White-Collar Crime


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The Promise of **Blockchain Technology** To Combat **Money Laundering**

BY CHRISTIAN EVERDELL
AND DANIEL MANDELL

If you have been following the news recently, you probably know what Bitcoin is. It is a digital currency or cryptocurrency—or to use the language of Bitcoin's enigmatic creator, Satoshi Nakamoto, a "peer-to-peer electronic cash system"—that was first introduced to the world in 2008.

You probably also know that Bitcoin has had a somewhat checkered past. For example, Bitcoin was the only form of payment accepted by Silk Road, the online drug bazaar that was shut down in 2013, and is frequently the cryptocurrency of choice for ransomware hackers who demand Bitcoins in exchange for unfreezing your computer files.

Despite the ubiquitous familiarity of Bitcoin, a much smaller number know what the blockchain is. On a practical level, the blockchain is the digital ledger system that keeps track of, and securely records, all Bitcoin transactions that have ever occurred from day one to the present. On a loftier level, it is what creates trust and confidence in the validity of Bitcoin transactions, which allows the system to function. Quite simply, without the blockchain, there is no Bitcoin.

But recently the blockchain has moved out of the shadow of Bitcoin and has emerged as a potentially groundbreaking technological innovation that many are convinced will have countless transformative beneficial applications. One of the most touted applications is in the area of bank transfers and anti-money laundering (AML). Paradoxically, the same technology that made Bitcoin so attractive to criminals as a way to move their money may now help financial institutions crack down on illicit transfers. So how can the blockchain help combat money laundering?

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How Does Blockchain Work?

To appreciate how blockchain technology might be applied in the AML context, it is useful to understand first how it functions in its native environment of Bitcoin transactions and how Bitcoin transactions differ from typical bank transactions.

Let's look at a relatively simple bank transaction between Anna and Ben, where Anna and Ben have accounts at the same bank. Anna owes Ben $10 and tells her bank to transfer $10 from her account to Ben's account. The bank debits Anna's account by $10 and credits Ben's account by $10. No money actually moves anywhere—the transaction is simply reflected as a corresponding debit and credit that balance out in the bank's electronic ledger system.

The blockchain has moved out of the shadow of Bitcoin and has emerged as a potentially groundbreaking **technological innovation** that many are convinced will have countless **transformative beneficial applications.**

In this example, the bank is the trusted intermediary between Anna and Ben that handles all of the accounting and ensures that the transaction is carried out properly. Anna trusts the bank to credit the correct bank account (Ben's) with the correct amount ($10). Ben trusts the bank to verify that Anna has at least $10 in her account to cover the transaction before the transaction settles. And both Anna and Ben trust the bank to maintain an accurate ledger of their accounts so that when they check their balances, they have confidence that the amounts reflected are correct.

In a Bitcoin transaction, however, there is no trusted third-party intermediary like a bank. Bitcoin was specifically designed to be a decentralized system that eliminates the intermediary and allows Bitcoin users to make transfers directly to and from each other. But without a trusted intermediary to audit and record Bitcoin transactions, how can Bitcoin users keep track of who paid what? And how can they be certain that the system is secure? Answer: the blockchain.

The blockchain is the general ledger for Bitcoin transactions. It contains a complete, unbroken audit trail for every Bitcoin transaction that that has ever taken place. But the blockchain is not maintained by a single central authority like a bank. Instead, it is a distributed ledger that is maintained by thousands of computers around the world, called "nodes," each of which contains a complete copy of the blockchain.

The people who operate the nodes are called "miners." It is the miners' job to update the blockchain as new Bitcoin transactions occur on the Bitcoin network. Miners identify all of the pending transactions on the Bitcoin network for a given time period and then aggregate those transactions into a "block." To create the block, the miners run the transactional data through a series of mathematical calculations to produce a "hash" value—a unique string of numbers and letters that identifies that data—which is then stored on the block. The purpose of the hash value is to ensure that the data in the block can never be altered. If someone were to change the data in the block even slightly, the hash value would change and the block would be recognized as a fake. Once the new block has been successfully created, it is added to the blockchain, which is updated instantaneously across all of the nodes on the network.

To see how this works in practice, let's take our previous example, but now Anna owes Ben 10 Bitcoins instead of $10. How does Anna get those 10 Bitcoins to Ben? First, Anna needs to know Ben's Bitcoin address, which is the rough equivalent of a bank account number for Bitcoins. Next, Anna goes to her computer or smartphone and opens her Bitcoin "wallet," which is a software program that keeps track of her Bitcoins and gives her access to the Bitcoin network to make transfers. Anna sends a request to the network to update the blockchain to reflect a transfer of 10 Bitcoins from her Bitcoin address to Ben's Bitcoin address. The miners see the request and verify that Anna actually has 10 Bitcoins in her Bitcoin address. They then group Anna's transaction with numerous others into a new securely hashed block and add it to the blockchain. Once this process is complete, which usually takes about 10 minutes, the transaction is final and Ben's Bitcoin wallet will show that he has 10 more Bitcoins (and Anna's, 10 less). All of this is done quickly, securely, and without the need of a bank.

Blockchain's Troubled Youth

Despite all the current excitement about the blockchain, it got off to a rocky start. In its infancy, the block- » Page 12

Retaliatory Discharge Suit by Former General Counsel Unsettles Scope of **Attorney-Client Privilege**

BY MAURICIO A. ESPAÑA
AND BRENDAN HERRMANN

On Feb. 6, 2017, in a closely-watched case with potentially resounding implications for publicly-traded companies, a California jury awarded $5.92 million in doubled back wages and $5 million in punitive damages to Sanford Wadler, the former general counsel of Bio-Rad Laboratories. See *Wadler v. Bio-Rad Labs.*, No. 15-cv-2356 (N.D. Cal.).

Wadler's hefty award followed a trial in which he argued that Bio-Rad terminated him in retaliation for bringing potential violations of the Foreign Corrupt Practices Act to the attention of the audit committee of the company's board of directors, conduct expressly required by Sarbanes-Oxley's "up-the-ladder" reporting requirement. On top of Wadler's damages, Bio-Rad, pursuant to Dodd-Frank's and Sarbanes-Oxley's fee-shifting provisions, must pay Wadler's attorney fees and costs totaling $3.5 million—all after spending significant amounts to defend against Wadler's claims, investigate the alleged FCPA violations that Wadler disclosed, and present the findings of that investigation to the U.S. Securities and Exchange Commission and the Department of Justice.

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Bio-Rad's exorbitant legal bill is not only a stark reminder that a company's management should not retaliate against a whistleblower employee, it also serves as a warning that its in-house counsel can be the whistleblower and that its attorney-client privilege may not prevent her or him from vigorously litigating a retaliatory discharge claim if she or he feels mistreated. Such causes of action are available to attorneys like Wadler pursuant to the whistleblower protections of §806 of Sarbanes-Oxley and §922 of Dodd-Frank, and, as U.S. Magistrate Judge Joseph C. Spero held in Wadler's case, these federal protections can preempt state law rules concerning the attorney-client privilege and confidentiality.

The pivotal moment in Wadler's case came in December 2016—shortly before Wadler and Bio-Rad were set to go to trial—when Bio-Rad filed its motion in limine to exclude the overwhelming majority of the evidence Wadler expected to offer in support of his claim on the grounds that such evidence was protected from disclosure by Bio-Rad's attorney-client privilege. The court rejected Bio-Rad's argument and » Page 12

The **Compliance Monitor** Dilemma

BY DAVID A. RING
AND MATTHEW CVERCKO

The U.S. Department of Justice continues to churn out policies and guidance reflecting the view that it is not merely looking to *punish* companies for their employees' misdeeds, but to *help* the companies get better quicker.

