REGRESSIVE WHITE-COLLAR CRIME

STEPHANIE HOLMES DIDWANIA*

ABSTRACT

Fraud is one of the most prosecuted crimes in the United States, yet scholarly and journalistic discourse about fraud and other financial crimes tends to focus on the absence of so-called "white-collar" prosecutions against wealthy executives. This Article complicates that familiar narrative. It contains the first nationwide account of how the United States actually prosecutes financial crime. It shows—contrary to dominant academic and public discourse—that the government prosecutes an enormous number of people for financial crimes and that these prosecutions disproportionately involve the least advantaged U.S. residents accused of low-level offenses. This empirical account directly contradicts the aspiration advanced by the FBI and Department of Justice that federal prosecution ought to be reserved for only the most egregious and sophisticated financial crimes. This Articles argues, in other words, that the term "white-collar crime" is a misnomer.

To build this empirical foundation, the Article uses comprehensive data of the roughly two million federal criminal cases prosecuted over the last three decades matched to county-level population data from the U.S. Census. It demonstrates the history, geography, and inequality that characterize federal financial crime cases, which include myriad crimes such as identity

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theft, mail and wire fraud, public benefits fraud, and tax fraud, to name just a few. It shows that financial crime defendants are disproportionately low-income and Black, and that this overrepresentation is not only a nationwide pattern, but also a pattern in nearly every federal district in the United States. What's more, the financial crimes prosecuted against these overrepresented defendants are on average the least serious. This Article ends by exploring how formal law and policy, structural incentives, and individual biases could easily create a prosecutorial regime for financial crime that reinforces inequality based on race, gender, and wealth.

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INTRODUCTION

Fraud is an old crime. It can be found in criminal codes around the world for as long as the historical record exists. The Code of Hammurabi, composed around 1750 B.C.E. in Ancient Babylon, included several provisions outlawing various forms of fraud with punishments including death.[1] As Alice Ristroph has noted, the second-lowest level of Hell in Dante's fourteenth-century *Inferno* is reserved for people who perpetrate fraud, treating them more harshly than those who engage in physical violence.[2] According to the United States Supreme Court, "fraud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude."[3]

Our state and federal criminal codes define myriad kinds of frauds, which comprise the majority of what we call "financial crimes" or "white-collar crimes." Every year, tens of thousands of U.S. residents are convicted of financial crimes, most of them frauds.[4] Yet, financial crime rarely surfaces in public discussion about how substantive criminal law fuels mass and unequal incarceration in the United States.

Instead, the terms "financial crime" and "white-collar crime" usually conjure up images of a rich banker on Wall Street or an elite executive in a powerful multinational corporation who is able to escape prosecution.[5] This imagery is fueled by an academic and popular discourse that tends to equate financial crime with the executive class and emphasizes the *absence* of

1. MARTHA T. ROTH, *Laws of Hammurabi*, *in* LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 82–84, 105, 130 ¶¶ 9, 11, 126, 265 (Piotr Michalowski ed., 1997).

2. Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 620–21 (2011) (quoting DANTE, THE INFERNO, CANTO XI, 23–29). On the other hand, fraud and financial crimes are capable of causing significant physical harm and, for that reason, some resist labeling white-collar crime as "non-violent." *See, e.g.*, MIRIAM SAXON, SUBCOMM. ON CRIME OF THE COMM. ON THE JUDICIARY, 95TH CONG., 2D. SESS., WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE 4 (Comm. Print 1978) ("[P]articularly in those many instances of economic crime in which hundreds or thousands of people are affected, the harm to society can frequently be described as violent.").

3. Jordan v. De George, 341 U.S. 223, 229 (1951).

4. *See infra* Section I.B.1.

5. *See* Samuel W. Buell, *"White Collar" Crimes*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 839 (Markus D. Dubber & Tatjana Hörnle eds., 2014) (noting public discussion of white-collar crime tracks a definition that includes bankers, "Wall Street," or "corporate America," as well as "professionals and other service providers and gatekeepers, such as lawyer and accountants, who are integral to the corporate world").

prosecutions against wealthy people. For example, in recent years, much journalistic coverage of financial crime has focused on explaining why so few people and no companies were convicted of a crime connected to the financial crisis of 2008.[6] Similarly, much academic scholarship about financial crime attempts to document and explain the causes and consequences of the U.S. Department of Justice's ("DOJ") routine policy of declining or deferring prosecution of financial crimes committed by or within large companies.[7] This Article argues that this popular conception of financial crime is inaccurate.

The popular imagery surrounding white-collar crime is also kindled by prosecutors themselves. For decades, the DOJ has repeatedly and publicly touted its focus on fraud prosecutions that hold corporate executives and corporations accountable as opposed to poor and middle-class people. Prosecuting business executives, according to Attorney General Merrick Garland, is "essential to Americans' trust in the rule of law."[8] That is because "the rule of law requires that there not be one rule for the powerful and another for the powerless; one rule for the rich and another for the poor."[9] Numerous attorneys general have made similar statements.[10] This

6. *See, e.g.*, MIRIAM BAER, MYTHS AND MISUNDERSTANDINGS IN WHITE-COLLAR CRIME 108 (2023) ("Commentators simply cannot fathom why federal prosecutors were unable to mount cases against the architects of the subprime crisis, a crisis that is commonly described as one big scam."); JESSE EISINGER, THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES (2017); Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2017), https://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail [https://perma.cc/QU8K-2UUX]; Michael Winston, *Why Have No CEOs Been Punished for the Financial Crisis?*, THE HILL (Dec. 8, 2016, 6:10 PM), https://thehill.com/blogs/pundits-blog/finance/309544-why-have-no-ceos-been-punished-for-the-financial-crisis [https://perma.cc/4SWK-HFGA]; William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES (July 21, 2016), https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-of-financial-crisis-prosecutions.html? [https://perma.cc/8DTA-JKK3]; William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368 [https://perma.cc/P3BD-7BYU].

7. *See, e.g.*, W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905 (2019); Nick Werle, Note, *Prosecuting Corporate Crime When Firms Are Too Big to Jail: Investigation, Deterrence, and Judicial Review*, 128 YALE L. J. 1366 (2019); Mihailis E. Diamantis, *Clockwork Corporations: A Character Theory of Corporate Punishment*, 103 IOWA L. REV. 507 (2018); BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014); Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191 (2016); Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323 (2017). *But see* Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L. J. 823, 824–25 (2014) (questioning the validity of the popular belief that the American criminal system favors corporate offenders).

8. Attorney General Merrick B. Garland, Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022) (transcript available at https://www.justice.gov/opa/speech/attorney-general-merrick-b-garland-delivers-remarks-aba-institute-white-collar-crime [https://perma.cc/V9MT-8FU3]).

9. *Id.*

10. For example, in 2002, Attorney General John Ashcroft compared corporate fraud with the September 11th attacks. While those attacks were an assault on freedom "from abroad," corporate fraud, according to Ashcroft, was an assault on freedom "from within." Attorney General John Ashcroft,

prosecutorial discourse risks creating the false impression that financial crime is primarily committed by the most wealthy and privileged Americans and, perhaps as a result, is leniently, if ever, punished. The reality, as this Article shows, is the opposite.

In short, this Article shows that our prevailing conception of financial crime is, at best, incomplete and, at worst, wrong. It argues that scholarly and public discourse around financial crime, which focuses on the absence of "white-collar" prosecutions (that is, prosecutions of members of the wealthy executive class), paints an inaccurate picture of how financial crime is prosecuted. The United States does, in fact, prosecute a huge number of people for financial crimes—thousands per year. But these defendants are for the most part not wealthy executives. Instead, financial crime prosecutions disproportionately involve people who are low-income and people who are Black. This Article suggests that financial crime is in this way unexceptional in an American criminal system that otherwise consistently reflects class- and race-based inequality.[11]

With data on the roughly two million federal criminal cases prosecuted since the early 1990s matched with county-level Census data, this Article is the first comprehensive study of all federal financial crime prosecutions.[12] This Article demonstrates that, like all federal criminal defendants, the people convicted of financial crimes have fewer resources than the average U.S. adult. Financial crime defendants have attained less formal education than average and frequently rely on appointed counsel. Federal judges waive the fines of roughly eighty-six percent of federal financial crime defendants due to the defendant's inability to pay. In other words, the median fine in a federal white-collar prosecution is $0.

Enforcing the Law, Restoring Trust, Defending Freedom, Remarks to the Corporate Fraud/Responsibility Conference (Sept. 27, 2002) (transcript of remarks as prepared at https://www.justice.gov/archive/ag/speeches/2002/092702agremarkscorporatefraudconference.htm [https://perma.cc/P5RZ-SBT2]). In a 2014 speech about corporate crime, Attorney General Eric Holder boasted that DOJ charged more white-collar defendants between 2009 and 2013 than during any previous five-year period going back to at least 1994. Attorney General Eric Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014) (transcript available at https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law [https://perma.cc/HA2A-QFBK]).

11. This Article thus suggests that the notion "carceral exceptionalism" in the context of white-collar crime is misguided. *See* Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 548-57 (2019) (identifying "carceral exceptionalism" as the phenomenon in which "scholars and advocates on the left" favor "the full force of the carceral state" for certain "exceptional" defendants).

12. As described in Section I.C, others explored similar questions in a series of studies produced in the 1980s through early 2000s known as the "Yale Studies." The Yale Studies focused on 210 white-collar defendants prosecuted in seven federal district courts. *See infra* notes 112–116 and accompanying text.

This Article also shows that financial crimes are not prosecuted at equal rates across the U.S. population. Women are prosecuted at higher rates for financial crimes than for other types of federal crimes.[13] The same is true in state courts, as Kaaryn Gustafson and others have pointed out.[14] Financial crime prosecutions are also unequal by race. Black women are especially likely to be prosecuted for financial crimes and are prosecuted at roughly three times the per capita rate as Hispanic and non-Hispanic White women.[15] The same is true for Black men, who are prosecuted at roughly three times the rate as Hispanic and non-Hispanic White men.[16]

This analysis is especially important for understanding racial inequalities among female defendants. Black women are more likely to be convicted of a financial crime than any other type of federal crime.[17] This has been true every year since 1994—as far back as reliable federal criminal case data goes.[18] The same is not true of any other race-gender group of defendants.[19]

This Article also shows it is not the case that the defendants most overrepresented in financial crime cases (that is, low-income defendants and Black defendants) commit the most severe or complex financial crimes. The opposite is true. I argue that these prosecutorial patterns could easily stem from a combination of formal law and policy, individual biases, and systemic incentives.

A muddled view of how financial crime is prosecuted has meaningful consequences. Maybe because financial crime (often stylized as "white-collar" crime) is viewed as a pursuit of the elite, there seems to be little appetite for leniency toward those convicted of financial crimes on either side of the political aisle. As Benjamin Levin and Kate Levine write,

13. *See infra* Appendix Table A.3 (noting that women make up roughly thirty percent of federal financial crime defendants and roughly fourteen percent of all federal criminal defendants).

14. *See* KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 7 (2011) (pointing out that prosecutions of fraud are "unusual" in that they are more frequently prosecuted against women than other types of crimes); *see also* BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 5 (2013), https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/C74Y-LETR] ("In 2009, the most frequently charged offenses among female felony defendants were fraud (37%), forgery (34%), and larceny/theft (31%).").

15. *See infra* Appendix Table A.3.

16. *Id.*

17. This observation is based on the author's analysis of the data. The data used in this paper is available for download at Stephanie Holmes Didwania, *Data for "Regressive White-Collar Crime*, NW. UNIV. (2024), https://doi.org/10.21985/n2-gav7-wt94 [hereinafter Didwania, *Data*].

18. *Id.*

19. *Id.* Like Black women, non-Hispanic White women and non-Hispanic women of another race are prosecuted for financial crimes more than any other type of crime. Unlike Black women, however, this has not been the case every year for women who are not Black.

"prosecuting some imagined class of bankers or executives remains very popular with many liberal, left, and progressive commentators."[20] Along these lines, President Biden's clemency efforts have almost exclusively—and in some cases explicitly—focused on people serving sentences for drug trafficking or possession.[21]

Not only has the Biden administration essentially excluded white-collar prisoners from its clemency efforts, but Attorney General Merrick Garland has also emphasized that cracking down on white-collar crime is one of DOJ's top priorities.[22] In a March 2022 speech describing this white-collar initiative, then-Assistant Attorney General for the Criminal Division Kenneth A. Polite, Jr. echoed the idea that white-collar crime is not punished harshly enough, telling the audience, "When we talk about drug dealing and violence, we all have no problem conjuring notions of accountability for the criminal actors. But the sheer mention of individual accountability in white-collar cases was, and is, received as a shockwave in our practice."[23] This Article cautions that directing more resources toward prosecuting white-collar crime could perpetuate class- and race-based inequalities rather than mitigate them.[24]

20. Benjamin Levin & Kate Levine, *Redistributing Justice*, COLUM. L. REV. 26 (forthcoming 2024). *See also* Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27, 51-52 (2020) ("Even those members of the public who tend to agree that the criminal justice system punishes too many persons with too much severity can be heard to complain when leniency is afforded to . . . white collar criminals.").

21. For example, in September 2021, the Biden administration invited federal prisoners to apply for clemency if they had been released home under the pandemic relief bill and had four years or less remaining on their sentences. The invitation was limited, however, to people who had been convicted of drug crimes. Sam Stein, *Biden Starts Clemency Process for Inmates Released due to Covid Conditions*, POLITICO (Sept. 13, 2021, 1:17 PM), https://www.politico.com/news/2021/09/13/biden-clemency-covid-inmates-511658 [https://perma.cc/N93A-GUEM]. In April 2022, Biden took his first formal clemency actions as President, granting three pardons and seventy-five commutations. Press Release, White House, Clemency Recipient List (Apr. 26, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/clemency-recipient-list [https://perma.cc/6RQG-NGMV]. Of the seventy-eight clemency recipients, all but one had been convicted of drug crimes. *Id.* In October 2022, Biden announced a pardon of all prior federal convictions of marijuana possession. Press Release, White House, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform [https://perma.cc/3X8W-U2UE].

