An Uneasy Case for White-Collar "Martyrs"

By REZA DIBADJ*

Introduction

PROFESSOR SANDEEP GOPALAN has written a provocative Article.[1] His argument begins with the proposition that there is a subset of white-collar crimes "involving corporate fiduciaries who make bad decisions at the expense of shareholders (corporate governance offenses)."[2] Further, for a subset of these offenses that do not involve fraud as moral wrongfulness,[3] he argues that "[i]rrespective of the theoretical justification underpinning the decision to criminalize, imprisonment must not follow conviction. The conviction, despite the lack of incarceration, and the consequential sanctions likely to be imposed on the wrongdoer are sufficient to satisfy the three main justifications for criminalization: [deterrence, retribution, rehabilitation]."[4] Gopalan thus presents a stimulating argument; to the extent his goal is to foster intellectual discourse, it is a resounding success.

While I applaud Professor Gopalan for his courage, I find his thesis uneasy. Some might be tempted to dismiss his arguments as simply an apology for corporate criminals, but I have given his arguments the seriousness and careful reading they deserve. This Essay summarizes my reactions and is structured into three principal sections. Part I argues that the Article's overall theoretical framework is implausible: it delimits a category of offenses that has the dubious distinction of being both narrow and unclear at the same time, falls prey to commodifying human behavior through a rational actor model, and fundamentally offers anemic remedies. Part II argues the Article's

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1. *See* Sandeep Gopalan, *Skilling's Martyrdom: The Case for Criminalization Without Incarceration*, 44 U.S.F. L. REV. 459 (2009).
2. *Id.* at 461.
3. *Id.*
4. *Id.* at 462.

case study, the putative "martydom" of former Enron CEO Jeff Skilling, is ultimately unconvincing and unfortunately serves to exhibit many of the Article's theoretical weaknesses. Part III concludes by addressing some minor difficulties I had with various propositions in the Article.

I. An Implausible Framework

The Article's overall theoretical framework is implausible for three principal reasons. First, it delimits a category of offenses that has the dubious distinction of being both narrow and unclear at the same time. Second, it falls prey to commodifying human behavior through a rational actor model. Third, the construct ultimately offers anemic remedies.

The category of offenses that the Article seeks to address is, oddly enough, both narrowly defined and imprecise. As a baseline, consider the category of crimes to which Gopalan's thesis applies:

> This Article is restricted to white-collar crimes involving corporate fiduciaries who make bad decisions at the expense of shareholders (corporate governance offenses). It does not address white-collar crimes that have a moral wrongfulness component, such as tax evasion, bribery, perjury, extortion, fraud, and embezzlement.[5]

But even this short paragraph engenders more questions than it answers. First, assuming one is able to draw a magic line to delineate other white-collar offenses from corporate governance offenses—which is by no means evident[6]—the latter category is regulated by state corporate or agency laws that only very rarely have criminal enforcement.

To the extent the Article is talking about securities laws, it has to tread very carefully for two reasons. First, securities laws are not concerned with fiduciaries per se, but rather focus on any person committing fraud. Second, securities laws on their own terms require mens rea—they are not strict liability statutes. Simply reading the principal antifraud statute, Section 10(b) of the Securities and Exchange Act of 1934, reveals these realities:

> It shall be unlawful for *any person*, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

5. *Id.* at 461.

6. Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1537 (1997) ("'[M]oral wrongfulness' . . . is present if the conduct made criminal is viewed by a consensus of society as immoral or in violation of a moral norm.").

> . . . .
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> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . *any manipulative or deceptive device or contrivance* in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[7]

The implementing regulation, Rule 10b-5 similarly speaks of "device, scheme, or artifice to defraud" and "fraud or deceit."[8] As the U.S. Supreme Court has noted, "§ 10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception."[9]

It goes almost without saying that showing fraud under Section 10(b) and Rule 10b-5 requires some showing of mens rea. Similarly, Section 13(b)(5) of the Securities and Exchange Act of 1934, requiring appropriate accounting systems and prohibiting the falsification of documents, requires that the defendant have acted "knowingly."[10] Beyond these general requirements which apply to both civil and criminal cases, Section 32(a) of the 1934 Act imposes criminal penalties only if the violation is made "willfully" or "willfully and knowingly."[11] As such, there is even further protection for defendants in such cases.

7. 15 U.S.C. § 78j (2006) (emphasis added).

8. Rule 10b-5 reads as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
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> (a) To employ any device, scheme, or artifice to defraud,
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> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
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> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (2008).

9. United States v. O'Hagan, 521 U.S. 642, 655 (1997).

10. *See* 15 U.S.C. § 78m(b)(5) (2006) ("No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).").

11. Section 32(a) states, in relevant part:

> Any person who *willfully* violates any provision of this chapter (other than section 78dd–1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who *willfully and knowingly* makes, or causes to be made,

Even a simple glance at the securities laws thus reveals that they neither apply strictly to fiduciaries, nor impose liability without mens rea on the defendant's part. As such, statements to the effect that "[t]here must be a fundamental distinction based on the moral blameworthiness of conduct if our distinctions between criminal and civil sanctions are to have any merit"[12] seem incongruous. Even more puzzling is Gopalan's caveat:

> Crimes with a *mens rea* element are not problematic; therefore, this Article addresses only those offenses where the defendants were most likely acting in the belief that their conduct was legal. This is particularly plausible in cases involving the interpretation of complex accounting rules or risky business decisions.[13]

Similarly, he suggests that "the conduct at issue only invites attention because it was seen to be too aggressive by regulators, when the actors themselves only believed that they were engaging in legitimately risky enterprise."[14] But the statutes under which white-collar offenders are charged, by their own terms, require mens rea—to wit, the specific charges against Jeff Skilling as well described in Gopalan's Article.[15] So unless the Article assumes that defendants are charged willy-nilly without a statutory basis, its theoretical construct is at best problematic. In a similar vein, Gopalan suggests that "[m]oral wrongfulness is essential to criminalization for corporate governance offenses; otherwise, determinations about culpability rest only on ex post loss rather than clear guidelines for behavior ex ante."[16] The securities statutes focus precisely on this question, however, by requiring the mens rea necessary for fraud.

Ironically, it is perhaps the Article itself that deemphasizes morality along two dimensions. First, it refers to morality as malleable across time and therefore of limited value as a litmus test for the imposition

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> any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . .

15 U.S.C. § 78ff (2006) (emphasis added).

12. Gopalan, *supra* note 1, at 467.

13. *Id.* at 466.

14. *Id.* at 464; *cf. id.* at 469 ("Given the lack of clarity as to what underlying moral norm has been violated by a particular alleged crime, and because the precise complexities are hard to understand, there is likely to be a great deal of dissonance about moral wrongfulness and culpability.").

15. *See id.* at 488 (Charges included wire fraud, securities fraud, false statements to auditors, and insider trading.).