Whether viewing the Fraud Section's recent "Evaluation of Corporate Compliance Programs"[1] or the National Security Division's "Guidance on Voluntary Self-Disclosures,"[2] the message is much the same: the Justice Department isn't just focused on deterrence and accountability, but is becoming more interested in ensuring that companies implement effective compliance programs to prevent and detect *future* misconduct. While these principles have long been ensconced in Chapter Eight of the U.S. Sentencing Guidelines, the subtle but growing focus on corporate get-well programs fits hand-in-glove with the Yates Memo's unstated raison d'etre:[3] Corporate penalties often fail to hit those who deserve it most.

The DOJ's growing interest in corporate compliance dovetails with the burgeoning trend, in both criminal and administrative enforcement actions, favoring the appointment of external corporate compliance monitors. What better way to ensure that a company stay on track than to embed an independent monitor at headquarters to oversee the company's progress? *But not so fast*, at least according to Walmart, which is reported to have recently rejected a DOJ settlement offer and taken a "not in my house" approach to DOJ's insistence on an external monitor.[4]

It's not difficult to speculate why Walmart, or any other company for that matter, might balk at the government's request. First, ask any criminal defendant who's been on pre-trial supervision whether he or she would trade a modicum of extra jail time for the elimination of post-sentence supervision, and you'll find an answer: Being snooped and second-guessed is never fun. Second, it's important to look to the purpose for imposing a monitor in the first place; that is, to ensure that the company satisfies a stated set of program objectives in order to remediate past shortcomings. But if the company has already done so, then why the need for a monitor? Last, one only has to click on a compliance blog to read stories of monitors-run-amok, hiring legions of support staff, imperiously fighting with senior executives, or acting as if they've discovered the key to transmuting lead to gold.

Of these concerns, the first and second can be tied together and rationally resolved by making an honest assessment of the company's current compliance program. If the program meets the government's compliance goals, there's no legitimate need for a monitor; if not, the company would probably benefit from a monitor, like it or not. But it's the third reason that really causes fits: Like the "military-industrial complex" long ago warned against by President Dwight D. Eisenhower, the government-monitor dynamic can create an alignment of interests that is capable of spinning away from its original, well-intentioned purposes.


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Whether relying on the ABA's Monitor Standards[5] or DOJ's guidance for Selection of Monitors in Criminal Division Matters,[6] one point is perfectly clear: the touchstone for monitor selection is *independence*. Like an arbitrator or judge, a monitor cannot be beholden to either side or have an interest in any outcome. Thus it would be outrageous to say that a monitor's compensation should be tied to the early, or timely, completion of the consent agreement (or deferred prosecution, etc.), by means of an "early-completion" bonus, *right*? Such incentive would surely cause a monitor to lean too far in one direction and loose objectivity. Or *would it*? Think of the flip-side: offering a "late-completion" bonus for when a company struggles under its consent agreement and can't be let go on time. Equally outrageous? Perhaps not.

It would be unfair to suggest that a monitor-to-be might harbor a nefarious intent to line his or her pockets at the company's expense; but an ethical dilemma does arise. Years ago, in the heyday of the drug wars, it became the rage for state and local governments to pursue the civil and criminal forfeiture of cash, cars, houses, you name it. No doubt, the members of law enforcement engaged in this activity were well intentioned and set on depriving misfeasors of the fruits or instrumentalities of their illegal activity. But in some places law enforcement agencies were able to reap direct and substantial benefits from their forfeitures, and some prosecutors were known to drive to work in high-end luxury cars seized through non-criminal administrative processes. Studies have shown that, where law enforcement was able to "police for profit," forfeitures rose at astronomical rates and the incidents of injustice grew accordingly.[7] To put it plainly, even those with the best of intentions could find themselves leaning away from the center, consciously or not, when their own self-interests came into play. It's simple Freakanomics.

There is a solution to this dilemma. In most instances the company negotiating a » Page 12

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Inside

A New Era of Enforcing **Protectionist Trade Measures**

BY JINI KOH

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Even prior to the 2016 Presidential election, Congress had already determined that certain enforcement measures were necessary to protect U.S. companies. Signed into force in February 2016, the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was the first comprehensive authorization of U.S. Customs & Border Protection (CBP) since the Department of Homeland Security was created back in 2003.

Provisions within the TFTEA update longstanding CBP programs such as duty drawback making the process of obtaining refunds of customs duties paid for imported products that are later exported easier; formalize modernization efforts such as CBP's Automated Commercial Environment (ACE), or e-filing entry process; and introduce certain enforcement measures further outlined below. Combined with the protectionist statements from the new Administration, companies that import and export products should, at a minimum, expect increased scrutiny of their shipments and more sophisticated companies should anticipate a new landscape where trade measures are used to gain competitive advantages.

Of note in the TFTEA are three enforcement measures of which companies should be particularly aware. The first is Title Four of the TFTEA, commonly referred to as the Enforce and Protect Act (EAPA), which established a new administrative procedure for investigating allegations of evasion of antidumping and countervailing (AD/CVD) duty orders. As background, dumping occurs when a foreign company prices its products at below fair market value and countervailing occurs when a foreign government provides assistance and subsidies to a foreign company enabling them to sell products below fair market value. A U.S. manufacturer can file a petition with the International Trade Commission claiming that it is injured in the marketplace because these foreign imports are priced below fair market value, whether through dumping or by receiving countervailable subsidies. The International Trade Commission determines if the domestic industry suffered injury as a result of lower priced imports, as opposed to increasing costs or other market forces. If injury is decided in the affirmative, the Department of Commerce then determines by how much the domestic industry was injured. The ensuing AD/CVD tariff is assessed on imports from the offending countries/producers to 'level' the playing field between the unfairly priced imported and competitively produced domestic products. AD/CVD orders are product and country specific, e.g., carbon and alloy steel cut-to-length plate from Brazil or honey from China, and the AD/CVD rates tariff can range from 0 percent to over 200 percent, which are assessed as an ad valorem tax (i.e., on the value) at importation. As AD/CVD rates in the double or triple digits are lock out rates from the U.S. market, certain foreign companies will attempt to evade these AD/CVD duties. One common evasion method is transshipping products through a third country and labelling them as being from the non-subject country. Another method is to classify, or categorize, subject-merchandise as another product that is not-subject—since import declarations are electronically filed through ACE and physical inspections at the border have a low-risk of occurrence since the focus is on security risk versus commercial risk, the likelihood of getting caught is lower than not getting caught.

The EAPA directs the Department of Homeland Security to establish a National Targeting and Analysis Group dedicated to preventing and countering evasion, including proactive targeting of imports. The EAPA also directs CBP to investigate allegations of evasion filed by an "interested party," which is not limited to a domestic manufacturer but could be another importer, a trade union, or another federal agency, among others. The target of the investigation is not limited to the foreign producer or others in the supply chain, but is actually focused on the U.S. importer. The U.S. importer is the entity legally liable for an imported shipment under the U.S. customs laws and could be related or unrelated to the foreign producer. Once an interested party files an allegation, CBP has 15 days to determine whether or not to initiate a formal investigation. These formal evasion investigations are new processes and CBP just published interim rules for the investigative process in fall of 2016. Uniquely, perhaps to the trade laws, is that the EAPA and the interim rules permit CBP to make an adverse inference if any questioned party (e.g., importer, foreign producer, exporter, foreign governments, etc.) does not cooperate to the best of its ability. Given the limited implementation period to date, CBP is still determining key parameters such as what type of information is sufficient to support an evasion allegation and initiate an investigation to how to conduct its investigations. Since EAPA went into force, CBP has only released two investigation outcomes—one determining non-initiation of an investigation and one determining to initiate an investigation. Interestingly in its determination not to initiate an investigation, CBP stated that the interested party "may resubmit the allegation" indicating that a decision not to initiate an investigation is not an acquittal, per se, but rather that insufficient evidence was submitted this time to move forward, almost inviting the company making the allegation to do so again once additional information is available. Companies that import or have upstream components that are subject to AD/CVD orders should monitor EAPA developments as the interim rules become final and CBP concludes additional investigations. While EAPA investigations are intended to protect domestic manufacturers by seeking to fully enforce an AD or CVD order, they could also easily be used as both a sword or shield against competitors, whether domestic or fellow importers.