22. Garland, *supra* note 8.

23. Assistant Attorney General Kenneth A. Polite, Jr., Justice Department Keynote at the ABA Institute on White Collar Crime (Mar. 3, 2022) (transcript of remarks as prepared for delivery at https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-justice-department-keynote-aba [https://perma.cc/L8UU-FFBB]).

24. This Article thus supports the argument advanced by Benjamin Levin and Kate Levine that those on the progressive left who hope the criminal system will work as a tool of progressive redistribution is unlikely to succeed. Levin & Levine, *supra* note 20, at 37–38 (forthcoming 2024) (arguing that "institutions of the punitive state are inherently regressive and are antithetical to the egalitarian vision articulated by many of the commentators who have embraced redistributive carceral projects")

The federal criminal system is a worthy site to study the regressive prosecution of white-collar crime even though most criminal defendants in the United States are prosecuted in state courts.[25] This Article focuses on the federal system for two reasons. First, the federal criminal system is important in its own right. The federal government incarcerates more people than any state and federal prisoners on average serve longer sentences than state prisoners.[26] Fraud—the most common financial crime—is itself the third-most prosecuted type of federal crime after drug trafficking and immigration offenses.[27] Indeed, even as federal prosecutions of other types of crimes have exploded, fraud alone has constituted around 10 percent or more of the federal felony docket since the early 1990s.[28]

Second, as described in Section I.B, federal officials repeatedly emphasize that it is their goal to prosecute the most egregious and complex financial crimes. Because state courts have concurrent jurisdiction over many financial crimes, DOJ and FBI can in theory focus their efforts on complex investigations. DOJ and FBI routinely tout their partnerships with other federal agencies to detect and prosecute sophisticated financial crimes. It seems unlikely that state prosecutors are doing better than the federal government at prosecuting complex financial crimes with fewer investigative resources. For this reason, prosecuting serious financial crime is often viewed as a federal project.[29]

Indeed, many observers rightly view the complexity of serious financial crimes as an impediment to prosecution. Criminal investigations can take years; relevant documents can number in the millions; trials can take

25. In 2020—the last year for which data was available—around 1.2 million people were under the legal jurisdiction of a state or federal correctional authority. Within this population, eighty-seven percent of the people were under state jurisdiction and thirteen percent were under federal jurisdiction. This calculation excludes people held in local jails. *See* E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2020 – STATISTICAL TABLES 7 (2021).

26. *Id.* at 7–8 (showing that the federal prisoner population was 152,156 in 2020 and the jurisdiction with the second-largest prisoner population (Texas) imprisoned 135,906 people in 2020). The median time served in state prison for prisoners released in 2018 was 1.3 years. DANIELLE KAEBLE, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., TIME SERVED IN STATE PRISON, 2018 1 (2021). By contrast, the median federal sentence in the 1994–2019 period was two years. Federal criminal defendants must serve at least eighty-five percent of their sentence, so even accounting for good time credit, the median time served for federal prisoners over this period was at least 1.7 years. 18 U.S.C. § 3624(b)(1) (providing that federal prisoners serving more than 1 year in prison can get credit towards their sentence of 54 days per year if they display "exemplary compliance with institutional disciplinary regulations").

27. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

28. *Id.*

29. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601–02 (2005).

months.[30] This Article's primary goal is not to determine whether the federal government has chosen the best balance in prosecuting the cases that it does, but rather to bring to light the fact that most financial crime cases are modest ones that disproportionately impact people with the fewest advantages.

This Article's analysis advances in four steps. Part I traces the history of financial crime and shows how, for centuries, rich and powerful people have escaped prosecution for financial crimes while people who are poor and middle-class have been prosecuted. Section I.B describes how federal financial crime cases are prosecuted today and provides examples of four such cases. Section I.C argues that most scholarly and public discourse around financial crime overlooks the types of financial criminal cases that are most routinely prosecuted in U.S. courts.

Part II presents the bulk of the empirical analysis. It shows persistent income, gender, and race gaps in financial crime prosecutions that disfavor defendants who are low-income, male, and Black. Part III offers many possible explanations for the results. It groups these explanations into four categories. First, Section III.A considers but rules out the possibility that people who are overrepresented commit the most serious financial crimes. Second, Section III.B describes how systemic and structural conditions create a system in which prosecutors are motivated to prosecute the cases they view as most winnable. Third, Section III.C describes ways that formal criminal law and policies could lead prosecutors to focus their efforts on simplistic, low-level financial crimes. As one example, it shows how federal laws governing restitution benefit defendants with more resources. Finally, Section III.D describes how biases on the part of actors in the criminal system could contribute to inequality.

Part IV concludes. It argues that the findings provide vital context for understanding how financial crime is prosecuted in the United States and challenges the popular notion that financial crime is under-prosecuted.

I. PROSECUTING FINANCIAL CRIME

This Part broadly traces the history of financial crime prosecution. As described in Section I.A, the United States has a long history of prosecuting poor and middle-class people for financial crimes. (Part II shows that this pattern continues through today, despite repeated statements to the contrary by modern prosecutors). Section I.B describes how the federal government

30. *See, e.g.*, Press Release, U.S. Dep't. of Just., Federal Jury Convicts Former Enron Chief Executives Ken Lay, Jeff Skilling on Fraud, Conspiracy, and Related Charges (May 25, 2006), https://www.justice.gov/archive/opa/pr/2006/May/06_crm_328.html [https://perma.cc/9UYY-Y7LE] (noting that the trial of Enron executives Kenneth Lay and Jeffrey Skilling took fifty-six days).

has prosecuted fraud since the 1990s and presents four archetypical examples of federal financial crime cases, to which I return throughout the Article. Section I.C explains how this Article contributes to the existing literature on federal financial crime, which largely avoids discussing the relatively low-level cases that pervade the federal criminal system.

A. EARLY PROSECUTIONS AND THE CONCEPT OF "WHITE-COLLAR" CRIME

Most financial crimes are frauds.[31] For centuries and up to present day, Anglo-American legal systems have tolerated frauds committed by the rich and powerful while systematically prosecuting poor and middle-class people for fraud offenses.[32] But wealthy people have always committed fraud and other financial crimes even if they went unpunished. For example, the term "robber barons" originated to describe medieval English nobles who engaged in extortion.[33] As historian Barbara Hanawalt describes, "kings and barons [of medieval England] both assumed that a certain amount of criminal activity was involved in being a noble and that it would be tolerated as long as it did not become excessive."[34] Although medieval English nobles engaged in "widespread extortion," they were rarely criminally prosecuted.[35]

In other words, society saw financial crimes committed by the elite as part of the social fabric. Fraud was thus considered what observers would come to call a "street crime," meaning it was viewed as a crime when committed by poor or middle-class people. For example, one of early America's most infamous fraudsters—Charles Ponzi—was a poor immigrant from Italy who worked as a dishwasher, waiter, and bank teller before launching the eponymous scheme that would eventually result in his arrest, conviction of federal mail fraud, and a seven-year prison sentence.[36] Despite

31. Other financial crimes include embezzlement, antitrust violations, and counterfeiting. *See infra* Sections I.B (explaining how the FBI categorizes white-collar crime), II.A (explaining how the U.S. Sentencing Commission categorizes white-collar crime), and II.B, Table 1 (showing that fraud makes up almost eighty percent of cases in the data).

32. *See, e.g.*, Emily Kadens, *The Persistent Limits of Fraud Prevention in Historical Perspective*, 118 NW. U. L. REV. 167, 173-79 (2023) (describing challenges in efforts during the Middle Ages to regulate fraud in consumer markets).

33. Barbara A. Hanawalt, *Fur-Collar Crime: The Pattern of Crime Among the Fourteenth-Century English Nobility*, 8 J. SOC. HIST. 1, 1 (1975). The title of Hanawalt's article refers to legislation by King Edward III of England that only permitted noble families to wear minever fur. *See id.* at 2.

34. *Id.* at 2; *see id.* at 3, 15 n.9 (reporting that 14 out of around 10,500 felony indictments in the fourteenth century involved members of the nobility).

35. *Id.* at 2–3 (noting that "the kings could use a number of informal and indirect means to control the illegal activities of their barons without bringing them into common criminal courts"); *see also* Kadens, *supra* note 32, at 168 ("Fraud is not, as it is sometimes assumed, a creature of modern capitalism, industrialization, the spread of complex financial systems, or the development of the corporation. On the contrary, many of the same types of frauds that we see today have existed throughout the history of organized society.").

36. Sewell Chan, *A Look Back at Charles Ponzi the Schemer*, N.Y. TIMES (Dec. 15, 2008, 12:53

eventually amassing enormous wealth through his pyramid scheme, Ponzi was never a member of the elite.[37]

Meanwhile, as centuries went on, the term "robber barons" adapted to refer to business magnates of the nineteenth century who monopolized industries, corrupted government, engaged in unethical business practices, and exploited workers and investors.[38] Like the medieval robber barons whose criminal activity was ignored by the King,[39] the robber barons of the 1800s were also rarely prosecuted.[40]

By the early twentieth century and spurred by the Great Depression, the public and federal government grew increasingly interested in regulating markets and prosecuting members of the upper classes. During this era, Congress passed antitrust laws and laws regulating Wall Street.[41] Following the stock market crash of 1929, Congress in 1934 created the Securities and Exchange Commission ("SEC") to restore confidence in the stock market and enforce securities laws.[42]

Scholars and the public needed an entirely new phrase—"white-collar crime"—to recognize that fraud committed by members of the elite *was* crime. Recognizing that members of the upper class engaged in enormous amounts of unpunished financial crime, sociologist Edwin Sutherland coined the term "white-collar crime" in his 1939 presidential address to the American Sociological Society.[43]

Sutherland defined a "white-collar crime" as "a crime committed by a person of respectability and high social status in the course of his

PM), https://archive.nytimes.com/cityroom.blogs.nytimes.com/2008/12/15/ponzi-the-schemer-evoked-once-again [https://perma.cc/L842-PRXA].

37. *Id.* (quoting Mitchell Zuckoff describing, "[Ponzi] had his nose pressed against the glass . . . . He was not linked with Wall Street and New York, though he had dreams of being like Rockefeller").

38. *See* Hal Bridges, *The Robber Baron Concept in American History*, 32 BUS. HIST. REV. 1, 1 (1958).

39. *See supra* note 33 and accompanying text.

40. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 290 (1993) ("[T]here was a certain lack of zeal for punishing business behavior [before the 1930s].") (cited in EISINGER, *supra* note 6 at 59).

41. Congress passed the Sherman Act in 1890, the Federal Trade Commission Act (creating the FTC) in 1914, and the Clayton Act in 1914. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/JZ6J-S5TT]. As the Federal Trade Commission describes, "[w]ith some revisions, these are the three core federal antitrust laws still in effect today." *Id.*

42. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (creating the U.S. Securities and Exchange Commission and requiring stock exchanges to register with the federal government).

43. Edwin H. Sutherland, *White-Collar Criminality*, 5 AM. SOCIO. REV. 1, 1–2, n.1 (1940) (Thirty-Fourth Annual Presidential Address delivered at Philadelphia, Pa., Dec. 27, 1939). Sutherland went on to write a book by a similar name. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949).

occupation."[44] Sutherland's basic thesis was that the academic methods by which crime was understood and measured at the time were invalid because "they have not included vast areas of criminal behavior of persons not in the lower class."[45]

Sutherland critiqued the academic criminological community for focusing too heavily on "street crimes" perpetrated by "low status" people and for being insufficiently interested in crimes committed by people in "high status" occupations. As an example, Sutherland explained, "The 'robber barons' of the last half of the nineteenth century were white-collar criminals, as practically everyone now agrees."[46] Sutherland warned, however,

> The present-day white-collar criminals . . . are more suave and deceptive than the "robber barons" . . . . Their criminality has been demonstrated again and again in the investigations of land offices, railways, insurance, munitions, banking, public utilities, stock exchanges, the oil industry, real estate, reorganization committees, receiverships, bankruptcies, and politics. Individual cases of such criminality are reported frequently, and in many periods more important crime news may be found on the financial pages of newspapers than on the front pages.[47]

Beginning in the mid-twentieth century, the federal government began to articulate and attempt to carry out a new vision of white-collar prosecution. In the 1970s the SEC created its first enforcement division to uncover fraud.[48] In 1977, Congress passed the Foreign Corrupt Practices Act which outlawed bribery of foreign officials principally by large U.S. companies.[49] In the 1980s, DOJ prosecuted over 1,000 cases associated with the savings and loan crisis, including some top executives at major banks.[50] During this time, as some observers noted, "Many U.S. Attorneys' Offices . . . restructured their offices in order to develop and prosecute a large number of cases of white-collar crime."[51] The next subsection

44. SUTHERLAND, WHITE COLLAR CRIME, *supra* note 43, at 7.

45. Sutherland, *White-Collar Criminality*, *supra* note 43, at 2.

46. *Id.*

47. *Id.*

48. Harwell Wells, *The Securities and Exchange Commission's Enforcement Division: A History*, TEMPLE 10-Q, https://www2.law.temple.edu/10q/the-securities-and-exchange-commissions-enforcement-division-a-history [https://perma.cc/C8HF-X9MS].

49. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

50. KITTY CALAVITA, HENRY N. PONTELL & ROBERT H. TILLMAN, BIG MONEY CRIME: FRAUD AND POLITICS IN THE SAVINGS AND LOAN CRISIS 28 (1997) ("By the spring of 1992, in excess of one thousand defendants had been formally charged in major savings and loan cases, with a conviction rate of 91 percent . . . .").

51. Kenneth Mann, Stanton Wheeler & Austin Sarat, *Sentencing the White-Collar Offender*, 17 AM. CRIM. L. REV. 479, 480 n.3 (1980); *see also* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 24 (2016) (noting that FBI

describes the mechanics of this modern era of federal enforcement of financial crime.