16. *Id.* at 469; *see also id.* at 503 ("Criminalizing risky actions undertaken by corporate fiduciaries confuses ex post harm with moral wrongfulness."); *id.* ("[S]ince white-collar wrongs are not always morally wrong the criminal law's expressive and coercive powers are seriously undermined by the crude application of criminal sanctions.").

of criminal sanctions.[17] Second and more subtly, by suggesting that moral opprobrium is an insufficient condition for criminalization, Gopalan seems to suggest that non-consensual harm should be present as well.[18] For instance, note how prominently harm appears in the following passage:

> It is important to understand what constitutes harm. As is typically used in the criminal law, "criminal harm" can involve bodily harm, as well as social harm involving collective losses. The first kind is unproblematic and the validity of the state's criminalization of such conduct is not seriously disputed. *The second might also be acceptable in cases where the conduct is non-consensual and involves third parties suffering without the ability to avoid the harm.*[19]

The argument thus appears to be that "bodily harm" should be criminalized in all cases, whereas "social harm" should only be criminalized in specific instances where there are non-consensual, unavoidable losses. Yet this is a framework created by the Article, not by the statutes. Even ignoring this problem, there is sufficient non-consensual loss in white-collar crime—on Gopalan's own terms, he observes that the "horror stories of families being deprived of their savings by the actions of corporate executives have shattered the myth that white-collar crime is victimless."[20]

Another problem with the Article's theoretical ambition is that it tries to commodify human behavior using a rational actor model typical of traditional law and economics scholarship.[21] Consider a particularly telling passage which purportedly seeks to get inside the mind of the would-be white-collar criminal:

> The most frequently advanced justification for criminalization is deterrence—offenders will be deterred from committing criminal acts if the benefits from committing those acts do not exceed the probability of being caught multiplied by the cost of punishment following prosecution. Thus, a rational actor will trade off the expected value of committing the criminal act against two variables: the probability of being caught and the punishment after convic-

17. *See, e.g.*, *id.* at 471 ("The fact that our perceptions about morality are capable of temporal change and that conduct regarded as morally wrongful or harmful during a certain timeframe might be regarded as perfectly acceptable at another timeframe must give us further pause for thought when we see the temptation to criminalize.").

18. *See id.* ("Moreover, moral wrongfulness is not an automatic justification for criminalization: several morally wrongful acts might cause no harm in many circumstances involving consent.").

19. *Id.* at 473 (emphasis added and footnotes omitted).

20. *Id.* at 472.

21. *See, e.g.*, *id.* at 478 ("In sum, monetizing the disutility suffered by the white-collar criminal upon conviction offers clarity about the sufficiency of the punishment function served by conviction alone.").

> tion. If the probability of being caught is low, the criminal act might still seem attractive even if the punishment is high. The same principle applies if the punishment is low and the probability of being caught is high.[22]

One is reminded of well-known work in law and economics that assumes an inverse linear correlation between enforcement efforts and the degree of punishment.[23] Unfortunately, though, there is neither empirical analysis nor even raw data to support these assertions. To be sure, Gopalan does provide some equations to back up his claim.[24] The equations—based on variables such as total disutility, the probability of conviction, the length of imprisonment, the disutility of imprisonment, and the disutility of conviction—do at first glance look impressive. When readers go through them, however, they realize that the numbers assumed for these variables are instrumentally chosen in a self-serving manner—assumptions thrown into the pseudo-math typical of traditional law and economics scholarship.[25]

The lack of empirical support and use of pseudo-mathematics is entirely unsurprising. Depictions of individuals as utility-maximizing automatons stretches common sense notions of how people behave: behavioral research suggests that a high certainty of punishment is perhaps the most effective way of deterring individuals from anti-social behavior. As Dan Kahan has shown in the context of street crime, an "order-maintenance" strategy, where law enforcement places an emphasis on visible responses to criminal activity, is the most effective strategy.[26] As Kahan summarizes:

> When public deterrence predominates, individuals are much less likely to perceive that criminality is widespread. Moreover, when they feel reassured that law enforcement is adequate, law-abiders are *more* likely to view private precautions as worthwhile, and less likely to see such precautions as signs that those around them lack confidence in the efficacy of law. These attitudes are likely to sustain norms of private behavior that reduce the need for expenditures on public deterrence. *In short, a mix tilted toward public law enforcement rather than private precautions would be more likely to generate a low crime-rate equilibrium at any given price of crime.*[27]

22. *Id.* at 474.

23. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 483 (2004) ("[T]he sanction is governed by a fundamental probability-related *multiplier*—the sanction must equal the harm multiplied by the inverse of the probability of its imposition.").

24. Gopalan, *supra* note 1, at 475–76.

25. *See, e.g.*, Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005).

26. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 371 (1997).

27. *Id.* at 389 (emphasis added).

This is a far cry from commodifying human behavior into an implausible rational actor model. As scholars have noted, "what is needed is not a theory of 'crime' (let alone a theory of 'economic crime') but theories of human behavior."[28]

Third and finally, the Article's framework offers anemic remedies that ultimately remain unsatisfying. Gopalan's central point is apparently that "[c]onviction inevitably results in consequential sanctions ranging from shaming to legal impediments and denial of privileges."[29] Yet each of these "sanctions"—shaming, legal impediments, and denial of presumably social privileges—when examined carefully reveals itself to be relatively mild.

To begin with, shaming unfortunately cannot be taken too seriously. Gopalan seems to suggest that shaming will work because defendants are concerned about their image in society. He postulates that corporate governance offenders are more likely to be "reputation conscious and have a high rate of disutility for conviction alone . . . because their very livelihood is tied to reputation."[30] But once again, no evidence is offered to adduce this point: will often arrogant and egotistical miscreants really appreciate shame? Another glaring problem with the shame sanction is, ironically enough, created by the Article's own thesis: if the activities under question are not morally wrongful, then why would any defendant feel any shame? After all, if one hews to the argument, then they have not done anything morally wrong.

To his credit, Gopalan himself seems to recognize the internal inconsistency with his shaming argument. But his attempt to overcome it simply shifts away from shaming to his next putative sanction, legal impediments:

> If offenders charged with violating accounting rules do not believe that their conduct was wrongful, then they are likely to be angered by the imposition of a shame sanction rather than feel remorse. Even if they change their actions following the shaming because they realize the disutility created, this reformation is unlikely to be sustainable. Resentment and anger are likely to motivate them to find new ways to break the rules. *This problem could be partially ad-*

28. Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 Stan. L. Rev. 197, 223 (1965).

29. Gopalan, *supra* note 1, at 480.

30. *Id.* at 477.

> *dressed by incapacitating them from holding similar positions of trust through the use of legal impediments.*[31]

The argument thus seems to be: shame might not work, so we should shift to legal impediments.