The second enforcement measure in the TFTEA is additional authority for CBP to protect intellectual property (IP) rights from infringing imports, whether they are counterfeit, pirated or other violative goods. Perhaps a surprise to companies will be that CBP can now provide samples of potentially infringing products to the IP owner to help determine if the product is indeed infringing. This allows IP owners unique insight into what infringers are doing and in real-time, perhaps even prior to the IP owner being aware of the latest infringing technique or commodity. Companies can also submit allegations of infringing shipments which CBP will use in its targeting and enforcement efforts. Depending on the nature and specifics of the IP registered with CBP, in practice it seems that the violative company does not necessarily need to be importing counterfeit goods but could also be importing legitimate goods through unauthorized channels.

> Companies should not only be aware of these new enforcement measures but also consider **how best to prepare for or even to utilize these measures** to increase their own competitive edge.

The third enforcement measure in the TFTEA outlined here is increased focus directed to the prohibition of importing products that are produced, whole or in part, by forced labor (including convict labor, child labor, and indentured servitude). The original prohibition has been in the customs laws since the 1930s and is similar to other instances where Congress has used trade measures to enforce social objectives such as the conflict minerals provisions in the Dodd-Frank Act and plant and wood product reporting requirements in the Lacey Act. The TFTEA removed an exception permitting imported goods made with forced labor if there were not sufficient products made without forced labor to satisfy the "consumptive demand" of the United States. To enhance enforcement, CBP publishes the Withhold Release orders (i.e., instruction to the ports of entry to refuse importation of the listed items) of goods suspected of being produced with forced labor. The Withhold Release orders list the product and the manufacturer. There were four Withhold Release orders issued in 2016, all against Chinese companies involving different products, which ended a lull stretching back to 2000.

While the TFTEA outlined specific and increased enforcement provisions to protect domestic companies, the new Administration places a different lens on how these enforcement actions may be executed. The new Administration may focus its enforcement efforts on certain countries (e.g., China and Mexico) and on certain commodities (e.g., steel) in these newly established mechanisms as well as pursue new enforcement measures. More importantly, given how young these new enforcement provisions are, the new Administration will heavily influence the standards by which evasion or infringement are met, which will have a long-term impact on the trade community. Companies should not only be aware of these new enforcement measures but also consider how best to prepare for or even to utilize these measures to increase their own competitive edge.

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Ending Endless Punishment: Why Judges Should Address **Criminal Records** at Sentencing

BY MARK RACANELLI AND BRIANNA STRANGE

SHUTTERSTOCK

While criminal defendants expect punishment when they are sentenced, they also expect that when their debt is paid they can work to rebuild their lives. What many do not expect is that even after their sentence is complete, their punishment often continues as a result of having a criminal record.

A criminal record can limit access to housing, impose obstacles to employment, and restrict the ability to obtain loans or other financial assistance. As courts and government officials are coming to recognize, the consequences of a criminal record are an unintended form of punishment that continues long after a defendant has served her sentence.

This issue was recently highlighted in *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016), where the Second Circuit reversed a decision by Judge John Gleeson in the Eastern District of New York. Judge Gleeson had expunged a criminal record that prevented Jane Doe from obtaining long-term employment 13 years after the event giving rise to her conviction. The Second Circuit overturned the decision, finding the district court lacked jurisdiction.

This article discusses a potential way to address the problem highlighted in *Doe* by establishing a sunset provision for criminal records as part of the sentence imposed under 18 U.S.C. § 3553(a). Still, given that there is no express authority for courts to seal records at sentencing, the most effective way to address this problem may be through legislation.

The Criminal Record As Punishment

The prison population in the United States expanded by nearly 300 percent from 1980 to 2014. All of these defendants have a criminal record that will follow them after they serve their sentences.

Criminal record holders are continuously harmed by their records. Limitations on employment are an obvious consequence. Approximately 70 percent of organizations conduct background checks on prospective employees.[1] People with criminal records are "only one-half to one-third as likely as nonoffenders to be considered by employers."[2] And as many as 65 million Americans cannot apply for certain jobs simply because they have a record. More than 60 percent of people formerly incarcerated are unemployed one year after their release.

The collateral effects go beyond employment. Under federal law, felons can be ineligible for public housing, §8 vouchers, Social Security benefits, and student loans. Felons are permanently precluded from voting in states like Florida, Iowa, and Kentucky, unless the governor restores the right. There are also over 27,000 state licensing restrictions that apply to record holders.

> Certain laws have been enacted to **curtail the consequences of having a criminal record.**

Certain laws have been enacted to curtail the consequences of having a criminal record. In New York City, for example, the Fair Chance Act prevents employers from questioning employees about their criminal record until after a conditional job offer is made.[3] Still, an employer can run a background check after giving the offer and rescind it upon discovering a criminal record.

Former Attorney General Loretta Lynch summed up the problem that flows from open-ended criminal records: "Americans who have paid their debt to society leave prison only to find that they continue to be punished for past mistakes."[4]

'United States v. Doe'

That is the issue that Judge Gleeson sought to address in *Doe*.[5] Jane Doe was convicted of health care fraud in 2001 after participating in a scheme in which she rode in the back of a car during a staged car accident. Doe was paid $2,500 for her role. She was single, working as a home health aide, and raising four kids on a net monthly income of $783. Her monthly rent payment exceeded her salary.

Doe was sentenced to five years' probation and restitution. Following sentencing, Doe found it was impossible to keep a job. Whenever she was fortunate enough to get one, she was fired soon afterwards when the employer conducted a background check. This went on for more than a decade; she then moved to expunge her record.

As Judge Gleeson explained, the record in the case "paint[ed] a portrait of a woman who (1) needs to work to support the four young children she was raising by herself at the time; (2) wants very much to work; (3) detests being on public assistance; and (4) poses no risk of financial harm to others … .[T]he probation files also show[ed] that during the 13 years since Doe was sentenced, her conviction has become an increasingly insurmountable barrier to her ability to work."

The court found that Doe's case presented extraordinary circumstances meriting expungement of her record. Judge Gleeson relied on *United States v. Schnitzer*[6] and *Kokkonen v. Guardian Life Insurance*[7] to hold that the court retained ancillary jurisdiction. *Kokkonen*, a 1994 U.S. Supreme Court case, held that ancillary jurisdiction of collateral proceedings can be exercised where necessary "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent," and "(2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees."

The court was able to rely on evidence that Doe was not a recidivist and suffered actual harm from her record. But while a developed factual record has the virtue of providing more certainty with respect to those issues, it has the drawback of requiring the district court to make its determination long after sentencing—which the Second Circuit seized on in its decision to reverse.

The Second Circuit reversed on the ground that the district court did not have ancillary jurisdiction "because Doe's conviction was valid and the underlying criminal case had long since concluded." The court found that jurisdiction over the motion to expunge was "entirely unnecessary to 'manage [a court's] proceedings, vindicate its authority, [or] effectuate its decrees.'"