B. MODERN FRAUD PROSECUTIONS: 1990S THROUGH PRESENT

Efforts to differentiate financial crime committed by the elite from financial crime committed by poor or middle-class people were short-lived. Today, the term "white-collar" crime eludes easy definition.[52] Scholars, journalists, and public officials often use the term as in its original definition—to refer to financial crimes committed by wealthy people in the course of business activity,[53] as exemplified by Ralph Nader's pithy description of white-collar crime as "crime in the suites," rather than "crime in the streets."[54]

However, official definitions of the term "white-collar" crime typically do not refer to the social status or occupation of those who perpetrate it, but rather, to the type of criminal behavior committed by the defendant.[55] The FBI, for example, defines "white-collar crime" as "those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence."[56] The National Incident-Based Reporting System ("NIBRS"), which compiles data on crimes reported to law enforcement, classifies the following crimes as white-collar crimes: fraud, bribery, counterfeiting/forgery, embezzlement, and writing bad checks.[57]

This Article roughly follows the NIBRS definition but uses the term *financial crime* because, as this Article shows, the term *white-collar crime* is a misnomer. I define a crime as a *financial crime* if it is categorized as an

crime data during the 1960s and 1970s "emphasized street crime to the exclusion of organized and white-collar crime").

52. Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1, 2 (2004) (claiming that "the meaning of white collar crime . . . is deeply contested. . . . [but d]espite its fundamental awkwardness, the term 'white collar crime' is now so deeply embedded within our legal, moral, and social science vocabularies that it could hardly be abandoned").

53. *See infra* note 111 and accompanying text.

54. Ralph Nader, *White Collar Fraud; America's Crime Without Criminals*, N.Y TIMES, May 19, 1985 (§ 3), at 3, https://www.nytimes.com/1985/05/19/business/white-collar-fraud-america-s-crime-without-criminals.html [https://perma.cc/E7DE-SZQS].

55. The FBI explains that it would be impractical for the FBI to report white-collar crime statistics based on the offender's socioeconomic status because that data is not available in the Uniform Crime Reports. *See* CYNTHIA BARNETT, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 1 (2000) ("Although it is acceptable to use socioeconomic characteristics of the offender to define white-collar crime, it is impossible to measure white-collar crime with UCR data if the working definition revolves around the type of offender. There are no socioeconomic or occupational indicators of the offender in the data.").

56. *Id.*

57. *Id.* at 2.

antitrust violation, bribery, counterfeiting, forgery, fraud, or tax offense.[58] Since the mid-1990s, the federal government has prosecuted around 10,000 financial crimes per year, most of them frauds.[59] This section describes in broad terms how the federal government prosecutes and talks about financial crime.

1. The Statutory Landscape

Federal law today defines many types of financial crimes, most of which are contained in Chapter 47 of Title 18 of the United States Code. The most commonly prosecuted federal financial crimes are embezzlement of public money, mail and wire fraud, bank fraud, and tax fraud.[60] Congress has repeatedly expanded the scope of federal financial criminal law and, over the years 1994 to 2019, federal defendants were prosecuted for violations of many different types of fraud.[61]

Federal prosecutors use mail fraud (and its sister crime, wire fraud) particularly expansively. The original mail fraud statute prohibited the use of the mails to advance "any scheme or artifice to defraud."[62] The original purpose of the statute was to protect the U.S. Postal Service from being used to commit fraud. Mail was the "first communications network in the United States,"[63] and in 1870 the U.S. Postal Service enjoyed a natural monopoly over mail delivery.[64] Perhaps because the mail was so widely used, "[o]ver time, the mail fraud statute came to be viewed as a stop-gap provision that provides a 'first line of defense' to combat innovative frauds until Congress could enact more specific legislation."[65]

In 1995, Peter Henning contended that "the mail fraud statute has become the primary provision to extend federal jurisdiction to crimes

58. *See infra* Section II.A (describing how the data is constructed).

59. *See infra* Appendix Figure A.1. The statistics presented in the Article show the same patterns when the data is restricted to fraud cases. Until fiscal year 2018, the U.S. Sentencing Commission reported separately whether a defendant's offense of conviction was a fraud, larceny, or embezzlement. Beginning in 2018, however, the U.S. Sentencing Commission began combining these three types of crime into one category in the data. To make the data consistent throughout, I combined the three categories together under the label "financial crime" in the years prior to 2018.

60. *See infra* Appendix Table A.1.

61. *See id*.

62. Act of June 8, 1872, Pub. L. No. 42-335, § 301, 17 Stat. 283, 323 (revising, consolidating, and amending the statutes relating to the Post Office Department). Congress has expanded the mail fraud statute several times since its original passage. Mail fraud is now defined in 18 U.S.C. § 1341.

63. Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 STAN. L. REV. 553, 553 (2007).

64. *See id*. at 573.

65. Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 437 (1995).

traditionally prosecuted only at the state and local level."[66] Today nearly all frauds use mail, telephone, radio, or the Internet in some way, giving the federal government the ability to prosecute almost any fraud it chooses. Federal prosecutors exercise enormous discretion in deciding which fraud crimes to prosecute, and the resulting prosecutions therefore reflect decisions by prosecutors and law enforcement agents about which cases to prioritize.

Although there are many federal financial crimes, their defining characteristic is that they involve dishonesty. To this end, most financial crimes include mens rea elements that require the government to specifically prove the defendant's deceitful intent.[67] For example, the mail fraud statute requires proof that the defendant devised or intended a "scheme or artifice to defraud."[68] Health care fraud similarly requires proof that the defendant knowingly and willfully executed "a scheme or artifice . . . to defraud any health care benefit program" or to obtain, "by means of false or fraudulent pretenses, . . . any of the money or property owned by, or under the custody or control of, any health care benefit program."[69]

Despite this common element, the financial crimes that are prosecuted vary widely on many grounds. Victims of financial crimes can be individuals, organizations, or the government. Some financial crimes have a single concrete victim, others have many, and yet others have no concrete victim (like insider trading). Some financial crimes involve wrongdoing that is also investigated and enforced by the government through civil proceedings (such as securities fraud or tax fraud), while others have no regulatory counterpart (such as embezzlement). The next section broadly describes how federal prosecutors and agents investigate and bring financial crime cases.

2. Federal Prosecutions in Practice

Nearly all federal financial crime prosecutions are brought by prosecutors who work in the ninety-three U.S. Attorney's Offices ("USAOs"). Each USAO is associated with exactly one of the 94 geographically distinct federal district courts, with one exception.[70] Every USAO is led by a U.S. Attorney, who is appointed by the President. The prosecutors who work in USAOs are called Assistant United States

66. *Id.*

67. Some observers point out that financial crime's traditionally high mental state requirements have, to some extent, been eroded with theories of, for example, willful blindness or reckless regard for falsity. BAER, *supra* note 6, at 30-31 (2023).

68. 18 U.S.C. § 1341.

69. *Id.* § 1347 (a)(1)–(2).

70. The District of Guam and the District of the Northern Mariana Islands share a USAO.

Attorneys ("AUSAs").

Although USAOs must follow centralized policies dictated by DOJ leadership, they for the most part work independently, prosecuting crimes that occur within their jurisdictions. Most prosecutorial decisions (such as the decision to bring criminal charges) are subject to little judicial oversight and courts are "hesitant to examine the decision whether to prosecute."[71] As a result, prosecutors enjoy broad discretion in deciding how to carry out their work.[72]

Despite limited oversight from the courts, individual prosecutors are subject to other forms of workplace oversight. AUSAs are governed by the Justice Manual, which contains detailed rules for how individual prosecutors should exercise their discretion. For example, the Manual dictates that charging decisions should be reviewed by supervisors and specifies that "[a]ll but the most routine indictments should be accompanied by a prosecution memorandum that identifies the charging options supported by the evidence and the law and explains the charging decision[s] therein."[73]

The Manual also expresses a nationwide policy that federal prosecutors should usually charge "the most serious offense that is encompassed by the defendant's conduct and that is likely to result in a sustainable conviction."[74] However, the Manual leaves room for an AUSA to deviate from this policy by also considering "whether the consequences of those charges for sentencing would yield a result that is proportional to the seriousness of the defendant's conduct, and whether the charge achieves [the] purposes of the criminal law."[75]

Given these policies, how do prosecutors decide which cases to charge? The answer is complicated and varied, but much legal and sociolegal scholarship has shown the perhaps unremarkable phenomenon that

71. Wayte v. United States, 470 U.S. 598, 608 (1985).

72. *See* Stephanos Bibas, *Prosecutorial Regulations Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 959 (2009) ("Few regulations bind or even guide prosecutorial discretion, and fewer still work well."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (describing prosecutors as "the criminal justice system's real lawmakers"). In theory, a defendant can challenge their prosecution on the ground that it was brought selectively—that is, based on a prohibited consideration such as the defendant's race or religion. *See* Oyler v. Boles, 368 U.S. 448, 456 (1962). In practice, however, selective prosecution challenges virtually never succeed. *See* Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of* Armstrong, 73 CHI.-KENT L. REV. 605, 615–16 (1998) (noting that since 1886 there has been only one published case dismissing a criminal charge based on racially selective prosecution). *But see* Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 987 (2021) (describing how federal courts can and should lower the discovery standards for defendants alleging racial discrimination by the police).

73. U.S. Dep't of Just., Just. Manual § 9-27.300 (2023).

74. *Id.*

75. *Id.*

prosecutors seem to like to bring cases they think they can win.[76] This is because obtaining convictions is often a metric for promotion and advancement.[77] Winning cases is also important for appropriations. As Lauren Ouziel describes,

> U.S. Attorney's Offices, after all, need money, and federal funds are not forthcoming—either from Congress in the first instance or Main Justice in the subsequent allocation—without some measure of demonstrated performance. For federal prosecutors, the relevant performance metrics are defendants charged and convicted. Both of these metrics determine the lump sum congressional appropriation for all ninety-three U.S. Attorneys' Offices across the country, while individual offices' caseloads largely determine the allocation of those funds among the offices. In short, case volume and prosecutorial success dictate a U.S. Attorney's Office's budget allocation.[78]

After a person is convicted of a federal crime, federal judges sentence them. At sentencing, a judge can impose fines or imprisonment or both on a defendant, and some scholars have pointed out that fines are imposed more frequently in financial crime prosecutions than in other federal prosecutions.[79] Some have theorized that fines are more appropriate for defendants convicted of financial crimes because their crimes are more deterrable.[80] Researchers have also argued that the prevalence of fines in

76. *See* Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. & LEE U. L. REV. 627, 632 (2021) ("The adversary system derails many prosecutors, including progressive prosecutors, and turns them into win-seekers instead of neutral agents of justice."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 883 (2009) (suggesting that prosecutors "may feel the need to be able to point to a record of convictions and long sentences if they want to be promoted or to land high-powered jobs outside the government" and prefer to "keep up [their] conviction rate"); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 867 (1995) ("A prosecutor will naturally select the stronger cases to charge."). *But see* Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV 379, 379 (2005) (finding that "conviction rates do not appear to affect the careers of U.S. attorneys").

77. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) ("[P]rosecutors want to ensure convictions . . . . Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.").

78. Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077, 1108–09 (2017) (citing U.S. Dep't of Justice, U.S. Attorneys, FY 2014 Performance Budget Congressional Submission 1, 15; Dep't of Justice, Office of Inspector Gen., Audit Div., Audit Report 09-03, Resource Management of United States Attorneys' Offices 7–10 (Nov. 2008)).

79. Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 768 (2006).

80. *See, e.g.*, Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 724 (2005) ("An economist would argue that if one increased the expected cost of white-collar crime by raising the expected penalty, white-collar crime would be unprofitable and would thus cease."). Others, including Richard Posner, have argued that fines should be more widely used for the entire spectrum of crimes given the high costs of physical incarceration. *See* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 409–10 (1980) (arguing in

financial crime sentencing reflects a fine/incarceration tradeoff, in which the greater a defendant's ability to pay a fine, the less (if any) imprisonment is imposed at sentencing.[81]

The literature on white-collar crime's fine/incarceration tradeoff might give the impression that fines are widespread in financial crime prosecutions, but this is not the case. Most federal financial crime defendants do not have any fines imposed in their cases. In the data, the median fine amount for a defendant convicted of a federal financial crime is $0.[82] A fine of just $500 represents the top thirteen percent of fines imposed among people convicted of financial crimes.[83] It is true that fines are more prevalent among financial crime defendants than others (a fine of $500 for a federal defendant convicted of a non-financial crime would represent the top nine percent of all fines imposed),[84] but it is not the case that fines are widespread among those who are convicted of financial crimes. Instead, fines are much more relevant in cases involving corporate defendants. This is because corporations cannot be imprisoned, fines generate revenue, and prosecutors worry about the collateral consequences that criminal conviction can impose on large corporations.[85]

In addition to fines and imprisonment, convicted defendants will usually be ordered to pay restitution to any concrete victim. Restitution is different from a fine. A fine is a form of punishment imposed on a defendant and usually paid to the government prosecuting the case. Restitution is instead paid by the defendant to either the victim or a government restitution fund. Like the law in all states, federal law requires courts to order restitution in any case "in which an identifiable victim or victims has suffered a physical

favor of "the substitution, whenever possible, of the fine (or civil penalty) for the prison sentence as the punishment for crime"). *But see* Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 285 (2021) (arguing that "enforcers are unlikely to achieve optimal deterrence using fines alone"); Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions [https://perma.cc/5BRX-UBAD] (arguing that fines are inadequate to change corporate behavior and that the threat of imprisonment against executives would be a more effective deterrent).

81. *See* Joel Waldfogel, *Are Fines and Prison Terms Used Efficiently? Evidence on Federal Fraud Offenders*, 39 J.L. & ECON. 107, 107 (1995).

82. *See infra* Table 1.

83. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

84. *Id.*

85. For example, Mary Jo White, former U.S. Attorney for the Southern District of New York (and future SEC Chair) said in an interview, "[a]ny prosecutor hesitates before bringing an action against a company because of the fear that that company will go out of business." *Interview with Mary Jo White, Debevoise, New York, New York*, 19 CORP. CRIME REP. (Dec. 12, 2005), https://www.corporatecrimereporter.com/news/200/category/sampleinterviews [https://perma.cc/MLL3-UCCM].

injury or pecuniary loss."[86]

Unlike fines, most defendants convicted of a financial crime *are* ordered to pay some restitution. The median restitution amount ordered is around $6,000.[87] In contrast, for federal defendants convicted of non-financial crimes, fewer than ten percent are ordered to pay any restitution.[88]

The majority of defendants convicted of federal financial crimes are sentenced to prison. Sentences for financial crime defendants are lower than the average among other types of federal crimes. For federal criminal defendants convicted of financial crimes, the average sentence is around sixteen months.[89] For all other federal criminal defendants, the average sentence is fifty-three months.[90] This could reflect the fact that most financial crimes do not carry mandatory minimum penalty provisions.[91]

3. Federal Financial Crime Archetypes

This subsection illustrates some of the kinds of financial crime cases the federal government prosecutes. It centers around four real-world examples of federal financial crimes, from least to most severe.[92] These cases exemplify nationwide patterns that this Article reports and explores in Part II, and this Article returns to these examples throughout.