But what are these so-called impediments, and how meaningful are they? As far as I can discern the argument, they fall into two categories: (1) banning defendants from roles as fiduciaries, and (2) monetary fines and disgorgement.[32] In turn, each of these reveals itself unsatisfactory.

The first category relies on the assertion that "[c]onviction is sufficiently liberty depriving for corporate governance offenders insofar as it destroys the ability to hold fiduciary positions, thereby eliminating the possibility for further social harm."[33] Consider some illustrations:

> For example, if the offender is a lawyer, he may lose his license. He may also be suspended from practicing before the SEC. If she is the CEO of the company she founded, she must demit that office. Following the passage of the Sarbanes-Oxley Act, under section 1105, the SEC has the power without going to court to issue officer and director bars as part of a cease-and-desist proceeding.[34]

While these sanctions might in the abstract sound plausible, they are woefully inadequate sanctions for white-collar crime. Gopalan suggests that "[s]uch legal impediments to the offender holding offices involving trust can be finely calibrated to achieve incapacitation in much the same way that jail does."[35] But I am at a loss to understand how this "finely calibrated" feat will be accomplished. Is an adequate societal response to an individual who has defrauded investors of millions or billions of dollars simply to disallow that person from serving as a fiduciary? Might such mild sanctions offend basic notions of proportionality?

The second category of legal impediments, fines and disgorgement, also reveals itself inadequate. Gopalan advocates fines by relying "on work by Gary Becker, whose economics-based approach showed

31. *Id.* at 485 (emphasis added); *cf. id.* at 483 ("Even if some offenders are not affected by shaming, other observers might see the disutility of the alleged offense and modify their behavior.").

32. *See, e.g.*, *id.* at 474 ("Decoupling blame from punishment also recognizes the reality that conviction alone is sufficient punishment. Assuming further punishment is necessary, state-punishment [sic] could be restricted to fines and impediments to holding positions of trust.").

33. *Id.* at 504.

34. *Id.* at 479.

35. *Id.* at 482–83.

that stringent fines were preferable to imprisonment."[36] But even if one were to accept Becker's Chicago School approach, it is much more nuanced than Gopalan makes it out to be. Consider, for instance, Becker's conclusion that "fines cannot be relied on exclusively where the harm exceeds the resources of offenders, and fines would have to be supplemented with prison terms or other punishments in order to discourage offenses optimally."[37] This would seem to be precisely the type of situation white-collar crime engenders. Gopalan additionally suggests the possibility of "an order to disgorge and by taking back ill-gotten gains."[38] This sanction perhaps comes closest to actually meting out punishment, but is not sufficient. For instance, how would this disgorgement compare to the defendant's overall financial net worth? Would fines and disgorgement, even combined, be sufficient to discourage white-collar crime? Perhaps the Article might have some responses to these questions, but they are regrettably not even broached.

After shaming and legal impediments, we arrive finally at the third category of sanctions; the denial of privileges, which would presumably be enforced extra-legally by the defendant's peer group and broader society.[39] The most obvious manifestation would be the fact that private parties would not want to hire a convicted white-collar criminal; in other words, the "significant detriment in terms of loss of employment opportunities and social exclusion" experienced (in other words, disutility of conviction).[40] Other social sanctions could include "shaming, withholding of esteem, shunning, and negative voting by investors and other market participants . . . ."[41] All of this may be fine as far as it goes, but these extra-legal denials are subject to the proportionality critique discussed in the context of legal sanctions; for instance, does society really think that loss of earnings power or more

36. *Id.* at 475.

37. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 196 (1968).

38. Gopalan, *supra* note 1, at 480.

39. *See, e.g.*, *id.* at 477–78 ("Conviction also triggers consequential sanctions, such as shaming, by emboldening third parties to enforce social norms on offenders."); *id.* at 484 ("Conviction serves as a focal point for shaming in that it emboldens individuals to impose social sanctions.").

40. *Id.* at 481; *see also id.* at 477 ("If earning capacity is destroyed or substantially diminished, the conviction itself would satisfy the punishment function."); *id.* at 481 ("Corporate governance offenders are likely to experience significant detriment in terms of loss of employment opportunities and social exclusion and might internalize the values sought to be conveyed by the law even without going to jail.").

41. *Id.*

nebulous social punishments such as "withholding of esteem" are sufficient remedy for the havoc wreaked by white-collar offenders?

In addition, the Article seems to suggest that the earning capacity of white-collar criminals should make them amenable to more lenient punishment. After all, according to this line of thought, "[u]nlike the common criminal who may not have a similarly predictable earning capacity and therefore may not suffer the same extent of monetary loss from a conviction, this loss ought to serve the deterrence function . . . ."[42] Whether or not one wants to argue that earnings should be a determining factor as to whether a white-collar offender goes to jail, such a stance is at the very least inconsistent in that it seems to contradict a point made a few sentences later; namely, that "[t]here is no normative justification for treating criminal behavior by those of a high social status differently from crimes committed by the hoi polloi. A murder committed by a person from a higher class is still murder, and to define crimes based on economic status alone makes little sense."[43] But isn't this precisely what the Article is doing when it suggests more lenient sanctions for white-collar offenders?

In the end, it is no surprise that the remedies the Article proposes are weak. In one of the most telling passages in the Article, Gopalan argues that "[c]orporate governance crimes involve harm, and some even involve harm on a massive scale such as that caused by the bankruptcy of Enron. However, *this harm is the price of capitalism* and there are other mechanisms that can tackle it more efficiently than imprisonment."[44] While he is to be commended for being forthright about his position, it evinces a desire to paint the harm caused by white-collar defendants as small; of course, with minimal harm should come minimal sanction. Many, however, believe that corporate crime is precisely not the "price of capitalism"[45]—it is a perversion of capitalism, and as such should be addressed with sanctions appropriate to the degree of the transgression against our economic system.

II. Skilling as "Martyr"?

The Article's case study, the putative "martyrdom" of former Enron CEO Jeff Skilling, is ultimately unconvincing and unfortunately serves to exhibit many of the theoretical weaknesses illustrated above. One does not even need to look beyond the Article's title, "Skilling's

42. *Id.* at 463.
43. *Id.* at 464.
44. *Id.* at 474 (emphasis added).
45. *Id.*

Martyrdom"[46] to get a sense of what Gopalan's argument will be. Unfortunately, even on the terms Gopalan presents them—presumably in the best light for his "martyr"—the example hardly helps the thesis, and perhaps even detracts from it.