A Different Approach: Preemptive Sealing

Courts may be able to achieve the same result Judge Gleeson sought, without triggering the Second Circuit's jurisdictional concern, by addressing the predictable problems caused by criminal records at the time of sentencing.

If the collateral effects of a criminal conviction constitute continuing punishment, district courts may be able to address it, along with other aspects of punishment, at sentencing under 18 U.S.C. § 3553(a). That statute authorizes judges to consider several factors in imposing a sentence, including "the need for the sentence imposed … to reflect the seriousness of the offense."[8]

That is, courts must ensure that the overall punishment does not exceed the seriousness of the offense. And if the punishment associated with a life-long criminal record is disproportionate to the seriousness of the offense of conviction, courts arguably have the authority to temper the punishment at sentencing.

Accordingly, as part of the sentence imposed, courts could include a springing order sealing a defendant's record from the offense after a period of time, subject to her meeting certain post-sentencing conditions, such as not being arrested again. The length of time before sealing would vary, depending on the seriousness of the underlying offense.

This approach of sunsetting records via an order at sentencing would avoid the jurisdictional concerns raised by » Page 12

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Combatting **Hindsight Bias** In White-Collar Criminal Investigations

20/20 hindsight can sometimes mean 20 to life.

BY NICOLAS BOURTIN

SHUTTERSTOCK

In the otherwise forgettable Star Wars prequel "The Phantom Menace," Jedi Knight Qui-Gon Jinn instructs a young Anakin Skywalker to "always remember: your focus determines your reality."

Qui-Gon's insight is an important one, but you need not be a Jedi to recognize this basic principle of human psychology: You tend to find evidence of whatever it is you already believe, whether it's proof that your boss undervalues your work, or evidence that a job candidate who looks right for the job also possesses the necessary skills.

This effect—what psychologists call "confirmation bias"—is just as strong when we look backwards in time. Thucydides, the great historian of the Peloponnesian War, observed that "people make their recollections fit with their suffering." In other words, our perception of the past similarly bends to conform to what we "know" in our hearts to be true.

This tendency to find confirmation for facts already "known" is at the heart of the phenomenon known as "hindsight bias."[1] Decades of psychological research have proven the universal tendency not only to look for evidence to confirm a conclusion you have already reached, but also to greatly overestimate how foreseeable an outcome was once you know that the outcome has taken place.[2]

The effects of hindsight bias are particularly significant in criminal investigations and, as I'm going to discuss, in white-collar investigations most of all. Those of us who practice in this area quickly learn that white-collar criminal investigations are often heavily outcome-driven, leaving them especially vulnerable to the distortions of fairness and rationality that hindsight bias can produce. The problem is not insoluble, but solving it requires a broader awareness of hindsight bias, a greater understanding of the depth and dimensions of the issue among the white-collar community, and consideration of the range of potential solutions.

The Problem of Hindsight In White-Collar Crime

Hindsight bias infects white-collar investigations so meaningfully for two principal reasons. The first is that in financial fraud, more often than not, guilt or innocence turns not on *what* a defendant did, but on the defendant's mental state in doing it: with what *intent* did he or she make a statement in a securities filing, push for a particular accounting treatment, approve a payment to a third party, or perform some other job function that now appears suspect? That intent must usually be inferred from an ambiguous factual record, further amplifying the subjective nature of the fact finder's job. The result is that innocent mistakes, poor judgment, or even negligence can look like intentional conduct when viewed through the magnifying lens of hindsight.

Even worse, the degree to which a particular event is judged to have been improper after the fact and the notoriety it generates have an outsized impact on what inferences criminal investigators draw about the mental state of the persons involved. As discussed below, empirical studies have shown that the more negative the outcome, the more pronounced the hindsight bias. Real life examples of this phenomenon are not hard to come by. When Bernie Madoff's 48-year-old Wall Street firm was revealed to have been a Ponzi scheme of historic proportions, law enforcement agencies immediately set out to prove that the banks and investment advisors who had worked with Madoff knew what he was up to. This, in spite of the fact that government agencies had themselves failed to detect Madoff's fraud, despite having received complaints and warnings years earlier. Given the magnitude of the fraud and the media attention it drew, liability on the part of financial institutions that dealt with Madoff felt inevitable.

Hindsight Bias In Legal Settings

Numerous empirical studies have documented the effects of hindsight bias on the judgment of both experts and laypeople in situations that involve medical diagnoses, political strategy, and more.[3] Its impact in judgments of legal culpability by both juries and judges has been shown to be equally pervasive.[4] Typical "mock jury" studies ask subjects to evaluate the reasonableness of a defendant's decision.[5] Evaluators are randomly divided into a "foresight group," which is given all the information available to the defendant at the time of the decision, and a "hindsight group," which is additionally told the outcome.[6] These tests have consistently shown that the hindsight group—the group playing the role of typical investigators, judges, and juries—will view the outcome as more likely and the defendant as more culpable than the foresight group. And the more negative the outcome, the more pronounced the bias.[7] One example involved the choice of whether to undertake expensive precautions against the threat of a flood. It found that three quarters of the foresight group determined that flooding was too unlikely to justify extra precautions, while a majority of the hindsight group instead estimated a significantly higher probability of flooding and found negligence in the failure to take precautions.[8] Empirical analyses of decisions by actual juries and judges show similar results.[9]

In certain fields, such as civil litigation, lawmakers have recognized the problem and developed rules—or "de-biasing" methods, in the jargon of psychologists—to mitigate the effects of hindsight bias.[10] Federal judges and legislators have designed pleading requirements for securities fraud class actions to deter suits premised solely on "fraud by hindsight," in Judge Henry Friendly's famous phrase.[11] Various legal rules aim to de-bias hindsight assessments of a defendant's level of care. One method is to restrict the information available to the factfinder—for example, the inadmissibility of subsequent remedial measures evidence in negligence cases.[12] Another is to relax the standard of review or defer to professional norms—for example, the business judgment rule applicable to corporate officers.[13]

> The effects of hindsight bias are **particularly significant in criminal investigations** and in white-collar investigations most of all.

Nevertheless, hindsight bias has proven extremely difficult to combat. Studies have found little success with jury instructions that merely warn about its influence.[14] In the flood precautions study, for example, instructions cautioning that "hindsight vision is always 20/20" and urging jurors to "think of all the ways in which the event in question may have happened differently or not at all" failed to eliminate hindsight bias.[15] On the other hand, more elaborate de-biasing procedures than those typically used in court—requests for jurors to list alternative explanations along with specific evidence supporting each counterfactual—have proven more successful.[16]

Addressing Hindsight Bias In White-Collar Practice

Given that white-collar crime displays virtually every feature shown empirically to intensify or entrench hindsight bias, it is hardly surprising that this area of the law suffers from the problem. As noted, white-collar criminal and regulatory enforcement depends chiefly on after-the-fact judgments of foreseeability and state of mind.[17] Major white-collar investigations often follow the kinds of extreme outcomes—a company's collapse, a Ponzi scheme's unraveling, a full-blown financial crisis—that heavily bias estimates of likelihood. An exaggerated view of an outcome's foreseeability, coupled with an understandable motivation to assign blame retroactively, makes it difficult even for experienced, well-meaning investigators to credit alternative explanations for a defendant's actions or omissions, such as innocent blind spots in judgment or misplaced optimism.