In Case A, a man who is a citizen of Mexico used a social security number belonging to another person to secure employment and attend a job orientation training with a local company.[93] The man was prosecuted in the Eastern District of Louisiana and was ultimately convicted of violating 18 U.S.C. § 408(a)(7)(b), which makes it a crime to fraudulently use another

86. 18 U.S.C. § 3663A(c)(1)(B).

87. *See infra* Table 1.

88. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

89. *See infra* Table 1.

90. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

91. The only type of financial crime that carries a mandatory minimum is identity theft. Aggravated identity theft includes a two-year mandatory minimum penalty. 18 U.S.C. § 1028A; *see also* AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FED. CRIM. JUST. SYS. § 3 (U.S. SENT'G COMM'N 2017) (listing federal crimes that carry mandatory minimum penalties).

92. As Miriam Baer has pointed out, most federal fraud offenses are not statutorily graded the way other types of crimes are. *See* Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225, 228 (2018). Instead, a federal fraud's severity is largely driven by the dollar amount of loss, as dictated by § 2B1.1 of the United States Sentencing Guidelines. *See id.* at 250 ("Because the federal criminal code declines to differentiate fraud up front—either by amount, *mens rea*, or degree of risk—whatever sorting there is of fraud offenses takes place at sentencing.").

93. Press Release, U.S. Attorney's Office for the Eastern District of Louisiana, Mexican National Sentenced for Illegally Using a Social Security Number Belonging to Another Person (Oct. 12, 2022), https://www.justice.gov/usao-edla/pr/mexican-national-sentenced-illegally-using-social-security-number-belonging-another [https://perma.cc/4DMK-8C7S].

person's social security number. The man was sentenced to one year of probation.

In Case B, a man received Social Security and Department of Defense benefits intended for his late father for four years after his father's death.[94] The man's elderly father had moved in with the man in 2012.[95] The man cared for his father for next four years, until his father's death at age 92 in 2016.[96] When the man began caring for his father in 2012, they joined bank accounts, into which his father's benefits were deposited.[97] After his father's death, a death certificate was properly filed, but his late father's benefit payments continued to be deposited into their joint bank account.[98] Over the four years that followed his father's death, the man collected $42,103 in Social Security benefits and $41,609 in Department of Defense benefits to which he was not entitled.[99]

Case B was prosecuted in the U.S. District Court for the Southern District of Ohio. The man pled guilty to theft of public money. He was sentenced to eight months in prison and ordered to pay $83,712 in restitution to the Social Security Administration ("SSA") and Department of Defense.[100]

Case B was part of a federal initiative called the Social Security Administration Fraud Prosecution Project.[101] The SSA Fraud Prosecution Project is a collaboration of the SSA Office of the Inspector General ("SSA OIG") and DOJ.[102] The investigation of Case B also involved employees of the Department of Defense Office of Inspector General, the Veteran's Administration Office of Inspector General, the United States Office of Personnel Management Office of Inspector General, and the United States Secret Service.[103] It appears that many federal agencies and employees devoted significant resources to bringing Case B and others like it.

94. Press Release, U.S. Attorney's Office for the Southern District of Ohio, Fifteenth Person Charged with Theft in Ongoing Social Security Benefits Fraud Investigation (Aug. 10, 2020), https://oig.ssa.gov/news-releases/2020-08-10-audits-and-investigations-investigations-aug4-oh-fifteenth-person-charged-social-security-fraud [https://perma.cc/5CFK-7JWP].

95. Sentencing Memorandum of Defendant Napoleon Crawford at 2, United States v. Crawford, No. 1:20CR029 (S.D. Ohio Aug. 6, 2021).

96. *Id.*

97. *Id.*

98. *Id.*

99. Press Release, *supra* note 94.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

In all, the SSA OIG reports that as a result of its audit program, it discovered dozens of instances of people collecting social security or veteran benefits intended for another person in Ohio, a state that has an adult population of more than eight million.[104] The SSA OIG investigation has led the USAO for the Southern District of Ohio to prosecute at least fifteen people in cases like Case B. The losses to SSA associated with these cases average just under $60,000 per defendant.[105]

In Case C, a married couple owned and operated a company called Kingdom Connected Investments ("KCI"), which they advertised as a Christian organization.[106] KCI sought to pair clients who fell into two categories: (1) homeowners who owed more on their homes than the home was worth (that is, they were "underwater" on the home); and (2) potential homebuyers who did not have a high enough credit score to qualify for a conventional mortgage. KCI operated by matching homeowners (sellers) and buyers. KCI told the sellers they would transfer title of the home to KCI and take over the home's mortgage payments, allowing the homeowners to get out of their underwater mortgage. KCI collected down payments from the buyers, telling them they were renting-to-own the home.

None of this was true. In reality, KCI never actually purchased the sellers' homes, which meant each property still had an existing mortgage in the seller's name(s) after the sellers thought they no longer owned the home. Rather than using the buyers' down payments to pay the mortgages in full as promised, KCI used much of these down payments for personal use and to try to build their real estate business. Eventually, with the mortgages unpaid, nearly all the homes went into foreclosure and sold at auction. Many sellers learned that KCI had not actually purchased their home when they received foreclosure notices. Many of KCI's buyers, who thought they were renting-to-own their homes, learned the truth when the home's new owners sought to evict them. In all, KCI received $2.7 million from the buyers but only made $1.4 million in mortgage payments. Approximately 130 properties were involved in the scam, suggesting the average buyer lost around $20,000. Most sellers had their credit scores ruined by the foreclosures.

104. *Id. See also* GUSTAFSON, *supra* note 14, at 57 (finding that in California, the state conducts biometric imaging (that is, fingerprinting) of all welfare applicants as a way to detect fraud and discovers around three people per month who have submitted a duplicate application).

105. *Id.*

106. Press Release, U.S. Attorney's Office for the District of South Carolina, Married Greenville Business Owners Sentenced to More than Seventeen Total Years, Ordered to Pay More than $2.5 Million in Restitution for Defrauding Home Buyers and Sellers (Oct. 5, 2020), https://www.justice.gov/usao-sc/pr/married-greenville-business-owners-sentenced-more-seventeen-total-years-ordered-pay-more [https://perma.cc/SAN6-ZCTE].

Case C was prosecuted in the U.S. District Court for the District of South Carolina. A federal jury found the defendants guilty of conspiracy to commit mail fraud and equity skimming after just ninety minutes of deliberation. The husband and wife were sentenced to seventy-eight and 136 months in prison, respectively, and ordered to pay $2,664,796.69 in restitution.

Case D will be familiar to many readers. JPMorgan Chase, a major U.S. bank, knowingly packaged shoddy mortgages into securities that did not meet its credit standards. JPMorgan Chase sold these securities to investors. A JPMorgan Chase manager (and attorney), Alayne Fleischmann, described JPMorgan Chase's mortgage securities business as a "massive criminal securities fraud."[107] Before the 2008 crash, Fleischmann wrote a thirteen-page memo to her supervisor warning that the bank was improperly packaging bad mortgages into securities and selling them as investments. Fleischmann was fired and bankers at JPMorgan Chase continued in their scheme. Fleischmann eventually became a whistle-blower and provided detailed evidence about JPMorgan Chase's wrongdoing to the SEC and federal prosecutors.

Unlike the defendants in Cases A, B, and C, the federal government never prosecuted either JPMorgan Chase the organization or any of its employees for their fraud. Chase instead agreed to a $13 billion settlement with federal and state agencies for wrongdoing during the crisis. As a publicly traded company, Chase paid the settlement with shareholders' money and the settlement agreement did not name any bankers. A few weeks later, Chase's CEO, Jamie Dimon, received a seventy-four percent raise, bringing his salary to $20 million per year.

C. HOW WE TALK ABOUT FINANCIAL CRIME

Academic and journalistic writing about white collar crime tends to focus on cases like D.[108] It examines and seeks to understand the causes and consequences of a criminal system that is unwilling or unable to convict large firms and the people who lead them, even when those firms and people create staggering social harm and there is evidence that their conduct violates the criminal law. Much work in this area documents the DOJ's increased use of deferred and non-prosecution agreements for companies engaged in corporate crime.[109] Other work asks similar questions about individuals who

107. Matt Taibbi, *The $9 Billion Witness: Meet JPMorgan Chase's Worst Nightmare*, ROLLING STONE (Nov. 6, 2014), https://www.rollingstone.com/politics/politics-news/the-9-billion-witness-meet-jpmorgan-chases-worst-nightmare-242414 [https://perma.cc/SWB2-6ARH?type=standard].

108. *See supra* text accompanying note 7.

109. *See, e.g.*, Arlen & Kahan, *supra* note 7; Veronica Root Martinez, *The Government's*

hold positions of leadership in corporate organizations that commit crimes.[110]

In contrast to much of the literature, this Article focuses instead on cases like A, B, and C, which represent the bread and butter of most federal financial criminal enforcement in the United States. Many scholarly examinations of federal white-collar crime characterize these cases as not white-collar crime. For example, Samuel Buell explains in his 2014 study of white-collar sentencing:

> Many white collar offenses, maybe even most of them, are committed by pedestrian hucksters, scam artists, cheaters, and liars. Such persons have been among us for ages. This Article makes few claims about the treatment of this class of offenders—the home buyer who lies to obtain a mortgage, the taxpayer who cheats the Internal Revenue Service (IRS), the restaurant manager who bribes the health inspector, and their ilk. The discussion here responds to a public debate that does not often mention the small-time crook.[111]

Prioritization of Information Over Sanction: Implications for Compliance, 83 L. & CONTEMP. PROBS. 85, 85–87 (2020).

110. In this vein, some recent scholarship about white-collar crime committed by individuals has focused on a 2015 Memo from Deputy Attorney General Sally Quillian Yates (the "Yates Memo") that outlines steps that federal prosecutors should take to "strengthen [the] pursuit of individual corporate wrongdoing." Memorandum from Deputy Att'y Gen. Sally Quillian Yates to Assistant Att'ys Gen. & All U.S. Att'ys., Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) (on file with DOJ). For example, some have pointed out that even after the Yates Memo was promulgated, DOJ continued to enter deferred prosecution agreements with corporations without charging individuals. *See, e.g.*, Paola C. Henry, *Individual Accountability for Corporate Crimes After the Yates Memo: Deferred Prosecution Agreements & Criminal Justice Reform*, 6 AM. U. BUS. L. REV. 153, 160–161 (2016) (describing the post-Yates Memo case in which General Motors employees intentionally failed to disclose a safety defect in their ignition switches, which led to at least 124 deaths, but federal prosecutors entered a deferred prosecution agreement with GM without charging any individuals).

111. Buell, *supra* note 7, at 830–31 (2014); *see also* Mihailis E. Diamantis, *White-Collar Showdown*, 102 IOWA L. REV. 320, 320 (2017) ("Not many people would rank white-collar criminals among the downtrodden of the criminal justice system."); Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1315 (2001) ("Painting with an overbroad brush, street offenders are outside the mainstream norms of society. More committed to subcultures or simply irrational, violent, or greedy, their crimes are clearly intentional. White-collar offenders, on the other hand, except for those white-collar crimes that plainly mimic street crimes—for example, embezzling from an employer is stealing and credit card or insurance fraud are just other forms of theft—are more reasonable, mainstream people."). *But see* Pedro Gerson, *Less is More?: Accountability for White-Collar Offenses Through an Abolitionist Framework*, 2 STET. BUS. L. REV. 144, (noting that "[a]n important caveat to note at the outset is that [the author's] definition of white-collar crime is significantly narrower than the one used by law enforcement, which focuses on the type of offenses and centers on crimes of 'deceit, concealment or violation of trust' without the use of force"); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1483-84 (2021) (noting that the sorts of incidents reported in a 2000 FBI report tended to be low-level property crimes and frauds rather than "the dominant cultural (and legal) imagination of 'white-collar crime' "); Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 53 (2013) ("[C]rimes involving fraud, deceit, theft, embezzlement, insider trading, and other forms of deception . . . include[] a great many offenders and offenses of the middling sort."); *Posner*, *supra* note 80, at 409–10 (using the term *white-collar crime* "to refer to the nonviolent crimes typically committed

This Article argues that when—as Buell notes—the public debate about white-collar crime excludes financial crimes committed by people who are not wealthy executives, the exclusion is not merely semantic. Using the term "white-collar crime" to only include prosecutions of elite people shields from public view the vast majority of prosecutions that happen under our financial criminal laws.

We have not always talked about financial crime this way. This Article provides updated and more comprehensive answers to some of the questions asked in a series of studies produced in the 1980s through early 2000s by Stanton Wheeler and others called the Yale Studies on White-Collar Crime ("Yale Studies"). In the final of four studies in this series, the authors analyzed the personal characteristics of those whom the authors characterized as federal white-collar defendants. Using a sample of roughly 210 white-collar defendants randomly sampled from seven federal district courts, the authors found that their sample of white-collar defendants "departs from common images of the typical white collar offender in that they are very similar to average or middle class Americans."[112] The authors also noted that their study found white-collar crimes to "have a much more mundane quality than those which are associated with white collar crime in the popular press," noting that "the bulk of white collar crimes prosecuted in the federal courts are undramatic and maybe committed by people of relatively modest social status."[113]

The Yale study's findings are similar but less extreme than the updated and more fulsome patterns this Article documents in Part II. This Article, for example, suggests that the average financial crime defendant is likely to have lower income than the average U.S. adult, whereas the authors of the Yale study find that "most white-collar offenders were from the middle class, that is, they were significantly above the poverty line, but they were not from the upper echelons of wealth and social status."[114] Part II also shows that Black people are disproportionately prosecuted for white-collar crimes, which the

by either (1) well-to-do individuals or (2) associations, such as business corporations and labor unions, which are generally 'well-to-do' compared to the common criminal").