To his credit, Gopalan outlines upfront what he is trying to achieve by devoting so much time and attention to the Skilling case:

> As the Skilling case demonstrates in the following pages, it is unduly optimistic to suppose that public perceptions of moral wrongfulness are nuanced enough to separate conduct that is merely risky from that which is criminal, and the dangers are exacerbated in the context of corporate criminal conduct due to the infiltration of negative emotions like envy and resentment.[47]

In line with this objective, Skilling's actions are cast in a surprisingly benign light. According to Gopalan, Skilling's actions "were, at worst, bad business judgments."[48] His conduct "was, at worst, an aggressive interpretation of existing law"[49] and his statements "remarkably like puffery rather than criminal fraud."[50] Readers are asked "[w]here is the 'fraudulent' action undertaken by Skilling to achieve the corporate goal of achieving earnings?"[51] and, perhaps most remarkably, "what is the point of sending the *excessively optimistic* CEO to jail or imposing a fine?"[52]

This description may strike those familiar with the Enron tragedy as, to put it mildly, strange. Much closer to reality is the government's position:

> [T]he indictment alleged that, starting in late 1999, Skilling spearheaded a massive conspiracy to deceive investors about Enron's financial health by manipulating the company's financial results and lying about the performance of its businesses. . . . [T]he conspiracy's objective had been to pump up Enron's stock price artificially by regularly reporting financial information that met or exceeded Wall Street analysts' expectations, trumpeting Enron's successes, and concealing its failures.[53]

More specifically, the five principal areas of fraud—fudging the accounting of a special purpose entity, manipulating reserve accounts,

46. *Id.* at 459.

47. *Id.* at 468.

48. *Id.* at 492; *see also id.* at 464 (lamenting that Skilling was convicted "for bad business judgment devoid of moral wrongfulness"); *id.* at 490 ("In some cases they were bad business decisions based on hindsight, but were they worthy of imprisonment?").

49. *Id.* at 503.

50. *Id.* at 490.

51. *Id.* at 502.

52. *Id.* at 485 (emphasis added).

53. *Id.* at 488–89.

misrepresenting the Wholesale business, hiding the losses of the Retail business, and covering up the failures of the broadband business[54]—one is hard-pressed to treat them as merely bad business judgment, risk-taking, or excessive optimism. This is even before broaching the litany of misrepresentations to investors.[55] Reading Gopalan's description and attempt to treat these activities as modest transgressions, one becomes even more convinced of the strength of the government's case; simply put, there is a compelling case that Skilling was engaged in "a conspiracy to deceive investors about the true performance of Enron's businesses by cooking the books to increase reported earnings, reduce reported losses, maintain an investment-grade credit rating, and improve the price of Enron's stock."[56]

Perhaps the Article simply misunderstands the case against Skilling. Tellingly, Gopalan asserts that "[c]ritical to this Article's argument regarding moral wrongfulness and harm, Skilling was charged not with causing the bankruptcy, but instead for misrepresenting Enron's financial condition from 1999 to 2001."[57] But someone who has even a passing familiarity with fraud doctrine would observe that it is precisely misrepresentation that is the essence of fraud—I am unaware, for example, of any law that makes bankruptcy per se a crime. To the extent that one might argue that societal harm is a prerequisite to use the criminal law, then even by the Article's own admission there was wide societal harm:

> Consequences for Enron's employees and the city of Houston were drastic. On "Black Monday," over 4000 Houston Enron employees lost their jobs. Over the course of the following months, thousands more lost their jobs until the company, once Houston's largest employer, had only enough employees to administer the bankruptcy. Enron stock plummeted to its nadir, rendering many employees' 401(k) accounts worthless. Savings accumulated over lifetimes were rendered naught.[58]

The various defenses the Article offers are unconvincing. To try to argue that some of the losses suffered were "the byproduct of consensual risk taking"[59] is puzzling—to argue that shareholders somehow consented to the fraud would require adducing at least some evidence to support one's point.

54. *Id.* at 488–90.
55. *Id.*
56. *Id.* at 499.
57. *Id.* at 488.
58. *Id.* at 487.
59. *Id.* at 466.

The Article also devotes significant attention to argue that the fact that Skilling's reliance on organizational hierarchy and outside advisors somehow absolves him of responsibility. The core of this two-pronged claim is worth quoting at some length:

> As is apparent, the sheer size of a company like Enron necessitates the creation of large sub-structures comprising several layers of subordinates, governance systems, and internal and outside advisors to ensure the proper structuring and vetting of business transactions and decisions. It is to these substructures that CEOs and senior executives turn for most of the decisions they are required to make. They act upon the basis of the advice provided by these processes, and the success of any company is owed in substantial measure to the efficacy of these decision-making systems. It is indeed rare for CEOs to run companies the size of Enron as personal fiefdoms where every decision is made on their own accord and without consultation with and reliance on advisors, internal and external. It is also not typical that CEOs actively seek out personal accounting or legal advice in addition to those offered by these substructures. It makes sense then for them to rely on expert advice, and for such reliance to be useful in showing they did not possess the required knowledge or intent to engage in criminal conduct.[60]

The defense is either naive or disingenuous. It subtly ignores the quality of the organization and so-called "expert" advice—to wit, the well-known Arthur Andersen saga.[61] It shirks responsibility by suggesting that those at the top of the organizational food chain are not responsible if they surround themselves with so-called advisors.[62] One might be well-served to remember the old proverb: "The fish always stinks from the head downwards."[63]

A final defense is that Skilling's actions "were undertaken as a loyal employee of Enron."[64] Gopalan claims, for instance, that:

> [T]here is little morally wrongful in Skilling's conduct. There was no suggestion that Skilling had anything to gain at the expense of Enron by his alleged crimes. In fact, all the evidence pointed to

60. *Id.* at 494; *see also id.* at 497 ("Is deliberate ignorance even possible in a corporation the size of Enron with its army of lawyers, accountants and consultants?"); *id.* at 493 ("He [Skilling] also claimed he had always relied on competent legal and accounting advice.").

61. *See, e.g.*, Flynn McRoberts et al., *The Fall of Andersen: Greed Tarnished Golden Reputation*, CHI. TRIB., Sept. 1, 2002, at 1 ("The quiet dilution of standards and the rise of auditor-salesmen at Andersen are central to the scandals that have cost investors billions of dollars, eliminated thousands of jobs and threatened the retirement security of millions of citizens.").

62. *See, e.g.*, Robert A. Mintz, *A Landmark Win over Corporate Fraud: Enron Verdict Shows Executives Can't Hide from Responsibility*, NEWARK STAR-LEDGER, May 26, 2006, at 23.

63. THE ROUTLEDGE BOOK OF WORLD PROVERBS 153 (2006) (Jon R. Stone ed.).

64. Gopalan, *supra* note 1, at 493.

> Skilling working for the success of Enron. His alleged misstatements were in the nature of sales talk and puffery and there was no evidence that there was any intention to deceive.[65]

While more sophisticated, this defense too is problematic. It neglects to mention that Skilling's compensation was tied to Enron's stock price, which gave him a personal incentive to inflate the stock price artificially. One might argue, as Gopalan seems to,[66] that shareholders would also benefit from a higher share price, but such an assertion conveniently ignores that Skilling and other insiders were able to sell much of their shareholdings prior to Enron's collapse—something which neither the public, nor rank-and-file employees were able to do.[67] And this is all before even broaching the question of whether Skilling's actions were driven by personal ego or were in the best long-term interests of shareholders.