The human impact of this effect on well-meaning professionals is real. To take one all-too-common example, every bank anti-money laundering officer suffers sleepless nights worrying that one of the bank's customers will turn out to be at the center of the next big scandal. Major banks have millions of customers, and anti-money laundering officers charged with detecting and preventing terrorist financing and money laundering must sift through millions of daily transactions to try to find evidence of criminal activity. In view of the enormousness of the data haystack, the law requires that a bank's internal controls be "risk based" and not foolproof. But compliance officers know that if a terrorist attack, large-scale narcotics bust, or massive fraud reveals connections to one of their bank's customers, they will find themselves under the intense spotlight of criminal, regulatory, and sometimes political investigations. And they know that those connections, no matter how difficult to detect at the time, will appear glaring in the harsh light of hindsight. Worst of all for the compliance officer is the nightmare scenario where a now-notorious customer *did* raise suspicions in real time, suspicions that were allayed by explanations that now appear implausible or pretextual to investigators viewing the facts retrospectively. Innocent contemporaneous communications concerning the risk posed by a customer can falsely suggest indifference or willful blindness when read later by investigators possessing the full knowledge of the customer's criminal activity. And even though criminal charges in such circumstances are thankfully rare, the emotional and professional price paid by compliance officers put through the "near death experience" of such investigations is high.

Given the prevalence of hindsight bias in white-collar criminal enforcement, the law's failure to adapt is regrettable. Any strategy to combat cognitive bias, psychologists have found, requires not only awareness of the bias, but also awareness of its magnitude and direction, a motivation to correct it, and some means of correcting it.[18] And although some areas of law have shown a capacity to address hindsight bias—for example, through evidentiary rules and judicial instructions in simple negligence cases, or pleading and burden-shifting rules in corporate governance and securities litigation—white-collar criminal law lags behind in tackling or even recognizing these vulnerabilities. Neither the rules of criminal procedure or evidence, nor criminal statutes themselves, take into account the pernicious effect of hindsight bias in financial fraud cases. As noted above, a simple reminder of 20/20 hindsight in jury instructions is not effective. Given this reality, the responsibility falls to defense attorneys to posit alternative theories and to urge prosecutors, judges, and juries to view the facts at the time the events occurred, rather than through the lens of hindsight.

Compounding the problem is the infrequency with which white-collar investigations, particularly corporate investigations, ever make it in front of a neutral fact-finder. As has been much documented and discussed elsewhere, most corporate criminal resolutions are out-of-court settlements, where the investigators themselves serve as the arbiters of whether any crime was committed. The overwhelming majority of law enforcement agents and prosecutors act in good faith and want their investigations and charging decisions to be fair. But without understanding and correcting for the unconscious cognitive biases to which we all fall victim, they necessarily suffer from their own critical blind spots. To its credit, the DOJ has acted recently to address unconscious racial, ethic, gender and other biases among all of its law enforcement agents and prosecutors. It should do the same with respect to cognitive biases like hindsight bias. DOJ prosecutors and law enforcement agents should be trained on how to de-bias their evaluation of evidence—for example, by engaging in formal exercises to create and test counterfactuals and alternative hypotheses, including by employing "Devil's Advocate" teams to challenge prosecutorial theories.

Notwithstanding the difficulties, legal rules and practitioners in the area of white-collar criminal enforcement can and should adapt to reduce hindsight bias—not simply to ensure that white-collar criminal enforcement is fair and rational, but also to ensure that it achieves its critical function of deterrence. If hindsight bias undermines the law's ability to distinguish lawful conduct from wrongdoing, it weakens the deterrent value of compliance defenses, for example in the anti-corruption and anti-money laundering contexts.[19] Hindsight bias does not only undercut the law's effectiveness in conveying legal risk. It also fundamentally hampers our ability to understand and learn from past experience. Social scientists have amply demonstrated that even the most experienced, objective, and well-meaning decision makers will systematically overestimate the foreseeability of bad outcomes once they have occurred. If the law fails to correct for this error, then legal decision makers have little chance of encouraging rational risk-mitigation and ensuring the fair administration of justice.

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1. There's a reason why hindsight bias also goes more colloquially by the name "Monday morning quarterbacking": When Super Bowl LI reached its improbable conclusion, millions of football fans—including those who had turned the game off in the third quarter because it was clear that New England had no hope of coming back—quickly took to criticizing Atlanta's decision to continue to throw the ball late in the fourth quarter instead of running the ball and settling for a field goal.

2. For seminal accounts of the hindsight bias, see Baruch Fischhoff, "Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty," J. EXPERI- » Page 12

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Blockchain

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chain was inextricably linked to Bitcoin. And Bitcoin, when it was first introduced in 2008, quickly became a popular method among cyber-savvy criminals to pay for illegal goods and services and to launder their money. The possible alternative applications of blockchain's distributed ledger system were not immediately apparent and would not bubble up to the surface until much later.

It is easy to see why criminals flocked to Bitcoin. First and foremost, it allowed them to remain hidden and transfer funds anonymously. That is a little counterintuitive, because the blockchain is entirely public. Anyone can access the blockchain through their Internet browser and review the transactional data that it contains. They key is that the blockchain, by design, does not record any information about the participants to the transactions themselves.

When Anna sends her 10 Bitcoins to Ben, the only information that is recorded in the blockchain about that transaction are Anna's Bitcoin address, Ben's Bitcoin address, the amount of the transfer, and the date and time the transfer was added to the blockchain. Nothing that might identify Anna and Ben is recorded—no names, no phone numbers or email addresses, not even the IP address that Anna used to access the Bitcoin network to execute the transaction. This makes it virtually impossible for someone—say, a law enforcement officer—to trace the transaction back to Anna and Ben.

It is true that the blockchain captures the Bitcoin addresses of the participants. But these randomly generated strings of letters and numbers are meaningless to the outside observer. They only mean something to Anna and Ben. Anna knows her own Bitcoin address and knows Ben's too, because Ben gave it to her to complete the transaction. Ben knows his own Bitcoin address and can figure out Anna's because he can check the blockchain and see which Bitcoin address sent 10 Bitcoins to his Bitcoin address on the day that Anna said she would make the transfer. But without this type of external information to connect the dots, the blockchain data remains opaque and Anna and Ben stay hidden to the wider world.

The contrast to traditional bank transfers is evident. Banks cannot provide this type of anonymity because banks, as part of their AML controls, have know-your-customer (KYC) requirements. Before a bank can do business with a new customer, they must satisfy themselves that they know who they are dealing with. They require the customer to provide personal information—a name, an address, etc.—and documents to verify identity, like a driver's license. All of this information is then linked to the customer's bank account. It goes without saying that this is exactly the sort of information a criminal actor would rather not have to hand over. And by using Bitcoin, they do not have to.

Even worse for the would-be criminal, banks keep all of this information on file and will readily provide it to law enforcement agencies with a subpoena. Hence, the blockchain's decentralized design offers yet another advantage: There is no central repository of KYC information. The blockchain itself contains only limited information, and law enforcement agencies cannot subpoena the blockchain to obtain more.

A Brighter Future: Blockchain's Potential in AML

If the blockchain's past was murky, its future seems bright indeed. Blockchain evangelists are trumpeting that distributed ledger technologies will revolutionize entire industries, from banking and financial services, to securities, to insurance. Business and venture capitalists have lavished significant attention and money on developing the technology—over $1.4 billion in the past three years alone. The hype around the blockchain has now reached a fever pitch.

Ultimately, of course, **private blockchains will not eliminate the problem of money laundering entirely.** No matter how efficiently member banks obtain and share KYC documentation, sophisticated criminal actors can still provide false information that passes muster.

In the banking sector, there is a great deal of optimism that distributed ledgers will vastly improve AML compliance. But how can a technology that seems so tailor-made for facilitating money laundering now be the answer to that problem?