112. DAVID WEISBURD, ELIN WARING & ELLEN CHAYET, U.S. DEP'T OF JUST., WHITE COLLAR CRIME AND CRIMINAL CAREERS 2 (1993) (citing DAVID WEISBURD, STANTON WHEELER, ELIN WARING & NANCY BODE, CRIMES OF THE MIDDLE CLASSES: WHITE COLLAR OFFENDERS IN THE FEDERAL COURTS (1991)). The seven districts studied were: the Central District of California, the Northern District of Georgia, the Northern District of Illinois, the District of Maryland, the Southern District of New York, the Northern District of Texas, and the Western District of Washington. *Id.*

113. *Id.* at 11.

114. David Weisburd, Stanton Wheeler, Elin Waring & Nancy Bode, *Crimes of the Middle Classes: White Collar Offenders in the Federal Courts*, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS (1991), https://ojp.gov/ncjrs/virtual-library/abstracts/crimes-middle-classes-white-collar-offenders-federal-courts [https://perma.cc/VP9D-W3H4].

Yale study did not find.

A likely reason the nationwide findings presented in this Article suggest the federal financial criminal defendant population is even less advantaged than as suggested by the Yale study is that the Yale authors' sample was not representative of all federal financial crime prosecutions. The authors explain that they chose seven districts "in part because some of them were known to have a significant amount of white-collar prosecution,"[115] and all of the chosen districts contain major U.S. cities. By focusing on districts with active and sophisticated white-collar dockets in large U.S. cities, the Yale study likely overrepresents the income of all federal financial crime defendants. It also uses a sample of federal financial crime defendants whose racial makeup (seventy-eight percent White) is different from what this Article observes in its nationwide analysis (forty-nine percent White).[116]

This Article also relates to Max Schanzenbach and Michael Yaeger's 2006 examination of racial disparities in federal white-collar cases.[117] Using regression analysis, Schanzenbach and Yaeger find that after controlling for many relevant defendant and case characteristics, Black and Hispanic defendants convicted of white-collar crimes receive longer prison sentences than do White defendants.[118] They also find that a significant portion of this inequality can be explained by defendants' ability to pay a fine, lending support to the idea that there is a fine/incarceration tradeoff in white-collar cases.[119]

This Article fundamentally differs from Schanzenbach and Yaeger's work because this Article is a descriptive analysis. Many studies—like Schanzenbach and Yaeger's—estimate whether defendants within a criminal system appear to be treated differently for reasons they should not be (such as their race,[120] skin color,[121] gender,[122] or wealth[123]). In contrast, this Article

115. WEISBURD ET AL., *supra* note 112, at 16.

116. Another possible explanation for this difference is that over time the federal government might have increasingly prosecuted low-income people for financial crimes. The Yale study considered defendants sentenced between 1976 and 1978; this Article considers defendants prosecuted in 1994 through 2019, so perhaps the federal government's enforcement behavior changed in the sixteen years between our studies.

117. *See* Schanzenbach &Yaeger, *supra* note 79, at 758.

118. *Id.* at 790.

119. *See id.* at 792.

120. *See, e.g.*, Crystal S. Yang, *Free At Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75, 75 (2015).

121. *See, e.g.*, Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395, 395 (2015).

122. *See, e.g.*, Sonja B. Starr, *Estimating Gender Disparities in Federal Criminal Cases*, 17 AM. L. & ECON. REV. 127, 127 (2015).

123. *See, e.g.*, CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 45 (2019).

does not seek to advance a causal claim about the sources of inequality. To that end, this Article does not compare the outcomes of federal financial crime defendants to each other; it compares the population of federal financial crime defendants to the underlying U.S. adult population. It then examines whether, where, and for how long these inequalities in *who* is prosecuted have existed. The next Part presents this empirical analysis.

II. INEQUALITY IN FEDERAL FINANCIAL CRIME PROSECUTIONS

Between 1994 and 2019, 1.7 million defendants were convicted of federal crimes and sentenced under the U.S. Sentencing Guidelines.[124] Around 15% of these defendants were convicted of financial crimes, making financial crime the third-most prosecuted type of federal crime over this period, following drug crime (35% of cases) and immigration crime (25% of cases).[125] Most defendants convicted of financial crimes were convicted of some type of fraud, and even counted alone, fraud is the third-most prosecuted type of federal offense.[126]

This Part presents the first nationwide empirical analysis of federal financial crime cases. Section II.A explains how I constructed the data set. Section II.B presents summary information about federal financial crime cases. Sections II.C through II.E use sentencing data matched to county-level population data to examine inequality in *who* is prosecuted for federal financial crimes. Section II.C shows that people who are Black and low-income are overrepresented in financial crime prosecutions relative to the U.S. adult population, while people who are White and middle- to high-income are underrepresented. Section II.D shows that income and race gaps in the prosecution of financial crime have narrowed over the last few decades but remain significant. Section II.E documents differences in these inequality patterns across federal districts. It shows that USAOs in the Deep South prosecute female defendants at the highest rates. Because states in the Deep South have among the largest Black populations in the U.S., their more intensive prosecution of women for financial crimes drives the overrepresentation of Black women among financial crime defendants. Section II.E also shows that Black defendants are overrepresented in financial crime cases in nearly all federal districts, which demonstrates that the nationwide inequality patterns are not solely a function of different

124. This count does not reflect defendants who were convicted of offenses carrying a statutory maximum term of incarceration of six months or less (that is, petty misdemeanor cases), *see* U.S. SENT'G GUIDELINES MANUAL § 1B1.9 (U.S. SENT'G COMM'N 2021), which are typically handled by federal magistrate judges. 28 U.S.C. § 636(a)(4). *Infra* Part II.

125. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

126. *Id.*

prosecutorial priorities between districts.

A. DATA

The descriptive analysis that follows presents two types of facts about federal financial crime prosecutions. First, it describes the *scale* of federal prosecution of financial crime. It answers questions like: How many people does the federal government prosecute for financial crimes per year? How does this number compare to prosecutions for other types of federal crimes? How has this number changed over time? Second, the analysis describes *representation* in federal prosecutions of financial crime. It answers questions like: Are low- or high-income people over- or underrepresented among federal defendants charged with financial crimes? Which, if any, racial or gender groups are over- or underrepresented? Does over- or under-representation vary over time? Does it vary between USAOs?

Answering these descriptive questions requires two types of data: data on federal criminal cases and data on the U.S. adult population. The dataset used in this Article includes quantitative data of the roughly 1.7 million federal defendants sentenced under the U.S. Sentencing Guidelines in fiscal years 1994 through 2019, matched at the district and year level to population data from the U.S. Census. I built the federal criminal case dataset by combining annual data files published by the U.S. Sentencing Commission ("Commission").[127]

The Commission data files include thousands of variables that describe federal criminal defendants and their cases. Critically for this project, the Commission data include a defendant's self-reported race and Hispanic ethnicity, gender,[128] level of formal education, age, and the nature of the defendant's prior criminal record. The Commission data also include

127. The Commission data files are available for download from the U.S. Sentencing Commission website (fiscal years 2002–2021) and through the Inter-university Consortium for Political and Social Research (fiscal years 1987–2019). *See Monitoring of Federal Criminal Sentences Series*, INTER-UNIVERSITY CONSORTIUM FOR POL. AND SOC. RSCH., https://www.icpsr.umich.edu/web/ICPSR/series/83 [https://perma.cc/8DN8-3EFT]; *Commission Datafiles*, U.S. SENT'G COMM'N, https://www.ussc.gov/research/datafiles/commission-datafiles [https://perma.cc/U2U7-NLYA]. To compute inequality statistics, I dropped from the dataset defendants whose race, Hispanic ethnicity, or gender information are reported as missing (roughly four percent of defendants).

128. The Commission data uses a binary variable for gender (Male/Female), which the Codebook simply said "indicates the offender's gender." U.S. SENT'G COMM'N, VARIABLE CODEBOOK FOR INDIVIDUAL OFFENDERS 31 (2013). For at least some of the 1994–2019 period, the Federal Bureau of Prisons' Transgender Offender Manual indicated that an inmate's gender identity, rather than their gender assigned at birth, be considered when recommending a housing facility, which suggests that transgendered prisoners are likely coded according to their gender identity rather than biological sex. *See* Daniel Politi, *Trump Administration Gets Rid of Obama-Era Rules that Protected Transgender Inmates*, SLATE (May 13, 2018, 8:59 PM), https://slate.com/news-and-politics/2018/05/trump-administration-gets-rid-of-obama-era-rules-that-protected-transgender-inmates.html [https://perma.cc/PP8P-PPBH].

variables that provide information about the subject of the defendant's case, such as the type of offense (divided into thirty-five categories) and the statutes of conviction. The Commission data also include variables describing case outcomes, including details of the sentence imposed upon the defendant and their advisory sentencing range. Finally, the Commission data report the month, year, and federal district court in which the defendant was sentenced. These variables allow me to understand the geography and history of inequalities in federal financial crime prosecutions.

After building the Commission dataset, I merged it with county-level data published by the U.S. Census Bureau that describes the U.S. adult population ("Census Data"). The Census Data's county-level intercensal population estimates include annual age-by-race-by-gender data of county populations.[129] The Economic Research Service of the USDA publishes county-level educational attainment information of the adult population using data from the U.S. Census and American Community Survey.[130]

After compiling the county-level Census Data, I aggregated it to the federal district level with a district-to-county crosswalk file.[131] This matched data allowed me to measure per capita prosecution rates between districts and to compare characteristics of the federal defendant population with the entire adult resident population over time and within each federal judicial district.

B. PRELIMINARY DESCRIPTIVE STATISTICS OF FEDERAL FINANCIAL CRIME CASES

Before examining inequality in federal financial crime cases, Table 1 presents descriptive statistics of these cases from the data. I define a case as

129. *See Annual County Resident Population Estimates by Age, Sex, Race, and Hispanic Origin: April 1, 2020 to July 1, 2019*, *(CC-EST2019-ALLDATA*), U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/popest/2010s-counties-detail.html [https://perma.cc/XEN9-83YG]; *Intercensal Estimates of the Resident Population by Five-Year Age Groups, Sex, Race, and Hispanic Origin for Counties: April 1, 2000 to July 1, 2010*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/time-series/demo/popest/intercensal-2000-2010-counties.html [https://perma.cc/XZ4R-FS93]; *State and County Intercensal Datasets 1990–2000*, U.S. CENSUS BUREAU, https://www.census.gov/data/datasets/time-series/demo/popest/intercensal-1990-2000-state-and-county-characteristics.html [https://perma.cc/9J3T-DNAA].

130. *See Educational Attainment for Adults Age 25 and Older for the U.S., States, and Counties, 1970–2020*, USDA, ECON. RSCH. SERV., https://www.ers.usda.gov/data-products/county-level-data-sets/county-level-data-sets-download-data [https://perma.cc/7HBS-GZJ2]. Unlike population data, this data is not reported for every year. It is only reported for 1970, 1980, 1990, 2000, 2007–11 (five-year average), and 2016–2020 (five-year average). For this project, I use the data from 2007–2011 because it is closest to the midpoint of the study period (1994 to 2019).

131. Mary Eschelbach Hansen, Jess Chen & Matthew Davis, *United States District Court Boundary Shapefiles (1900–2000)*, INTER-UNIV. CONSORTIUM FOR POL. & SOC. RES. (Mar. 2, 2015), https://doi.org/10.3886/E30468V1 [https://perma.cc/5NA7-94ZH].

a "financial crime" if the Commission data characterizes it as an antitrust, bribery, counterfeiting, forgery, fraud, embezzlement, larceny,[132] or tax crime.

The Commission data do not include a variable to characterize the victim(s) in the case, so I coded this variable based on the criminal statute under which the defendant was convicted. Based on the statute of conviction, I coded the case as involving one of these four victim types: (1) a government victim; (2) a private victim; (3) no concrete victim; or (4) an unknown victim. For example, a case in which the defendant is convicted of embezzling or stealing public money is coded as having a government victim.[133] A case in which the defendant is convicted of defrauding a bank is coded as having a private victim.[134] A case in which the defendant is convicted of making a false statement to a federal agent is coded as having no concrete victim.[135] A case in which a person is convicted of defrauding a health insurer is coded as having an unknown victim because a person can commit this crime by defrauding either a government insurer (like Medicare) or a private insurer.[136] Appendix Table A.1 lists the statutory provisions for defendants convicted of the most common financial crimes and how they were coded.[137]

Table 1 provides summary statistics of many variables about the defendants and their cases in the data. Column (1) of Table 1 presents averages for the variables across all 276,210 defendants convicted of financial crimes in the years 1994–2019. Columns (2) through (5) present averages for the same variables among defendants whose crimes involve the lowest losses (column (2)) through largest losses (column (5)).[138] Because the severity of financial crimes is (for the most part) increasing in loss amount, readers should think of moving across Table 1 from column (2) to column (5) as moving from less serious to more serious financial crimes.[139]

132. Although larceny is not typically considered a white-collar crime, I include it in my definition for consistency because in fiscal year 2018, the Commission data began combining fraud, embezzlement, and larceny into one offense category. Defendants coded as committing larceny crimes in years prior to 2018 were frequently convicted of fraud and embezzlement crimes.

133. *See* 18 U.S.C. § 641.

134. *See id.* § 1344.

135. *See id.* § 1001.

136. *See id.* § 1347.

137. A complete list of all statutory provisions and how they were coded is on file with the author and available by request.

138. The observations in columns (2) through (5) do not sum to 276,210 because the "loss amount" variable is only available beginning in 1999. Even beginning in 1999, around twenty percent of observations are missing an entry in this variable.

139. It is important to note that when I use the term "loss," throughout this Article, I mean the "dollar amount of loss for which the offender is held responsible," which is how this variable is defined by the Commission. Commentary to the U.S. Sentencing Guidelines directs courts to consider "actual or

Overall, Table 1 presents initial descriptive patterns that suggest regressive inequality in financial crime prosecutions. First, readers will notice that fraud makes up more than 80% of financial crime cases across all columns, making up 76.5% of low-level cases (column (2)) and 87.8% of high-level cases (column (5)). The median loss in a financial crime prosecution is just under $50,000, but it is $0 in the lowest quartile and nearly $850,000 in the highest. The median fine in all categories—even the most serious financial crimes—is $0.