Nonetheless, Gopalan is quite astute to tie his loyalty argument to "honest services" fraud by arguing that:

> There is no evidence that Skilling engaged in bribery or self dealing. Nor did he act secretly for his own benefit at the expense of Enron. *There was no deprivation of honest services because, if anything, Skilling's interests were too closely aligned with Enron's.* Unless the causal link between Enron's ultimate collapse and Skilling's alleged actions are conclusively established, the harm was not directly caused by Skilling's alleged crimes.[68]

To be sure, there is significant controversy regarding the open-endedness of the "honest services" fraud statute, 18 U.S.C. § 1346.[69] Indeed, the Supreme Court has granted certiorari on this question in three cases, including Skilling's.[70] But to discuss the constitutionality of a specific statutory position is quite different than to argue that the honest services theory generally "dangerously corrodes the very basis of

65. *Id.* at 502–03; *see also id.* at 486 ("Given the nature of Skilling's personality and marriage to Enron's success, there was no case that Skilling had sabotaged the company's interests to benefit his own.").

66. *See id.* at 500 ("In fact, the immediate consequences of Skilling's actions were that Enron and its shareholders benefited.").

67. *See, e.g.*, Leslie Wayne, *Before Debacle, Enron Insiders Cashed In $1.1 Billion in Shares*, N.Y. TIMES, Jan. 13, 2002, at 1.

68. *Id.* at 500 (emphasis added).

69. *See* 18 U.S.C. § 1346 (2006) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

70. *See, e.g.*, Roger Parloff, *The Catchall Fraud Law that Catches Too Much*, FORTUNE, Jan. 18, 2010, at 86 ("The U.S. Supreme Court has chosen to hear no fewer than three cases this term—including [Jeff] Skilling's and [Conrad] Black's—that pose the question of whether prosecutors are applying this law too broadly, and indeed, whether the law must be struck down as unconstitutional.").

criminal liability by conflating moral wrongfulness with risk taking."[71] Even assuming arguendo that a majority of the Court finds Section 1346 invalid in this case, one must not forget that only one of Skilling's convictions even refers to honest-services fraud—the other eighteen do not.[72] Though no doubt Skilling's lawyers will try to cast it as central to Skilling's conviction, the constitutionality of Section 1346 is a distracting sideshow, albeit a very clever one for his defense team.

Beyond the specific defenses he enumerates, ultimately Gopalan is critical of the punishment imposed on Skilling:

> Imprisoning Skilling for 292 months then is an inappropriate tool for what society really wants to do. Conviction ought to suffice because it serves the expressive function of the law insofar as it tells the offender he has acted in a way that meets with society's disapproval and conveys the consequences of such conduct to other observers. It leaves other consequences to individual members to administer.[73]

Here again, though, this rhetoric leaves much to be desired. First, and most simply, a jury convicted Skilling,[74] and in our justice system the jury serves as a proxy for the public's moeurs. As a consequence, one has to at least identify why what the jury did does not reflect "what society really wants to do." Second, and more subtly, one thrust of Gopalan's defense of Skilling is that "[t]he court completely confuses Skilling's case—he did not contend that he knew that the acts were illegal. Rather, the claim was that he knew of the acts, which were all legal!"[75] Yet if this is true, how might shame follow from conviction?

Third, the Article argues repeatedly that Skilling's punishment—"292 months imprisonment, three years supervised release, and to pay $45 million in restitution"[76]—was draconian. For example, according to Gopalan, "Skilling would have had his earning capacity destroyed by conviction alone. An order of disgorgement would have reduced him to penury."[77] But is this necessarily so? For instance, how does the $45 million restitution compare to Skilling's overall financial net

71. Gopalan, *supra* note 1, at 502.

72. *See id.* at 500 ("The jury had convicted Skilling of one count of conspiracy. The problem was that it did not specify which object of the conspiracy had been used to convict, and given that one of them was honest services, Skilling sought to overturn the conviction alleging that this was an invalid theory."); *see also* Parloff, *supra* note 70, at 86 ("Only one of the 19 counts of which he was convicted—the first one, charging criminal conspiracy—actually alludes to honest-services fraud.").

73. Gopalan, *supra* note 1, at 485.

74. *See id.* at 493.

75. *Id.* at 498.

76. *Id.* at 494.

77. *Id.* at 503.

worth? Finally, he notes that "[i]f Skilling was indeed responsible for the harm, there were other avenues like civil suits to recover for the harm caused."[78] But how and why? Would a civil suit even be possible? Would Skilling have the assets to compensate investors for the billions of dollars of damages caused? Such questions are eerily ignored.

III. Minor Quibbles

I end my observations on Professor Gopalan's Article by outlining a few relatively minor quibbles I have with his arguments. At several points in the Article, Gopalan makes provocative points that are neither developed nor even backed up with sufficient citations. For example, he claims that while "[t]his Article focuses only on a subset of white-collar offenders[—]corporate fiduciaries abusing the principal-agent relationship[—t]he core arguments could be extended to other kinds of white-collar crimes as well, because, in many cases, conviction without incarceration would satisfy the objectives of criminalization."[79] Yet this point is left hanging: we are neither told why nor how his ideas could be extended.

In a similar vein, at several points in the Article, he suggests that "conviction without incarceration offers a second-best alternative to decriminalization."[80] Focusing the Article on his second-best alternative may be fine as far as it goes, but it is odd not to spend any time discussing one's first-best alternative, especially when the self-proclaimed overarching question of the Article is "whether such agency problems should be the subject matter of criminal law with imprisonment as the sanction or whether they are better suited to civil or social sanctions."[81] To belabor the obvious, whether or not to treat an infraction as criminal or not is an analytically different question than what remedy the criminal law should seek. As scholars have pointed out, labeling an activity as "criminal" provides an important signaling function to the public,[82] not to mention that legislation often includes

78. *Id.*

79. *Id.* at 465.

80. *Id.* at 504; *see also id.* at 463 ("Part II argues that conviction without imprisonment is a second-best alternative to decriminalization in cases where the conduct is blameworthy, and results in non-consensual harm."); *id.* at 474 ("For conduct without the taint of moral wrongfulness, but where non-consensual harm results, criminalization without incarceration is the second-best alternative to decriminalization.").

81. *Id.* at 465.

82. *See, e.g.*, Ball & Friedman, *supra* note 28, at 211 ("Labeling conduct as 'criminal' may change the public attitude toward the man who breaks the law as well as the attitudes of those who are themselves tempted to break the law.").

criminal sanctions as a reservoir from which to mete out punishment for more serious infractions, rather than as a first-line instrument of public policy.[83] Perhaps more philosophically, as Harry Ball and Lawrence Friedman have argued using the simple example of usury, declaring something a crime represents "a legislative judgment that it was best to socialize remedial action . . . because under existing social conditions civil enforcement had failed."[84] To the extent that Gopalan's first-best alternative, decriminalization, would suggest these issues are not important, the Article might be well served to tell its readers why.