The leading solution among the banks has been to develop a private or "permissioned" blockchain, as opposed to an open or "permissionless" blockchain. Instead of allowing anyone to become part of the network, as was the case with the Bitcoin blockchain, only trusted banks are given permission to join the network. The member banks each function as a node in the system and maintain a shared ledger that securely records all of the transactions on the network using the hash value process of the original Bitcoin blockchain. In a private blockchain like this, the ledger is distributed among the member banks, but the system is not decentralized. The banks retain their status as the trusted intermediaries that verify and record the transactions on the network.

Private networks such as these are still being tested. But if they are successfully implemented, the potential AML benefits are numerous:

- First, KYC documentation could be incorporated into the private ledger and shared simultaneously with the other member banks, eliminating the need for each bank to perform duplicative KYC due diligence on the same customer.
- Second, if the member banks permit the banking regulators to operate a node on the system, the regulators could receive real-time reports of suspicious activity at a greatly reduced cost to the banks.
- Third, because the private blockchain maintains an unbroken audit trail of every transaction on the network, it will be harder for money launderers to obfuscate their transfers by washing the money through multiple shell accounts. Those transfers could be unwound fairly easily using the information in the blockchain.

Ultimately, of course, private blockchains will not eliminate the problem of money laundering entirely. No matter how efficiently member banks obtain and share KYC documentation, sophisticated criminal actors can still provide false information that passes muster. And money launderers who prefer to avoid the watchful eye of regulated financial institutions entirely will still find a plethora of digital currencies available to them that will transfer their funds completely anonymously. But for those entities who take AML seriously, blockchain technology may prove to be a significant step forward.

Privilege

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allowed Wadler near-uninhibited use of this evidence.

In light of *Bio-Rad*, the first uncertainty that a publicly-traded company must prepare for when assessing the scope of its attorney-client protections in a retaliatory discharge situation is that its state's familiar attorney-client privilege rules may not apply. According to Rule 501 of the Federal Rules of Evidence, *federal* rules of attorney-client privilege govern in *federal* causes of action. Judge Spero, therefore, relied on Rule 1.6 of the Model Rules of Professional Conduct to determine whether Wadler could avail himself at trial of information he learned as general counsel to the company. Bio-Rad, on the other hand, argued that California's far more restrictive attorney-client privilege rule—which prohibits an attorney from revealing a client's confidences unless she or he reasonably believes that her or his client has not only committed a crime, but also that the crime will result in an individual's death or serious bodily harm—should have bound Wadler to silence.

By rejecting the more restrictive California rule, Judge Spero greatly expanded Wadler's opportunity to support his retaliatory discharge claim using information that the attorney-client privilege would ordinarily protect from disclosure. Notably, had the court conducted its analysis under New York law, which is less restrictive than California's attorney-client privilege rules, it likely would have reached the same conclusion. Rule 1.6 of New York's Rules of Professional Conduct authorizes attorneys to disclose confidential information under certain circumstances. Although New York's Rule 1.6 permits a lawyer to disclose client confidences in order "to *defend* the lawyer or the lawyer's employees and associates *against an accusation of wrongful conduct*," it is not broad enough to permit her or him to use those confidences offensively to support her or his own claim. The Model Rule, however, permits lawyers to use otherwise confidential information more broadly to "establish a *claim or defense* on behalf of the lawyer in a controversy between the lawyer and the client." Publicly-traded companies must, therefore, be mindful that New York's stronger protection of a client's confidences may also be undone in a federal whistleblower case or other dispute governed by federal law.

Bio-Rad's most radical holding, however, was that SEC regulations enacted pursuant to §307 of Sarbanes-Oxley to govern the conduct of lawyers practicing before the SEC preempted Wadler's obligations under California state law to protect Bio-Rad's confidences. The applicable SEC regulation imposes on attorneys the duty to report potential violations of the securities laws up-the-ladder to management and, if necessary, to the board of directors. Those regulations, however, also allow the attorney to use information otherwise protected by the attorney-client privilege "in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue." Moreover, according to the SEC's rule implementation, it intended this rule to permit an attorney to disclose confidential information to defend against charges of misconduct by his or her former employer. Judge Spero held that bringing a retaliatory discharge claim fell within those circumstances, and his analysis would similarly preempt New York's attorney-client privilege rules.

Bio-Rad's unprecedented preemption holding may conflict with the Second Circuit's 2013 ruling in another dispute between a company and its former attorney, *United States v. Quest Diagnostics*. In *Quest Diagnostics*, which the *Bio-Rad* opinion does not address, the Second Circuit ruled that the False Claims Act did not preempt New York's Rule of Professional Conduct limiting the circumstances in which an attorney could reveal a former client's confidences to prevent the client from committing a crime. Under the New York rule, an attorney may reveal such information only to the extent that the attorney "reasonably believes necessary" to prevent the client's crime.

The attorney in *Quest Diagnostics* was, like Wadler, the defendant's former general counsel, but unlike Wadler he was part of a partnership established for the sole purpose of bringing a qui tam action against his prior employer. While the information he supplied did, in fact, reveal his former employer's alleged violations, the Second Circuit found that the scope of the information he revealed exceeded what was reasonably necessary to identify the crime and prevent the defendant from continuing its behavior. Accordingly, the attorney argued that the False Claims Act, by authorizing people to come forward and reveal evidence of potential misconduct, preempted the applicable New York attorney-client privilege rules and established a broader scope of permissible disclosure. The Second Circuit rejected this argument, finding that Congress did not intend for the False Claims Act to preempt state rules governing attorney-client privilege or confidentiality.

Bio-Rad has already stipulated to a supersedeas bond, which suggests that it intends to appeal this ruling. The Ninth Circuit may, therefore, need to reconcile the apparent circuit split that would result from affirming Wadler's victory in light of the ruling in *Quest Diagnostics*. But the difference in outcomes may turn simply on the SEC's intent to preempt state law in *Bio-Rad*—where the general counsel acts as a federal whistleblower and may need to defend herself or himself—and the absence of Congress' intent to do so in *Quest Diagnostics*—where the general counsel seeks to potentially profit from the disclosure. As Judge Spero explained in *Bio-Rad*, the SEC's professional conduct rules explicitly state that, "[w]here the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern." Furthermore, the SEC's commentary accompanying the "up-the-ladder" reporting requirements reiterated the SEC's intent to preempt conflicting state law. The Second Circuit, on the other hand, considered no comparable evidence of Congress' intent, pursuant to the False Claims Act, to preempt state attorney-client privilege rules. Accordingly, the existing rulings in both *Bio-Rad* and *Quest Diagnostics* may be allowed to stand without any inconsistency.

Ultimately, the scope of protection afforded by the attorney-client privilege is important to any company that finds itself in a situation in which its former in-house counsel has suddenly become an adverse party, but Wadler's eye-popping verdict in *Bio-Rad* teaches more fundamental lessons about corporate best practices. Bio-Rad would never have been in the position of defending a retaliatory discharge claim if it had simply respected Wadler's independent judgment in investigating potential criminal conduct—conduct which Bio-Rad considered serious enough to investigate through outside counsel and explain to the SEC and DOJ. Bio-Rad's alleged decision to terminate Wadler because he disclosed that conduct to the audit committee cost the company almost $14.5 million in damages and attorney fees. This outcome should lead companies to be cautious when dealing with SEC whistleblower claims, particularly those asserted by former in-house counsel. The combination of SEC preemption of traditional attorney-client privilege protections and the fee-shifting provisions of Sarbanes-Oxley and Dodd-Frank can quickly lead to a result far more costly than accommodating a potential whistleblower's concerns.