Table 1 shows there are differences in the representation of defendants by race, gender, and income levels across the severity distribution. Black defendants and female defendants make up a smaller share of defendants in high-loss cases than in other types of cases. Specifically, Black defendants and female defendants each make up around 30–40% of defendants in low to medium-loss cases, but only around 25% of defendants in high-loss cases. Hispanic defendants are particularly overrepresented in low-loss cases. This could be because around half of Hispanic defendants convicted of financial crimes are not U.S. citizens, and among non-citizen defendants many are convicted of crimes that do not involve a concrete victim, such as making a false statement to federal officials or using a false social security number, as in Case A described in Section I.B.

The pattern is similar for education. Defendants who have not completed high school—who are likely to be those with the fewest resources—appear in low-level cases at much higher rates (28% of defendants) than they appear in high-loss cases (11% of defendants). The pattern for defendants who have college degrees—who are likely to be those with the most resources—is the opposite. College graduates make up 31% of defendants in high-loss cases and just 10% of defendants in low-loss cases.

Overall, Table 1 provides initial descriptive evidence of patterns that this Article explores in the next three subsections. It suggests that people who are likely to have the most advantages—people who are male, White, and have completed college—are more frequently prosecuted for more serious financial crimes than others. The rest of this Part examines inequality in the entire data, over time, and by geography.

intended loss," and there appears to be a recent circuit split on the question of whether using intended loss is acceptable. *Compare* United States v. Gadson, 77 F.4th 16, 21–22 (1st Cir. 2023) (district court did not commit plain error by using intended loss to calculate bank-fraud defendant's base offense level) *with* United States v. Banks, 55 F.4th 246, 248 (3d. Cir. 2022) (concluding that the Commission's commentary that includes "intended loss" in the definition of "loss" should be afforded no weight). *See also* BAER, *supra* note 6, at 53 (criticizing the loss variable for encompassing intended loss).

TABLE 1. Federal Financial Crime Prosecutions, 1994–2019

	All Financial Crimes (1)	*Low Loss* (2)	*Med-Low Loss* (3)	*Med-High Loss* (4)	*High Loss* (5)
Offense Characteristics					
Antitrust	0.002	0.003	0.003	0.003	0.003
Bribery	0.021	0.026	0.020	0.015	0.015
Counterfeiting/Forgery	0.083	0.189	0.103	0.049	0.021
Fraud	0.833	0.765	0.833	0.832	0.878
Tax Offense	0.061	0.018	0.044	0.105	0.083
Government Victim	0.246	0.305	0.315	0.294	0.151
Private Victim	0.422	0.298	0.440	0.455	0.540
No Concrete Victim	0.057	0.142	0.035	0.020	0.008
Unknown Victim	0.276	0.256	0.210	0.231	0.302
Loss (median in $)	48,362	0	20,802	105,997	847,375
Defendant Characteristics					
Black	0.293	0.302	0.384	0.324	0.237
Hispanic	0.147	0.199	0.114	0.115	0.137
Other Race/Ethnicity	0.068	0.064	0.056	0.058	0.065
White	0.492	0.434	0.446	0.503	0.561
Male	0.702	0.688	0.610	0.674	0.766
Less than HS	0.189	0.282	0.211	0.157	0.106
HS Only	0.315	0.356	0.355	0.308	0.248
Some College	0.310	0.258	0.316	0.343	0.333
College Grad	0.186	0.104	0.118	0.192	0.313
U.S. Citizen	0.669	0.671	0.740	0.773	0.797
Retained Counsel	0.337	0.218	0.264	0.408	0.562
Fines Waived	0.859	0.827	0.905	0.909	0.920
Case Characteristics					
Guidelines Mean (months)	28.7	12.3	12.6	22.6	54.3
Any Incarceration	0.559	0.491	0.495	0.702	0.863
Sentence (months)	16.4	8.4	7.2	14.2	36.2
Below Guidelines	0.478	0.236	0.495	0.611	0.599
In-Range	0.499	0.730	0.484	0.369	0.383
Above Guidelines	0.021	0.033	0.019	0.018	0.017
Fine (median in $)	0	0	0	0	0
Restitution (median in $)	5,800	0	11,422	65,000	429,968
Observations	276,210	43,151	43,146	43,226	43,071

Note: All variables are coded as 0/1 unless otherwise noted. Guidelines and sentence length variables are capped at 470 months—the Commission's assigned value for life sentences. Many variables are not reported in all years.

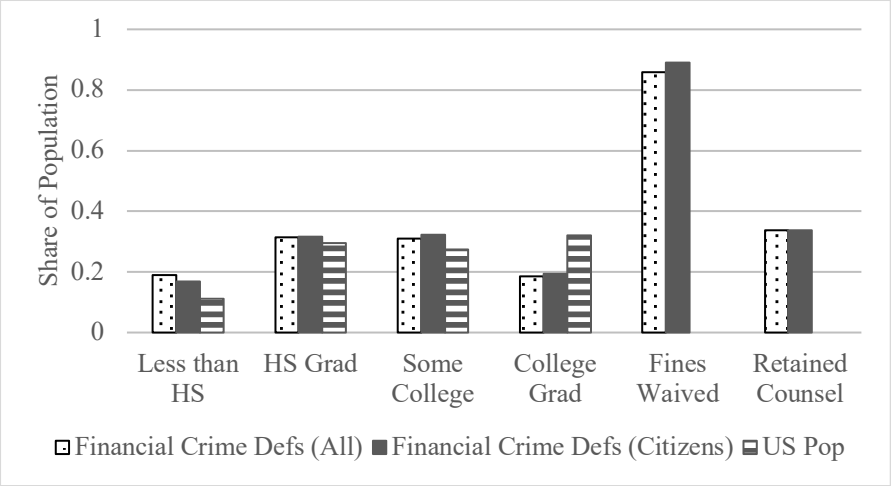
C. OVERALL INEQUALITY (ALL DISTRICTS, ALL YEARS)

This section begins by examining whether one can fairly say the government focuses its financial crime enforcement efforts on "white-collar" crime. It suggests the answer is no. It shows that low-income and Black

defendants are disproportionately represented while higher-income and White defendants are underrepresented in federal financial crime cases relative to the U.S. population. It shows that this overrepresentation is particularly stark for Black women, who are underrepresented in federal criminal cases as a whole but overrepresented in financial crime prosecutions.

The Commission data do not provide information about a person's income or wealth, so Figure 1 uses three proxies for a defendant's financial means: the level of formal education attained by the defendant, whether the defendant's fines were waived by the court based on the defendant's inability to pay them, and whether the defendant retained paid counsel. Appendix Table A.2 presents the same results in table form.

FIGURE 1. Proxies for Poverty in Federal Financial Crime Cases



Note: Educational attainment is only reported for defendants sentenced in fiscal years 1997 through 2019. Defense counsel type is only reported for defendants sentenced in fiscal years 1994 through 2003. Waived fines are reported for all years (1994 through 2019).

Figure 1 shows the averages for all federal financial crime defendants (dotted columns), for U.S. citizen financial crime defendants (solid columns), and for the U.S. adult population (striped columns). It reports the estimates separately for U.S. citizen-defendants because Census data, which is used to compute the averages across the U.S. adult population, chronically

undercounts people who are not U.S. citizens.[140] Despite this undercounting, the averages for U.S. citizen-defendants are very similar to the averages among all federal defendants.

As Figure 1 shows, nearly 20% of financial crime defendants did not graduate high school, which is true of only around 10% of U.S. adults. Around 30% of the U.S. adult population has a college degree, but less than 20% of federal financial crime defendants have one. Around 85% of federal financial crime defendants have their fines waived by the court. Put another way, only around 15% of federal financial crime defendants can afford to pay their fines. The majority (around two-thirds) of federal financial crime defendants rely on appointed counsel. These averages suggest that defendants convicted of financial crimes are likely to have a lot less income and wealth than the average U.S. adult.

Figure 2 displays race-gender representation in federal financial crime cases (solid columns) and all federal criminal cases (striped columns) over the years 1994 to 2019. Appendix Table A.3 presents the same results in table form. The horizontal line at $y = 1$ demarcates the boundary for whether a group is over- or under-represented in federal cases relative to their share of the U.S. adult population.[141]

Figure 2 shows that, as many readers will already know, Black and Hispanic men are the most overrepresented groups in the federal criminal system (their striped columns extend the highest), while women who are not Black or Hispanic are the most underrepresented groups (their striped columns extend the lowest). Overall, there are five race-gender groups that are underrepresented relative to the adult population: women of all race and ethnicity groups and White men. Men who are not Black or Hispanic are prosecuted at rates closest to parity (their striped columns are the shortest), with White men slightly underrepresented and men who are another race slightly overrepresented.

For financial crimes, the pattern is different in a few notable ways. First, unlike in the entire federal defendant population, Black men and women are

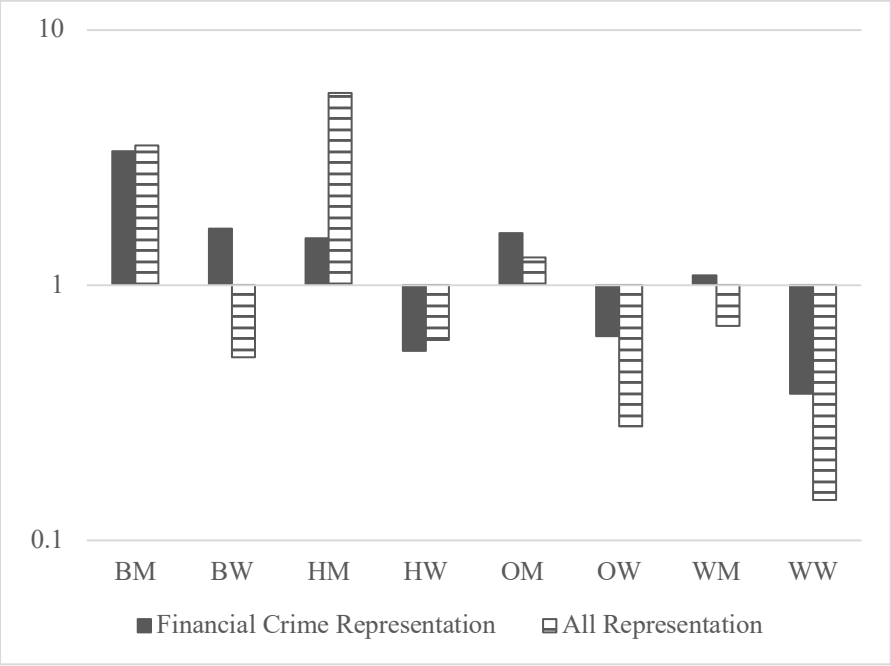
140. U.S. CENSUS BUREAU, COUNTING THE HARD TO COUNT IN A CENSUS 1, 4 (July 2019) (listing "[m]igrants and minorities" as a population in the U.S. that is "hard-to-count," which is defined as a population "for whom a real or perceived barrier exists to full and representative inclusion in the [Census] data collection process").

141. For each group, the column height represents the share of defendants in that group divided by the share of people in that group in the U.S. adult population over the period 1994–2019. For example, Black men make up roughly 18.8% of fraud defendants and roughly 5.5% of the U.S. adult population, so the height of their solid green column is (18.8/5.5) = 3.42. An alternative way to compute inequality would be to subtract rather than divide each defendant group's representation from their representation in the U.S. adult population. When computed this way, the inequality patterns are similar but less extreme because the race-gender groups are not equally sized.

the most overrepresented groups in financial crime prosecutions, while White and Hispanic women are the most underrepresented groups. Black men are significantly more overrepresented in financial crime prosecutions than any other group (their solid column is much taller than any other solid column). Men who are not Black are also overrepresented in financial crime cases but to a much lesser extent than Black men.

Black women are overrepresented among financial crime defendants despite being underrepresented in the federal criminal defendant population. Women of all other race and ethnicity groups are underrepresented in financial crime prosecutions, just as they are in all federal prosecutions. These findings suggest that financial crime prosecutions are an important site of racial inequality in the federal criminal system and that this inequality uniquely burdens defendants who are Black.

FIGURE 2. Race-Gender Representation in Federal Prosecutions, 1994–2019



Note: The y-axis is scaled such that a group that is *x* times overrepresented will have the same size column as a group that is *x* times underrepresented. BM=Non-Hispanic Black Men; BW=Non-Hispanic Black Women; HM=Hispanic Men; HW=Hispanic Women; OM=All Other Men (including Alaska Native, American Indian, Asian, Native Hawaiian, and Other Pacific Islander Men); OW=All Other Women (including Alaska Native, American Indian, Asian, Native Hawaiian, and Other Pacific Islander Women); WM=Non-Hispanic White Men; WW=Non-Hispanic White Women.

D. INEQUALITY IN FINANCIAL CRIME PROSECUTIONS OVER TIME

This section describes how the federal financial criminal caseload has changed over the past quarter century. It shows first that the annual number of financial crime prosecutions remained stable until 2015, when it began to decrease. Second, it shows that the caseload decline in 2015 did not coincide with any noticeable change in the education, gender, or race gaps that persist throughout the period. Third, it shows that since around 2008, Black defendants have been prosecuted at roughly three times the per capita rates that Hispanic, non-Hispanic White, and other defendants have been prosecuted for financial crimes. Beginning in 2008, defendants in all racial or ethnicity groups who are not Black were prosecuted at very similar per capita rates. Fourth, it shows that this race gap is larger but shrinking among female defendants and smaller but more stable among male defendants. Because most of the patterns I documented are stable over time, most of the figures that accompany this section are contained in the Appendix.

Before examining how inequality has changed over time, this section first considers how overall levels of financial crime prosecution have changed since the early 1990s. Appendix Figure A.1 plots the federal government's criminal caseload for the three most-prosecuted types of crime: drug trafficking (dotted line); immigration (dashed line); and financial crime (solid line). As Figure A.1 reveals, the annual number of federal prosecutions of financial crime remained stable until it began to decline in 2015. On the other hand, financial crime as a *share* of all federal prosecutions has decreased over a longer period, but this is not due to a significant decrease in the number of financial crime cases; rather, it is a result of a steep rise in immigration-related prosecutions, which dilute financial crime's share of all federal criminal cases.