Another provocative claim is that the criminal law "punishes people for actions that are not even civil wrongs, let alone undertaken with the taint of moral wrongfulness."[85] Given the reality that for all but rare strict liability violations, criminal prosecution requires a showing of mens rea—not to mention that "proof and evidentiary requirements are more onerous in criminal prosecutions than in civil suits"[86]—such an assertion requires significantly more explanation. Tellingly, the source Gopalan cites to in support of his point is considerably more nuanced, even to the point of arguing that "because the more expansive reach of criminal liability is arguably consistent with many of the theories underlying the civil-criminal divide, Congress should consider carefully whether to expand the reach of criminal liability . . . ."[87] Even more simply, if Gopalan's first-best solution is to decriminalize a category of actions, which are not actionable civilly, then is he advocating no legal remedy?

After all, as the source he himself cites to is careful to observe, "[a]s a consequence of the narrow scope of private civil liability, investors who are injured by criminally actionable conduct are often uncompensated."[88] Indeed, federal statutes and federal common law have made it increasingly difficult to bring private securities antifraud lawsuits. The legislative story dates from a triad of securities reform statutes passed in the mid-1990s. First, in 1995 the Private Securities

83. *See, e.g.*, Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. CHI. L. REV. 423, 426 (1963) ("Furthermore, implicit in the legislative scheme is the conception of the criminal sanction as a last resort to be used selectively and discriminatingly when other sanctions fail.").

84. Ball & Friedman, *supra* note 28, at 213.

85. Gopalan, *supra* note 1, at 461.

86. Kadish, *supra* note 83, at 442.

87. Wendy Gerwick Couture, *White Collar Crime's Gray Area: The Anomaly of Criminalizing Conduct Not Civilly Actionable*, 72 ALB. L. REV. 1, 3 (2009).

88. *Id.* at 39.

Reform Litigation Act introduced, "inter alia, heightened pleading requirements for class actions alleging fraud in the sale of national securities."[89] One year later, in 1996, the National Securities Market Improvements Act ("NSMIA") whose "primary purpose . . . was to preempt state 'Blue Sky' laws which required issuers to register many securities with state authorities prior to marketing in the state,"[90] was passed. Third, the Securities Litigation Uniform Standards Act in 1998 made "federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law."[91] Through heightened pleading standards and the preemption of more generous state securities laws, Congress has made it increasingly difficult for private plaintiffs to bring securities actions.[92]

Federal common law has evolved into a more defendant-friendly posture as well. Beginning with two landmark cases in 1975—*Blue Chip Stamps v. Manor Drug*[93] and *Cort v. Ash*[94]—the U.S. Supreme Court has by and large cabined the federal common law of securities fraud. Over the past five years and in rapid succession, the Court has placed restrictions on plaintiffs along two principal dimensions. Decisions such as *Dura Pharmaceuticals, Inc. v. Broudo*,[95] *Tellabs v. Makor Issues and Rights*,[96] and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*[97] move in the direction of imposing heightened pleading requirements on plaintiffs. Moreover, opinions such as *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*[98] and *Credit Suisse Securities (USA) LLC v.*

89. Lander v. Hartford Life, 251 F.3d 101, 107 (2d Cir. 2001); *see also* A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 WASH. U. L.Q. 435, 481–83 (2000).

90. *Lander*, 251 F.3d at 108. The securities exempted, called "covered securities," are those nationally listed on the New York or American Stock Exchanges, or on NASDAQ. *See* 15 U.S.C. § 77r(b) (2006). Note, however, that the "NSMIA expressly preserved state authority to bring enforcement actions with respect to securities transactions." Stefania A. Di Trollio, *Corporate Governance and the Sarbanes-Oxley Act: Public Choice Theory, Federalism, and the Sunny Side to Blue-Sky Laws*, 30 WM. MITCHELL L. REV. 1279, 1295 (2004).

91. *Lander*, 251 F.3d at 108.

92. *See, e.g.*, William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism* 6, 51 (Eur. Corp. Governance Inst. Working Paper Series, Paper No. 23, 2004 and Geo. Univ, L, Ctr., Bus., Econ. & Reg. Pol'y, Research Paper No. 606481, 2004), *available at* http://ssrn.com/abstract=606481.

93. 421 U.S. 723 (1975).

94. 422 U.S. 66 (1975).

95. 544 U.S. 336 (2005).

96. 551 U.S. 308 (2007).

97. 552 U.S. 148 (2008).

98. 547 U.S. 71 (2006).

Billings[99] have effectively given broad preemptive effect to the federal securities regime, to the detriment of state securities and antitrust law, respectively.

Curiously missing from the Article, however, is any treatment of these developments that have dramatically diminished the ability of private plaintiffs to seek civil remedies. For instance, to the extent that Gopalan might support these developments, perhaps he is content to let the administrative agencies such as the SEC—to which the restrictions on private plaintiffs do not apply—seek civil sanctions?[100] To the extent he does not support these restrictions, might his call for decriminalization be coupled with advocacy for fewer restrictions on private plaintiffs? Regardless, readers are left wondering.

Beyond its underdeveloped points, and at the risk of being overly nit-picky, I also permit myself to point out at least two inconsistencies in the Article's arguments: one with regard to public moeurs; the other, with regard to the power of principals—notably, shareholders in a corporation—over their agents. Especially toward the beginning of the piece, Gopalan makes it a point to emphasize again and again how strongly the public desires punishment for white-collar offenders. He laments "the popular perception that white-collar criminals are not punished enough"[101] and the "societal turn to vengeance."[102] Citing specific examples, the reader is told the following:

> Despite the long sentences alleged wrongdoers like Jeff Skilling of Enron, Bernie Ebbers of Worldcom, and Joseph Nacchio of Qwest have received, popular opinion remains that the law is too lenient on this class of offenders. The retributive impulse of the mob's baying for blood after Enron's collapse was not sated by the untimely death of Ken Lay shortly after his conviction . . . .[103]

Overall, Gopalan notes that there is a "growing public opinion that corporate wrongdoers must be equated with ordinary criminals and that incarceration is necessary."[104] Consider how different this stance

99. 551 U.S. 264 (2007).

100. Again, this is an issue the source he cites does broach. *See* Couture, *supra* note 87, at 38 ("In sum, the gap between criminal liability and SEC enforcement liability is smaller than the gap between criminal liability and private civil liability, but the gap nonetheless exists.").

101. Gopalan, *supra* note 1, at 459.

102. *Id.* at 460.

103. *Id.* at 459–60.