Monitor

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settlement with the government has the initial say in the monitor selection process.[8] Obviously, one of the key factors will be fees. The challenge, however, is tying a billable rate to an often ill- or vaguely-defined scope of work, making it difficult to compare bids or predict true costs. But these variables can be reduced or eliminated by insisting on fixed-fee arrangements. Better yet, the more mature the company's compliance program, the more competitive the bidding should become. Moreover, it would be wise to consider negotiating "term limits" with the government, which would allow the company to have the option of electing to select a new monitor at the end of a stated period, even if the company is not ready to be released by that time. While this may not be cost effective for a large company because of the time it would take for a new monitor to get up to speed, in other instances it may serve to counterbalance any implicit bias. Last, it may be appropriate to construct a fee arrangement that would grant the monitor the same set fee, regardless of whether the monitorship runs its full course, or ends early because of the company's ahead-of-schedule completion. This, perhaps as much as anything else, may serve to align all of the parties' interests.

Without doubt, a monitor can be a key ingredient to a company's get-well plan, especially when a company has struggled over time. For every horror story found in the blogs, there is a string of unwritten success stories of monitors helping companies overcome legacy weaknesses and construct best-in-class programs. Independent oversight most often will lead to fresh ideas, sober analysis, and a laser-focus on results. But with all well-intentioned ideas, the challenge is in implementation, and a creative approach to compensation will better ensure that a monitor's interest are wholly aligned with those of the government and company: the timely implementation of a durable compliance program.

1. U.S. Dep't of Justice, Criminal Division, Fraud Section, Evaluation of Corporate Compliance Programs (Feb. 8, 2017), https://www.justice.gov/criminal-fraud/page/file/937501/download. See also U.S. Dep't of Justice, Criminal Division, Fraud Section, "New Compliance Counsel Expert Retained by the DOJ Fraud Section" (Nov. 3, 2015), https://www.justice.gov/criminal-fraud/file/790236/download.
2. U.S. Dep't of Justice, National Security Division, Guidance Regarding Voluntary Self-Disclosures, Cooperation, and Remediation in Export Control and Sanctions Investigations Involving Business Organizations (Oct. 2, 2016), https://www.justice.gov/nsd/file/902491/download.
3. U.S. Dep't of Justice, Office of the Attorney General, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/dag/file/769036/download.
4. Joann S Lublin, Aruna Viswanatha & Sarah Nassauer, "Obstacles Remain in Talks to Settle Wal-Mart Bribery Probe," Morningstar (Jan. 27, 2017), https://www.morningstar.com/news/dow-jones/us-markets/TDJNDN_201701278855/obstacles-remain-in-talks-to-settle-walmart-bribery-probe.print.html.
5. American Bar Association, Criminal Justice Division, ABA Standards for Monitors (2015), http://www.americanbar.org/groups/criminal_justice/standards/MonitorsStandardsFourthEdition-TableofContents.html.
6. U.S. Dep't of Justice, Criminal Division, Selection of Monitors in Criminal Division Matters (June 24, 2009), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/11/14/response3-supp-appx-3.pdf.
7. See, e.g., Marian R. Williams, Jefferson E. Holcomb, Tomislav V. Kovandzic & Scott Bullock, "Policing for Profit," Institute for Justice, (March 2010), http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
8. U.S. Dep't of Justice, Office of the Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (March 7, 2008), https://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors.

Hindsight

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MENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975), and Amos Tversky & Daniel Kahneman, "Judgment Under Uncertainty: Heuristics and Biases," 185 SCIENCE 1124 (1974). Psychologists often distinguish between different types of hindsight effects: first, adjusting the perceived probability of an event after learning it has occurred; second, failing to realize that learning the outcome has altered one's perception, and so mistakenly believing that one's ex ante and ex post judgments would be similar (sometimes referred to as the "I knew it all along" effect); and third, concluding that another person would likewise have made equivalent ex ante and ex post judgments. See Reid Hastie, David A. Schkade, & John W. Payne, "Looking Backward in Punitive Judgments: 20-20 Vision?," in PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 107 (Cass R. Sunstein et al. eds., 2002).

3. For a recent review of research on hindsight bias generally, see Neal J. Roese & Kathleen D. Vohs, "Hindsight Bias," 7 PERSPECTIVES ON PSYCHOL. SCI. 411 (2012) (noting that over 800 scholarly papers had been published on hindsight bias as of 2012). For examples of studies on hindsight bias in varied settings, see Hal R. Arkes et al., "The Hindsight Bias Among Physicians Weighing the Likelihood of Diagnoses," 66 J. APPLIED PSCYHOL. 252 (1981) (finding hindsight bias in doctors' medical diagnoses); Baruch Fischhoff & Ruth Beyth, "'I knew it would happen'—Remembered Probabilities of Once-Future Things," 13 ORG. BEHAV. & HUM. PERFORMANCE 1 (1975) (studying hindsight bias in Americans' predictions of the outcome of President Richard Nixon's visit to China); MISSION COMMAND CTR., OF EXCELLENCE, U.S. ARMY, COGNITIVE BIASES AND DECISION MAKING: A LITERATURE REVIEW AND DISCUSSION OF IMPLICATIONS FOR THE U.S. ARMY (2015), available at http://usacac.army.mil/sites/default/files/publications/HDCDTF_WhitePaper_Cognitive%20Biases%20and%20Decision%20Making_Final_2015_01_09_0.pdf (collecting research on hindsight bias in military decision making and strategies to counteract it).

4. For reviews of research by psychologists, behavioral economists, and legal scholars on hindsight bias and de-biasing strategies within the legal system, see Erin M. Harley, "Hindsight Bias in Legal Decision Making," 25 SOC. COGNITION (SPECIAL ISSUE: THE HINDSIGHT BIAS) 48 (2007); Jeffrey J. Rachlinski, "A Positive Psychological Theory of Judging in Hindsight," 65 U. CHI. L. REV. 571 (1998); Neal J. Roese, "Twisted Pair: Counterfactual Thinking and the Hindsight Bias," in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 258 (Derek J. Koehler & Nigel Harvey eds., 2004); Cass R. Sunstein & Christine Jolls, "Debiasing Through Law" (John M. Olin Program in Law and Econ., Working Paper No. 225, 2004).

5. See Kim A. Kamin & Jeffrey J. Rachlinski, "Ex Post ≠ Ex Ante: Determining Liability in Hindsight," 19 L. & HUM. BEHAV. 89 (1995); see generally Harley, supra note 4 (reviewing studies).

6. See Harley, supra note 4.

7. See id. at 51 ("The severity of a negative outcome can have dramatic effects on the size of hindsight bias, with larger bias resulting from more severe negative outcomes.").

8. See Kamin & Rachlinski, supra note 5, at 98-99.

9. See, e.g., Galen V. Bodenhausen, "Second-Guessing the Jury: Stereotypic and Hindsight Biases in Perceptions of Court Cases," 20 J. APPLIED SOC. PSYCHOL. 1112 (1990) (finding that subjects considered the evidence in a criminal trial more incriminating when they were told the defendant was found guilty and less incriminating when they were told the defendant was found not guilty, as compared to subjects given only the evidence and not the outcome); Mitu Gulati, Jeffrey J. Rachlinski, & Donald C. Langevoort, "Fraud by Hindsight," 98 NW. U. L. REV. 773 (2004) (studying judges' strategies to correct for hindsight bias in securities fraud cases); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, "Inside the Judicial Mind," 86 CORNELL L. REV. 777 (2001) (finding federal magistrate judges susceptible to hindsight bias, though to a lesser extent than lay decision makers); Hastie, Schkade, & Payne, supra note 2, at 96-108 (finding substantial hindsight bias in jury determinations of recklessness and liability for punitive damages); Reid Hastie & W. Kip Viscusi, "What Juries Can't Do Well: The Jury's Performance as a Risk Manager," 40 ARIZ. L. REV. 901 (1998) (concluding that hindsight bias in punitive damages determinations was more pronounced for juries than experienced judges); Marianne M. Jennings et al., "Causality as an Influence on Hindsight Bias: An Empirical Examination of Judges' Evaluation of Professional Audit Judgment," 21 J. OF ACCT. & PUB. POL'Y 143 (1998) (observing hindsight bias in judges' evaluations of auditing opinions).