It is possible that as the number of financial crime prosecutions decreased beginning in 2015, inequality in *who* is prosecuted for financial crimes also changed. Appendix Figure A.2 looks for changes in the average education levels of defendants prosecuted for financial crimes, while Figure 3 considers changes in the race and gender composition of the financial criminal defendant population over time. Figure A.2 studies defendants' educational attainment because education proxies for a defendant's income, which is not a variable that the Commission data reports.[142]

Figure A.2 plots financial crime cases prosecuted against defendants who did not graduate high school, graduated high school but did not attend college, attended college but did not earn a bachelor's degree, and earned a

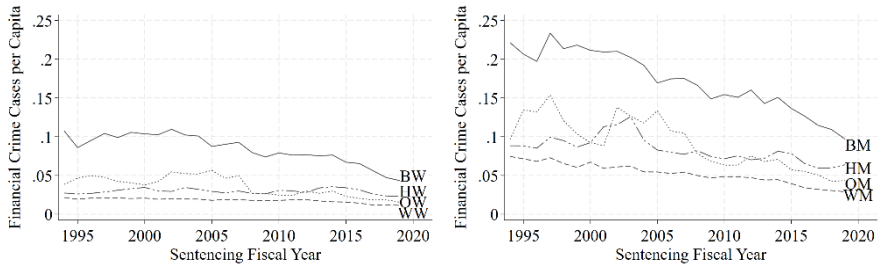
142. *See supra* Section II.C.

bachelor's degree. Panel A, which plots the share of defendants in each category, shows that the educational composition of financial crime defendants remained largely stagnant over the 1997 to 2019 period.

Panel A suggests a small increase in the share of financial crime defendants who have attended or completed college and a small decrease among defendants who never attended any college over the same period. However, as Panel B reflects, these changes have not kept pace with the population, which has on average seen increased formal education over time. If anything, the education gap expanded over the period, as Panel B shows. Panel B plots the extent to which defendants in each educational group are over- or under-represented relative to the U.S. adult population. It shows that defendants who have not completed high school were prosecuted at higher rates in the late 2010s than in earlier parts of the period. Thus, Figure A.2 suggests that overall changes in the financial crime caseload over time did not benefit those with few resources; if anything, the opposite is true.

Financial crime also has a race and gender gap. As with nearly all types of crime, men are more likely to be prosecuted for financial crimes than women. Racial gaps in financial crime also persist among both male and female defendants. Figure 3 plots the per capita rates at which each race-gender group is prosecuted for financial crimes over the 1994–2019 period. To avoid cramming eight lines into one graph, Panel A plots the prosecution rates for female defendants and Panel B for male defendants. The panels are arranged side-by-side and scaled with the same y-axis so that readers can compare female and male defendants by looking across the panels. The y-axis measures the number of financial crime defendants in each race-gender group divided by the U.S. adult population of that race-gender group (then multiplied by 1000). Thus, a higher line indicates a higher rate of prosecution.

FIGURE 3. Financial Crime Cases by Race, 1994–2019



Note: Each line represents the number of financial crime cases brought against defendants in the race-gender group, multiplied by 1,000 and divided by the U.S. adult population of that race-gender group. Race-gender groups are labeled as in Figure 2.

Figure 3 shows several facts about race and gender inequality in federal financial crime prosecutions. First, financial crime has a persistent gender gap. Men are prosecuted for financial crimes at higher per capita rates than women. Second, Figure 3 shows that Black men and women are prosecuted for financial crimes at the highest rates. Since 2008, there does not appear to be a significant race gap among any other race groups for either female or male defendants. Instead, Black adults are uniquely susceptible to prosecution for financial crimes.

Third, the racial gaps appear to narrow over time for women but not men. For female defendants, Panel A shows that prosecution rates among racial groups compressed over the 1994 to 2019 period. The data bears this pattern out: Black women comprised 38% of female financial crime defendants in 1994 and 32% in 2019.[143] For male defendants, Panel B shows less compression. The data also bears this pattern out: Black men comprised 25% of male financial crime defendants in 1994 and 27% in 2019.[144] Over this period, Black men and Black women constituted between 5–7% of the U.S. adult population, so these changes cannot be attributed to significant changes in the composition of the underlying population.[145]

143. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17.

144. *Id.*

145. In 1994, Black men made up 5% of the U.S. adult population and Black women made up 6%. In 2019, Black men made up 6% of the U.S. adult population and Black women made up 7%.

E. INEQUALITY IN FINANCIAL CRIME BY GEOGRAPHY

The previous section showed that over the last three decades, financial crime cases have remained a significant portion of the federal criminal docket and that income, gender, and racial inequalities persist in these prosecutions. Among male and female defendants, Non-Hispanic Black people are prosecuted at roughly three times the per capita rate as all other defendants. People who did not complete high school are by far the most overrepresented group in financial crime cases, while those who have completed college are the only group that is significantly underrepresented.

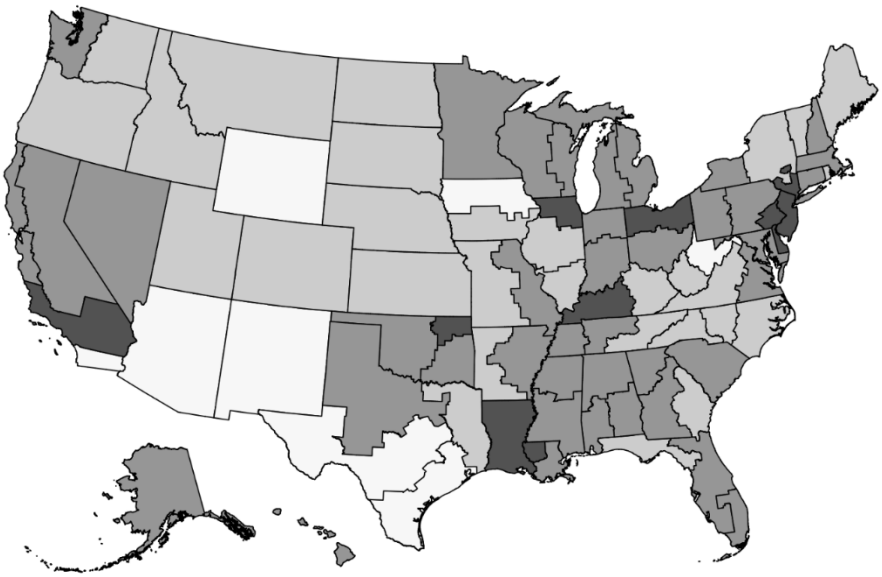
But averages across the entire federal criminal system as presented in the previous sections obscure differences in how individual USAOs prosecute financial crime. For example, the previous sections showed that Black women and Black men are overrepresented in federal financial crime cases while White women are underrepresented, but one might wonder whether this is true in all federal districts in the United States. Variation over the entire country might reflect variation in underlying rates of financial crime, office priorities, or the individual attitudes of decisionmakers such as prosecutors and agents. This section measures and maps inequalities in financial crime prosecutions at the USAO level. Figure 4 begins by showing the intensity with which each USAO prosecutes financial crimes. Darker shading means a larger share of the district's cases are financial crime cases.

Figure 4 shows that the districts that focus more heavily on fraud cases include large urban districts like the Central District of California (home to Los Angeles), the Northern District of Illinois (home to Chicago), and the Southern District of New York (home to Manhattan). In these USAOs, financial crime respectively constitutes 32.1%, 36.7% and 29.3% percent of all criminal cases. This finding is perhaps unsurprising because these districts encompass many major financial centers. The five districts that border Mexico have much less intense financial crime caseloads (less than 6% of all prosecutions in all five districts) because immigration cases dominate the federal criminal caseloads in those districts.[146] Figure 4 also shows that USAOs in Western states appear to prosecute financial crime less

146. This observation is based on the author's analysis of the data. *See* Didwania, *Data*, *supra* note 17. The five federal districts that border Mexico are the District of Arizona, the Southern District of California, the District of New Mexico, the Southern District of Texas, and the Western District of Texas. Together, the USAOs in these five districts prosecuted 32% of all federal criminal cases between 1994 and 2019. *Id.* In these USAOs, immigration cases made up 55% of the caseload. In the remaining 88 USAOs, immigration cases made up 10% of the caseload. *Id.*

intensely than states in the Deep South[147] and the Great Lakes Region.[148]

FIGURE 4. Financial Crime Prosecution Intensity (All Years)



Note: This figure maps the share of each district's criminal cases that are financial crime cases. Each shade represents an equal interval in the distribution. Lightest shading means roughly 2–11% of cases in the district are financial crime cases; second-lightest shading means 11–19% of cases are financial crime cases; second-darkest shading means 19–28% of cases are financial crime cases; and darkest shading means 28–37% of cases are financial crime cases.

Figure A.3 shows that districts in the Deep South, Alaska, and Oklahoma prosecute women for financial crimes at among the highest rates in the United States. Figure A.3 plots the intensity with which each district prosecutes women for financial crimes relative to men. Darker shading means female defendants make up a larger share of that USAO's financial crime caseload. There are eight districts in which women constitute more than forty percent of financial crime defendants: the Southern, Middle, and Northern Districts of Alabama; the District of Alaska; the Middle District of Georgia; the Middle and Western Districts of Louisiana; and the Northern

147. The term "Deep South" does not have a settled definition. Most definitions suggest the core states are Alabama, Georgia, Louisiana, Mississippi, and South Carolina, which is the definition used in this Article.

148. The Great Lakes region includes Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

District of Oklahoma. By contrast, women make up the smallest portion of fraud defendants in New England and southwestern states. There are ten districts in which women make up less than twenty-five percent of fraud defendants: the Southern District of California, the District of Connecticut, the District of Massachusetts, the District of Minnesota, the District of New Hampshire, the District of New Jersey, the Eastern and Southern Districts of New York, the Eastern District of Pennsylvania, and the District of Rhode Island.

Prosecuting women for financial crimes at higher rates in the Deep South, Alaska, and Oklahoma compared with other jurisdictions is likely to create racial inequality among female defendants because the Deep South states have among the largest Black populations in the United States.[149] Alaska and Oklahoma have among the largest Indigenous populations in the United States.

Figure 5 explores the geography of race and gender inequality in financial crime prosecutions. It depicts whether race-gender groups are over- or under-represented in financial crime prosecutions relative to their share of the U.S. adult population in each federal district. In Figure 5, districts filled in blue stripes mean the group is underrepresented (with darker shades of blue representing more underrepresentation). Districts filled in solid red mean the group is overrepresented (with darker shades of red representing more overrepresentation).

Panels A and B show that Black men are overrepresented in financial crime cases in every federal district, and Black women are overrepresented in all but six federal districts.[150] In contrast, Panel H shows that White women are underrepresented in financial crime cases in every federal district. White men are overrepresented in roughly half of all districts, but in all districts, it is clear their representation is relatively close to parity because all of the districts have pale shading. These findings demonstrate that the racial inequalities documented across the full United States are generated at least in part by inequalities within—not just between—USAOs.

As in Figure 5, Figure 6 explores the geography of income inequality in financial crime prosecutions. As throughout, the defendant's level of formal education is used as a proxy for income because the Commission data

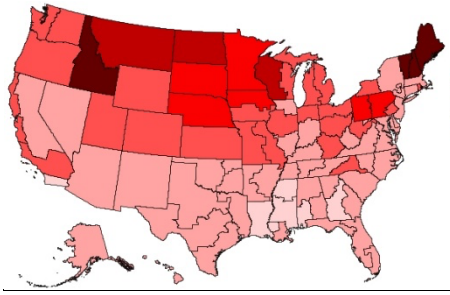
149. Over the 1994–2019 period, the states with the largest Black adult populations were Mississippi (34% of adults); Louisiana (30% of adults); Georgia (28% of adults); Maryland (28% of adults); South Carolina (27% of adults); and Alabama (24% of adults).

150. The six districts in which Black Women are underrepresented in financial crime cases relative to their share of the adult population are the District of Columbia, the Southern District of California, the Southern District of Florida, the District of New Jersey, the Eastern District of New York, and the Southern District of New York.

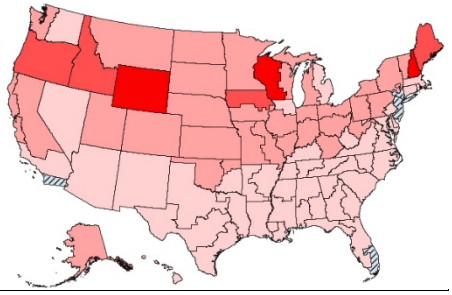
does not report information about a defendant's income or wealth. Also, like Figure 5, Figure 6 uses red solid- blue striped shading to indicate whether defendants are over- or under-represented relative to the U.S. adult population. Districts shaded in blue stripes mean the group is underrepresented (with darker shades of blue representing more underrepresentation). Districts shaded in solid red mean the group is overrepresented (with darker shades of red representing more overrepresentation). The shading in Figure 6 uses the same red/blue scale as Figure 5 so readers can compare.