104. *Id.* at 473; *see also id.* at 468 ("The popular perception that CEOs and senior corporate executives are greedy and arrogant is probably at the root of the visceral reactions to news reports about alleged acts of wrongdoing.").

is with that espoused later in the Article. There, we are told that actually society would like something different:

> Imprisonment and fine sanctions are crude in their application and do not serve to convey the emotions aroused by the actions of corporate offenders. Frequently, for most indirect, non-dangerous offenses, *all that society wants* is that these emotions be ventilated, and for the offender to be prevented from re-offending rather than to see the offender go to jail or be made to suffer financial loss. . . . *Civilized society* recognizes that the CEO's conduct is not worthy of jail time, and that fines are crude matches for their actions.[105]

A skeptic could be forgiven for wondering how, after a few pages, society's desires are magically transformed.

There is a similar tension between the early and later parts of the Article when discussing the power that principals, such as shareholders, have over their agents—the board of directors and officers that supervise and manage corporations. Early on appears an elaborate and eloquent discussion of the powerlessness of the principals in corporate law:

> The principal-agent relationship is especially pregnant with potential for abuse because of its inherently asymmetric nature. Agents are primarily employed in order to make up for the gaps in expertise, skill, and time that prevent principals from accomplishing the delegated tasks on their own. . . . [¶] [W]hen applied at the corporate level, the collectivization of the principal creates incentives for free riding and rational apathy. . . . These factors debilitate the monitoring power of principals to a point where the agent is the de facto master of the relationship. Thus, although in theory the shareholders are the principals, it is the management that exercises the greater power, primarily because of real barriers to removal caused by collective action problems and the deference that corporate law accords to business decisions taken by management.[106]

This point is important as far as it goes, and has a rich intellectual tradition behind it, beginning in modern times with the seminal work of Berle and Means.[107] Regrettably, though, later in the Article, the tone changes when trying to argue that the criminal law should not be applied to principal-agent problems:

> As is typically used in the criminal law, "criminal harm" can involve bodily harm as well as social harm involving collective losses. The first kind is unproblematic, and the validity of the state's criminal-

105. *Id.* at 484–85 (emphasis added).

106. *Id.* at 465.

107. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

> ization of such conduct is not seriously disputed. The second might also be acceptable in cases where the harm is non-consensual and involves third parties suffering without the ability to avoid the harm. *However, no such necessity exists in situations involving agency problems, as the principals have tools at their disposal to control the wrong-doers.* There are perfectly adequate civil and social sanctions that can achieve the objectives—incapacitation, retribution, and deterrence—at much lower cost. Principals can act in concert, use regulators like the SEC, or act through intermediaries like stock exchanges and institutional shareholders to do any of these without the state incurring imprisonment expenses.[108]

Yet how can the principals on the one hand be powerless, yet at the same time achieve astonishingly ambitious goals? Being more consistent, or at least making an attempt to explain the inconsistencies, would make Gopalan's argument more convincing.

Finally, in terms of minor issues, I remain unconvinced by the examples that Gopalan provides—to the point where they might even weaken rather than strengthen his argument. Consider first his attempt to present accounting as a field that does not require moral judgments: "[f]requently, the conduct alleged to be wrong involves accounting transactions without any evidence about the offender's expertise in accountancy. The accounting rules often do not have any moral element, and are explained more as coordination devices rather than moral guidelines."[109] To be sure, he is making such an assertion to bring accounting violations within his framework of agency crimes that lack moral wrongfulness. But it is a breathtaking statement to anyone with even a passing familiarity of accounting—consider, for example, an entire sub-field in accounting grappling with the ethical and moral issues its profession faces.[110] To make things even more puzzling, Gopalan states that "accounting rules often do not have any moral element, and are explained more as coordination devices rather than as moral guidelines."[111] Yet perhaps the opposite is true: it is precisely within the interstitial spaces of accounting that morality becomes of paramount importance.

108. Gopalan, *supra* note 1, at 473; *see also id.* at 483 ("White-collar offenders have a variety of agents who can impose shaming and other social sanctions including investors, other directors, employees, the media, politicians, and potential employers. Their position relative to the offender reduces the risk of retaliation by the offender and facilitates internalization.").

109. *Id.* at 469.

110. *See, e.g.*, RONALD F. DUSKA ET AL., ACCOUNTING ETHICS (2003); STEVEN MINTZ & ROSELYN MORRIS, ETHICAL OBLIGATIONS AND DECISION-MAKING IN ACCOUNTING (2007); DAN GUY ET AL., THE CPA'S GUIDE TO PROFESSIONAL ETHICS (2000).

111. Gopalan, *supra* note 1, at 469.

His offhand critique of charging defendants with so-called "process crimes" such as obstruction of justice requires significantly more development. Consider his observation that:

> The employment of criminal law to combat agency abuses is particularly troubling when the state is content to criminalize based on alleged obstructions of justice rather than proving the underlying allegations. The cases of Martha Stewart and Frank Quattrone are illustrative of this trend.[112]

But if one were to hew to the framework advanced in his Article, would it be fair to presume that Gopalan would somehow consider lying to a prosecutor not "morally wrongful"? If so, then such a novel argument should be spelled out. Stepping outside the Article's construct, whether one believes prosecutors have been overly zealous in pursuing process crimes deserves more than an offhand comment with no relevant citations—there is, after all, an emerging literature on the subject.[113]

An arguably more troubling example is the Article's casual treatment of insider trading law. Critiquing what it apparently views as current insider trading jurisprudence, the "abstain-or-disclose" rule[114] the discussion then proceeds to postulate "it is unlikely that the person who is purchasing the securities from the insider is being taken advantage of in every situation. It is possible that the buyer sold the securities also before the information surfaced and caused the stock price to fall."[115] No empirical evidence is adduced to support this claim. Gopalan then continues:

> If it is assumed that the argument is that the entire market is being taken advantage of, even that does not suffice as a strong case for criminalization because in many cases the size of the sale of the securities by the insider might be small in relation to the market for securities of the relevant company, with the result that the consequences are *de minimis*.[116]

112. *Id.* at 466 (footnotes omitted).

113. *See, e.g.*, Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9 (2005); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435 (2009).

114. Gopalan, *supra* note 1, at 470. This rule, developed by the SEC and the U.S. Court of Appeals for the Second Circuit, requires anyone trading on material, non-public information either to "abstain" from trading or "disclose" the material non-public information. It is sometimes referred to as the "equal access" rule. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968); *In re* Cady Roberts & Co., 40 S.E.C. 907 (1961).