10. See Rachlinski, supra note 4, at 602-24 (explaining how the law has adapted to accommodate hindsight bias).

11. See *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (affirming the dismissal of a securities class action where the lead plaintiff had "simply seized upon disclosures made in later annual reports and alleged that they should have been made in earlier ones"); Rachlinski, supra note 4, at 616-17 (analyzing heightened pleading requirements in §10(b) cases as a response to hindsight problems); Gulati, Rachlinski, & Langevoort, supra note 9, at 775 (finding that federal courts cited concerns with hindsight in nearly a third of all published securities class action opinions).

12. See Rachlinski, supra note 4, at 617-18; Dan M. Kahan, "The Economics—Conventional, Behavioral, and Political—of 'Subsequent Remedial Measures' Evidence," 110 COLUM. L. REV. 1616 (2010) (analyzing arguments for Federal Rule of Evidence 407 as a means of combating hindsight bias in tort cases).

13. See Rachlinski, supra note 4, at 619-23 (on the business judgment rule); see also id. at 608-13 (on legal defenses based on compliance with regulation or custom, in cases involving commercial or medical decisions). Delaware courts have specifically cited the problems of hindsight bias and judicial competence as rationales for applying the business judgment rule in cases alleging failures of director oversight. See *In re Citigroup Deriv. Litig.*, 964 A.2d 106, 124 (Del. Ch. 2009) ("[The doctrine] follows from the inadequacy of the Court, due in part to a concept known as hindsight bias, to properly evaluate whether corporate decision-makers made a 'right' or 'wrong' decision."); *Stone v. Ritter*, 911 A.2d 362, 373 (Del. 2006) ("With the benefit of hindsight, the plaintiffs' complaint seeks to equate a bad outcome with bad faith.").

14. See, e.g., Baruch Fischhoff, "Debiasing," in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 422 (Daniel Kahneman, Paul Slovic, & Amos Tversky eds., 1982) (reviewing various strategies to reduce hindsight bias, including warnings about its effects, and finding that only intensive personalized feedback reduced the bias); Merrie Jo Stallard & Debra L. Worthington, "Reducing the Hindsight Bias Utilizing Attorney Closing Arguments," 22 L. & HUM. BEHAV. 671 (1998) (in a study of jury determinations of director liability, finding some success in reducing hindsight bias through the defense's closing argument and little success through jury instructions warning against the use of hindsight).

15. Kamin & Rachlinski, supra note 5, at 97, 99.

16. See, e.g., Hal R. Arkes et al., "Eliminating the Hindsight Bias," 73 J. APPLIED PSCYHOL. 305 (1988) (finding that where foresight and hindsight subjects had to estimate the probability of different medical diagnoses, hindsight bias was lower for hindsight subjects asked to state reasons why different possible diagnoses might be correct); Martin F. Davies, "Reduction of the Hindsight Bias by Restoration of Foresight Perspective: Effectiveness of Foresight Encoding and Hindsight-Retrieval Strategies," 40 ORG. BEHAV. & HUM. DECISION PROCESSES 50 (1987) (finding reduction of hindsight bias where subjects listed supporting facts for various potential outcomes). But see Lawrence J. Sanna, Norbert Schwarz, & Shevaun L. Stocker, "When Debiasing Backfires: Accessible Content and Accessibility Experiences in Debiasing Hindsight," 28 J. EXPERIMENTAL PSYCHOL. 497 (2002) (finding that attempts to reduce hindsight bias by considering alternative outcomes exacerbated the bias and attributing this result to the perceived difficulty of listing counterfactuals).

17. See Samuel W. Buell, "Is the White Collar Offender Privileged?," 63 DUKE L.J. 823, 841-46 (describing characteristics of white-collar criminal offenses); Donald C. Langevoort, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION 43-44 (2016) (discussing hindsight problems specific to white-collar crime and securities enforcement).

18. See Timothy D. Wilson & Nancy Brekke, "Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations," 116 PSYCHOL. BULL. 117, 119 (1994).

19. For a similar point regarding securities regulation, see Gulati, Rachlinski, & Langevoort, supra note 9, at 774 ("The hindsight bias … creates a considerable obstacle to the fundamental task in securities regulation of sorting fraud from mistake.").

Sentencing

« Continued from page 10

the Second Circuit in *Doe*. There would be factual interdependence between the sealing order and the underlying conviction. And, the court would be "effectuat[ing] its decrees" by ensuring that the defendant is not punished beyond what the court intended.

A judge's ability to prospectively seal a record will not hinder law enforcement from accessing the record after sealing. The record is no longer publicly available, but it does not cease to exist. Rather, it would not appear on routine background checks by employers, for instance.

One challenge to this approach is that the authority to seal records is not expressly mentioned in §3553(a). While courts have recognized their inherent authority to seal records, that authority is typically limited to cases involving extraordinary circumstances, such as constitutional violations.[9] Courts would need to find that the continuing harm associated with the criminal record itself constitutes an extraordinary circumstance.

Another challenge associated with sealing a record at sentencing is that, unlike in *Doe* where the district court made its decision to expunge based on developed facts, a springing order would need to be made prospectively, based on future collateral consequences. Cases where collateral consequences were taken into account under §3553(a) typically involve specific harms that would flow from the sentence, such as the loss of particular licenses. Thus, courts would be on firmer ground if the springing order to seal was based on known consequences, rather than potential or generalized future harm.

Because of these challenges, it may be that legislation ultimately is the most effective way to address the problems raised in *Doe*. But so far comprehensive legislation in this area has been elusive. Even laws like New York City's Fair Chance Act address only some aspects of the issue, like employment, without focusing on others, like housing. Legislation would also need to address a potential limitation with judicial sealing—judges cannot prevent the collection of arrest and conviction records by private, non-governmental actors who can make information available to employers post-sealing.

Conclusion

Nearly one in three Americans face serious obstacles to living law-abiding lives after they serve their sentences solely as a result of having a criminal record. Judges and lawyers should explore ways to mitigate this unintended and continuing punishment by addressing it at the time of sentencing.

1. "Background Checking—The Use of Criminal Background Checks in Hiring Decisions," SOC'Y FOR HUMAN RES. MGMT. (July 19, 2012).
2. Devah Pager, "The Mark of a Criminal Record," 108 AM. J. SOC. 937, 960 (2003).
3. "The Fair Chance Act—Local Law 63 of 2015," NYC CITYWIDE ADMIN. SERVS. (Feb. 24, 2017).
4. Attorney General Loretta E. Lynch Delivers Remarks at National Reentry Week Event in Philadelphia (Remarks as Prepared for Delivery), U.S. DEP'T OF JUSTICE (April 25, 2016).
5. *Doe v. United States*, 110 F. Supp. 3d 448, 449–50 (E.D.N.Y. 2015).
6. *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978).
7. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).
8. 18 U.S.C.A. § 3553 (West 2017).
9. See, e.g., *United States v. Spinner*, 72 F. Supp. 3d 266 (D.D.C. 2014).