.5% less likely to judge a car scenario as a case of fraud.

Those respondents who viewed themselves as more conservative may have taken a laissez faire attitude that markets are self-regulating and government regulation, whether criminal or civil, is disfavored. No other measure had an independent effect.

III
CONCLUSION

White collar criminal offenses, such as bribery, gratuities, perjury, false statements, and fraud, reflect a kind of moral ambiguity that is lacking in the case of many more familiar street crimes. Whether a given actor will be punished as a criminal, or admired as a successful businessperson, politician, lobbyist, or witness will often depend on nuanced moral judgments and subtle distinctions in facts. Because the ability of laypersons to distinguish between criminality and non-criminality and to make confident judgments about retributive desert is crucial to the functioning of the criminal justice system, we conducted a set of studies to assess lay attitudes regarding a variety of issues in white collar crime.

In general, laypersons in our studies were capable of making fairly fine-grained distinctions regarding white collar crime. In some cases, the distinctions made by our respondents were consistent with current law, and therefore lend weight to the view that the law draws distinctions in the appropriate places. For example, participants in the fraud study were mostly sensitive to the kind of distinctions that lie at the heart of fraud law, including the distinction between misrepresentations relating to the quality, adequacy, or price of goods or services, on the one hand, and mere "puffing," on the other. The study, thereby, produced a pattern of results largely consistent with prevailing doctrines.

In other cases, however, we found that the judgments made by our subjects differed in some significant ways from current law. In the domain of perjury, for example, public perceptions of seriousness diverged from current law, particularly with respect to the distinction between lying in court under oath and lying to police while not under oath. The familiar distinction between lying and merely misleading was also less sharp than under current law. Similarly, in the case of bribery, participants' views diverged significantly from current American federal law. Participants wanted to criminalize both commercial bribery and payments accepted in return for performing a non-official act, neither of which would normally be criminalized under the status quo. In these latter cases where public attitudes diverged from current law, further investigation is in order.

The moral intuitions of the lay public are an increasingly important component in criminal law theory. In the context of white collar crime, a part of criminal law that remains largely under-theorized and misunderstood, there is an even greater need for this kind of research. These data present some significant, if preliminary, insights into how the lay public would draw the boundaries between criminal and non-criminal white collar behavior. These and

future studies should serve to aid theorists and policymakers seeking to sensibly and coherently define the borders of legitimate business practice.