115. Gopalan, *supra* note 1, at 471.

116. *Id.*

After all, according to him, "there is a body of scholarship contending that insider trading is actually beneficial to the market because it unearths vital information."[117]

These assertions might surprise those versed in modern insider trading law. To begin with, the U.S. Supreme Court has never accepted the "abstain or disclose" rule,[118] except in the specific context of insider trading associated with tender offers.[119] Instead, the Court has adopted the misappropriation theory, treating insider trading as a species of fraud; in other words, "[i]n lieu of premising liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock, the misappropriation theory premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information."[120] More generally, misappropriation theory can be viewed as an extension of larceny offenses[121]—even analogized to embezzlement, as the *O'Hagan* Court itself does.[122] Needless to say, insider trading conceptualized as theft is a far cry from insider trading as a governance offense that is somehow not morally wrongful, which is presumably the picture Gopalan is trying to paint.

Furthermore, the "clear body of scholarship" is a citation to Henry Manne, who apparently believes that "insider trading can be used as an important component of executive compensation,"[123] that "insider trading contributed importantly to the efficiency of stock market pricing"[124]—and who, above all, surmises that "investors would want every bit of market price information they could possibly get, whether it came from stock trading by insiders or the devil."[125] What such bold assertions conveniently forget is that an overarching

117. *Id.* at 470.

118. *See* Dirks v. SEC, 463 U.S. 646 (1983); Chiarella v. United States, 445 U.S. 222 (1980).

119. *See* United States v. O'Hagan, 521 U.S. 642, 666–77 (1997).

120. *Id.* at 652.

121. *Cf.* Kadish, *supra* note 83, at 425 ("The extension of the classic larceny offense by courts and legislatures to embrace fraud, embezzlement, and similar varieties of misappropriation that threatened newly developing ways of transacting business is a well documented chapter in the history of the criminal law.").

122. *See O'Hagan*, 521 U.S. at 654 ("A company's confidential information, we recognized in *Carpenter*, qualifies as property to which the company has right of exclusive use. The undisclosed misappropriation of this information, in violation of a fiduciary duty, the Court said in *Carpenter*, constitutes fraud akin to embezzlement . . . ." (citations omitted)).

123. Henry G. Manne, *Insider Trading: Hayek, Virtual Markets, and the Dog That Did Not Bark*, 31 J. CORP. L. 167, 168 (2005).

124. *Id.*

125. *Id.* at 181.

goal of the securities laws, articulated in section 2 of the Securities and Exchange Act of 1934, is "to insure the maintenance of fair and honest markets."[126] The ability of insiders to trade on material non-public information is an affront to that goal. As the Court observes in *O'Hagan*:

> [I]nvestors likely would hesitate to venture their capital in a market where trading based on misappropriated nonpublic information is unchecked by law. An investor's informational disadvantage vis-à-vis a misappropriator with material, nonpublic information stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill.[127]

In the end, the insider trading example—much like the accounting and obstruction of justice examples—are simply not credible without significantly further development. As such, they perhaps further hinder Gopalan's treatment, rather than help it.

Conclusion

Having spent the bulk of this Essay highlighting my unease with Professor Gopalan's thesis, I end by agreeing wholeheartedly with him on a broader point. As he correctly points out, it is quite sad to observe the increasing reliance that lawmakers have had to place on the criminal law—as just one example of this phenomenon, "of the approximately 3000 crimes in the federal statute books, over 1200 were created since 1970."[128] Not to mention the concomitant cost to society—both financial and emotional—of the criminal justice system, notably, its prisons.[129] But I remain unconvinced that decriminalizing a category of white-collar offenses, or not imprisoning its offenders, is a solution to these deep social woes.

The problem is, unfortunately, much deeper. Consider one commentator's perceptive analysis of the Enron saga:

> The cultural problem revealed by Enron ultimately is not subject to correction by teaching lawyers more accounting, fine tuning rules governing the use of "gatekeepers" in corporate matters, or requiring and expecting more from independent directors, though all these measures would help in a small way. The problem is that corporate and legal culture has lost all sense of right and wrong. Norms of business behavior have evolved so that compliance with

126. 15 U.S.C. § 78(b) (2006).
127. *O'Hagan*, 521 U.S. at 658–59.
128. Gopalan, *supra* note 1, at 460.
129. *See, e.g.*, *id.* at 462 (The model proposed by the Article "would yield significant savings by reducing prison costs . . . .").

> the positive law is the sole standard of ethical conduct—a role for which the positive law is ill-suited.[130]

Similarly, the dean of one prominent business school argues convincingly that the business community needs to develop more managers who are better citizens:

> If we [business schools] want to attract applicants who aren't just future perp-walk stars, we must show them that we too have learned from the recent scandals. Rather than just giving students tools they can use to game the system, we must inspire them to become true professionals, with aspirations that go well beyond greed.[131]

How should society achieve these lofty objectives? To the extent they involve "the cultivation of the sentiment of moral disapproval,"[132] then Gopalan's thesis—which comes close to preaching a form of moral relativism—cuts precisely the wrong way.

In a better world, we should heed Amitai Etzioni's advice to place emphasis "on the formation of preferences side, via moral education, peer culture, community values, and the mobilization of appropriate public opinion . . . ."[133] But we are regrettably not there yet, and in the interim need to rely on the positive law—carrots, sticks, and all—as the expressive arbiter of right and wrong[134] and even facilitator of positive social norms.[135] As political scientist James Q. Wilson has observed, when it comes to public policy, we unfortunately do not inhabit a world of "Big Answers to Big Questions";[136] rather, we need

130. William H. Widen, *Enron at the Margin*, 58 BUS. L. 961, 962–63 (2003).

131. Richard L. Schmalensee, *The 'Thou Shalt' School of Business*, WALL ST. J., Dec. 30, 2003, at B4. What Robert Lane observed in 1953 remains unfortunately still true today:

> Since violation is a product, in part, of social pressure and community attitudes, government and business should jointly seek to build respect for law—even distasteful law enforced by a repugnant administration. Government cannot do this alone; business cannot do this without a record of fair dealing by the government. It is a task for both elements of society.

Robert E. Lane, *Why Business Men Violate the Law*, 44 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 151, 154 (1953).

132. Kadish, *supra* note 83, at 439.

133. AMITAI ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS 242 (1988).

134. *See, e.g.*, Robert Prentice, *Whither Securities Regulation? Some Behavioral Observations Regarding Proposals for Its Future*, 51 DUKE L.J. 1397, 1502–03 (2002) ("When Congress outlaws racial discrimination or insider trading, people's views of the acceptability and even morality of those actions change. One theory is that legislation changes what people believe about approval patterns in their society and because people value approval, their new beliefs affect their behavior.").

135. Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 400 (1997) (suggesting "two specific ways that statutes create and strengthen norms: (1) lawmaking publicizes a societal consensus, and (2) law provides the concrete norms that define compliance with internalized abstract norms").

136. JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 375 (1989).

to find ways "to allow imperfect people to use flawed procedures to cope with insoluble problems."[137] The use of the criminal law, including imprisonment, is regrettably one of these flawed procedures, though I fervently hope someday we will be able to do better.

137. *Id.*