FIGURE 5. Race-Gender Representation in Financial Crime Prosecutions

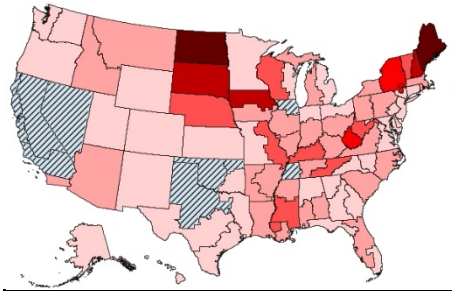
A. Cases Against Black Men



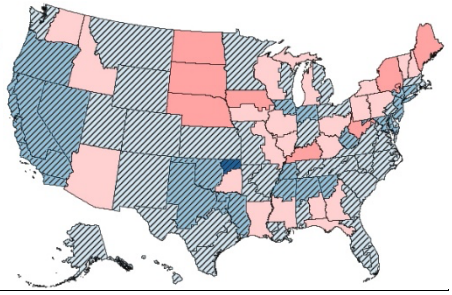
B. Cases Against Black Women



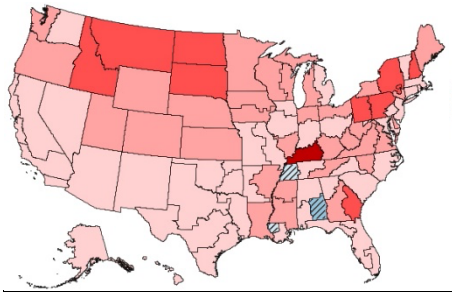
C. Cases Against Hispanic Men



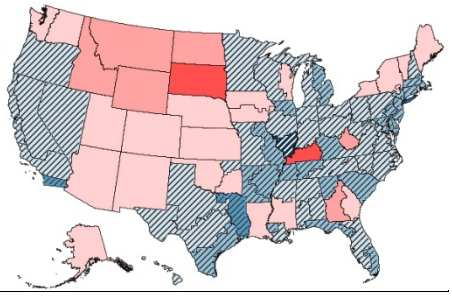
D. Cases Against Hispanic Women



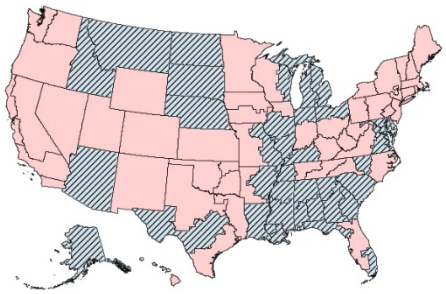
E. Cases Against Men of Another Race



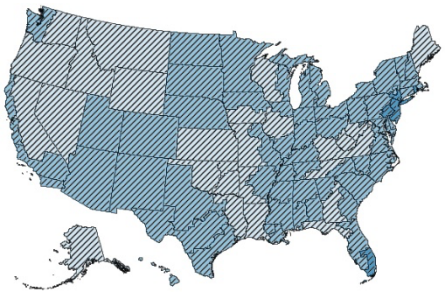
F. Cases Against Women of Another Race



G. Cases Against White Men



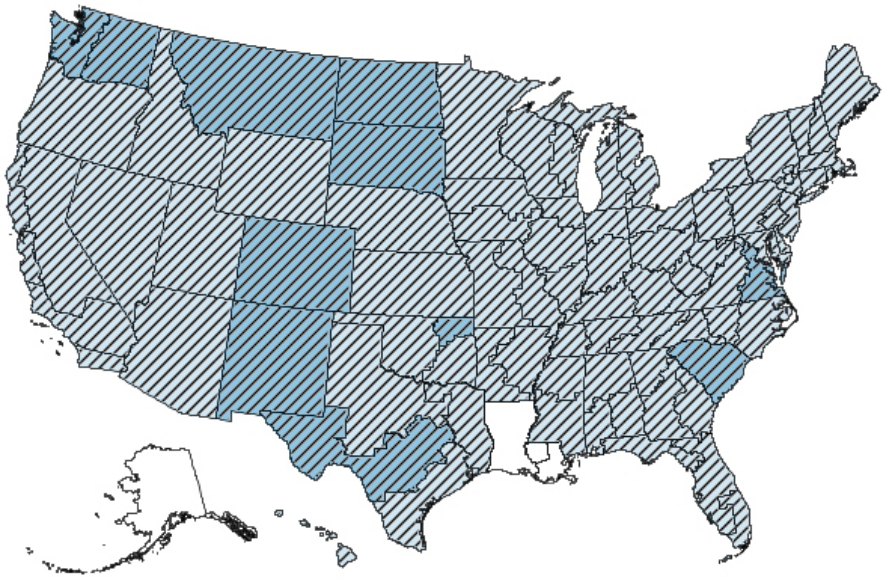
H. Cases Against White Women



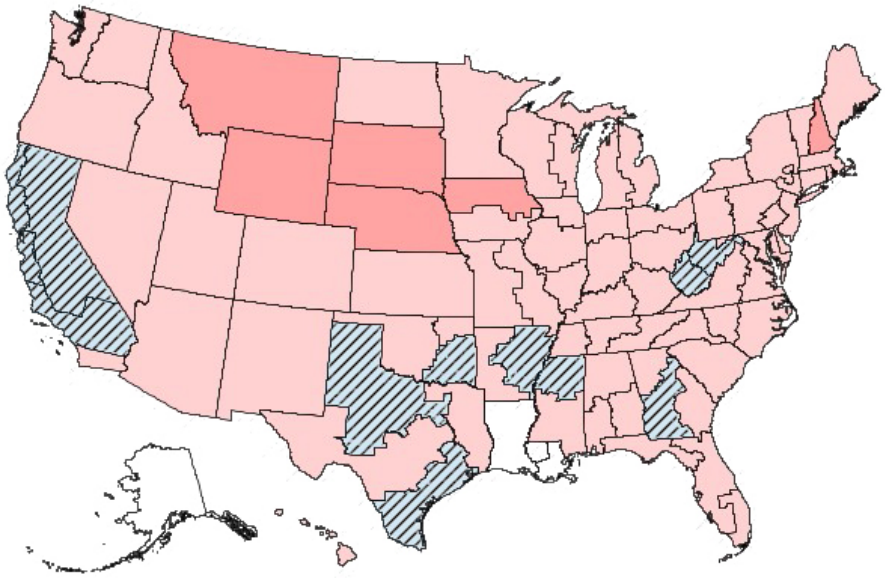
Note: This figure maps the over- and under-representation of each race-gender group in the district's financial crime cases. Districts shaded in striped (solid) fills prosecute the race-gender group at lower (higher) rates than the district's population. Darker shading indicates larger disparity.

FIGURE 6. Educational Representation in Financial Crime Prosecutions

A. Cases Against Defendants with a College Degree



B. Cases Against Defendants Without a High School Degree

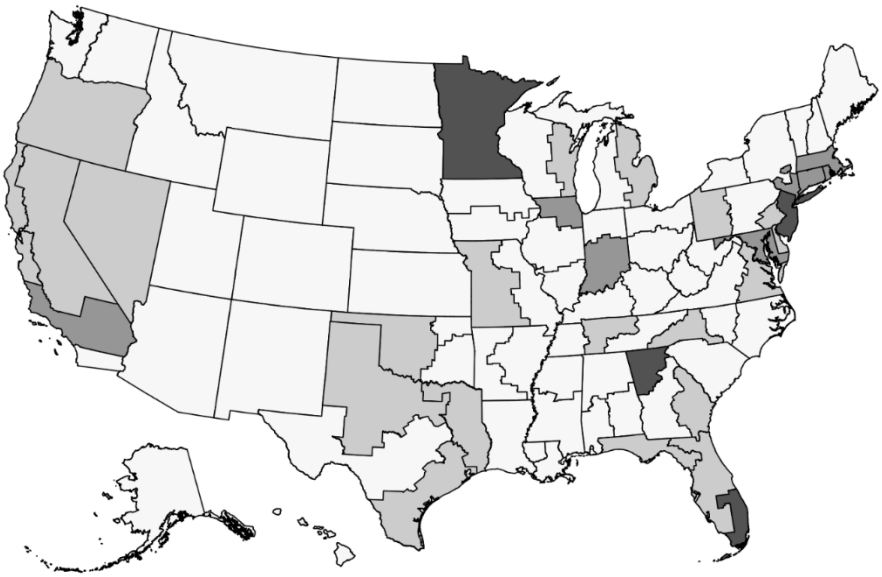


Note: This figure maps the over- or under-representation of defendants in the district's financial crime cases. Districts shaded in striped (solid) fill prosecute the education group at lower (higher) rates than the district's population. Darker shading indicates larger disparity.

Figure 6 shows that defendants who have graduated from college—and are likely to be the wealthiest federal defendants—are underrepresented in financial crime prosecutions in every federal district in the United States, even those that prosecute the most complex and sophisticated financial crime (such as the Southern District of New York). In contrast, defendants who have not completed high school—and are likely to have the fewest resources—are overrepresented in nearly every district, although they are underrepresented in eleven districts.

The preceding discussion suggests that USAOs could significantly vary in the average severity of financial crimes they prosecute. Figure 7 investigates this theory and depicts the median loss associated with financial crime cases in each federal district. In other words, Figure 7 shows the severity of the average financial crime prosecution by each USAO. It shows significant variation in severity across USAOs.

FIGURE 7. Median Loss Amount in Financial Crime Prosecutions (All Years)



Note: This figure maps the median loss in financial crime cases by USAO. Each shade represents an equal interval. Lightest shading means the median loss amount in financial crime cases is between $7,519 and $44,323; second-lightest shading means the median loss is between $44,323 and $81,127; second-darkest shading means the median loss is between $81,127 and $117,931; and darkest shading means the median loss is between $117,931 and $154,735.

Figure 7 shows that the most serious financial crimes are prosecuted in the Northeast (including the Eastern and Southern Districts of New York, and the Districts of Connecticut, Massachusetts, and Rhode Island), as well as a few scattered districts that are home to major U.S. cities (the Southern District of California, the Southern District of Florida, the Northern District of Georgia, the Northern District of Illinois, and the District of Minnesota). The least serious financial crimes are prosecuted in Southern and Great Plains states.

III. EXPLAINING THE FINDINGS

Part II presented evidence of income, racial, and gender inequality in the prosecution of federal financial crimes. It showed that the federal prosecution of financial crime has a disparate impact, prosecuting low-income and Black people at higher rates than the rest of the U.S. adult population, while prosecuting college graduates and White people at lower rates than the rest of the adult population. Part II also showed that these inequality patterns have persisted since the 1990s and appear in every federal judicial district. This Part offers several potential explanations for the inequalities documented in Part II. It first examines differences in the reported offense conduct of financial crime defendants in different education, race, and gender groups. It shows that the defendant groups that are the most overrepresented are also prosecuted for, on average, the least serious financial crimes. It then describes how systemic incentives, formal law and policy, and individual biases could explain the Article's findings. I do not attempt to definitively prove that any particular mechanism dominates. Instead, this Part is designed to present many possible explanations for the regressive nature of federal white-collar prosecution.

A. CHARGED OFFENSE CONDUCT

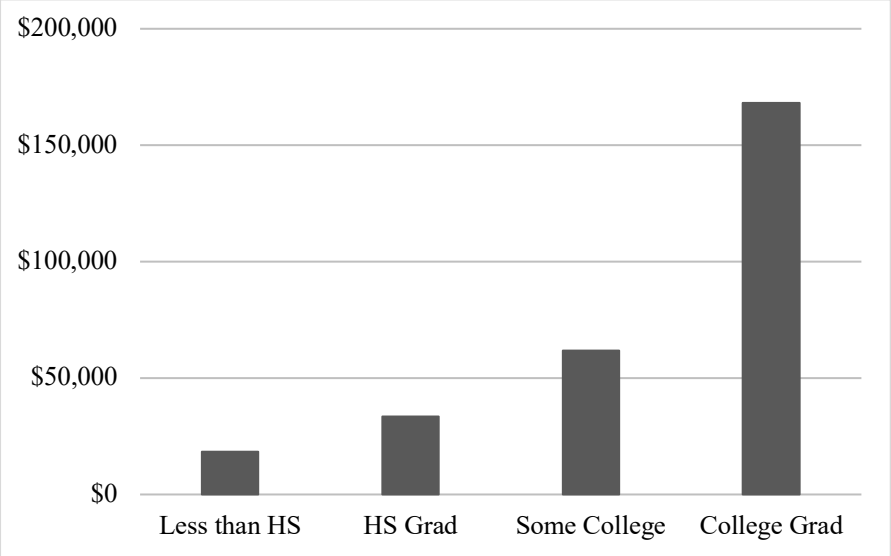
As a threshold matter, this section examines whether the federal financial crime cases brought against defendants of different education, race, and gender groups systematically differ in reported offense conduct. The DOJ and FBI routinely state that they prioritize prosecuting serious and sophisticated financial crimes. It could be that the groups that are most overrepresented in financial crime prosecutions also commit on average the most serious financial criminal offenses, and that overrepresentation is thus consistent with the federal government carrying out its stated priorities. This section considers but rejects that hypothesis.

To perform this analysis, this section considers three variables that capture offense conduct: (1) the offense severity (which primarily corresponds with the amount of monetary loss in financial crime cases);

(2) whether the case involved illegal drugs; and (3) the average amount of aggravation computed in the case. I define the amount of aggravation as the amount by which the defendant's base offense level was increased or decreased at sentencing on account of their offense characteristics.[151] The aggravation measure can therefore be a positive or negative number. Figure 8 presents averages for each of these measures of offense conduct by defendants' educational attainment. As before, I use the defendant's level of formal education as a proxy for income because the Commission data do not include information about defendants' income or wealth.

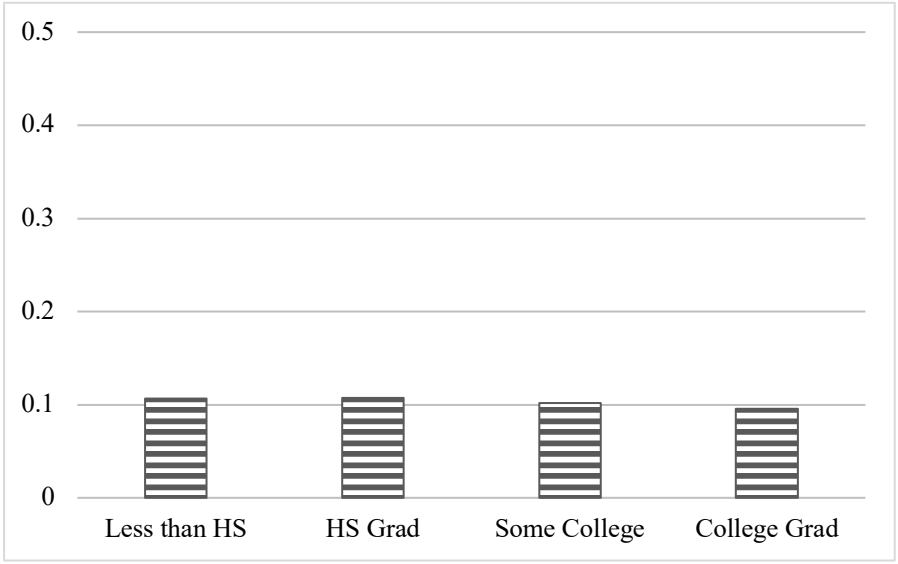
FIGURE 8. Financial Crime Case Characteristics by Education Group

A. Median Loss Amount in Financial Crime Cases

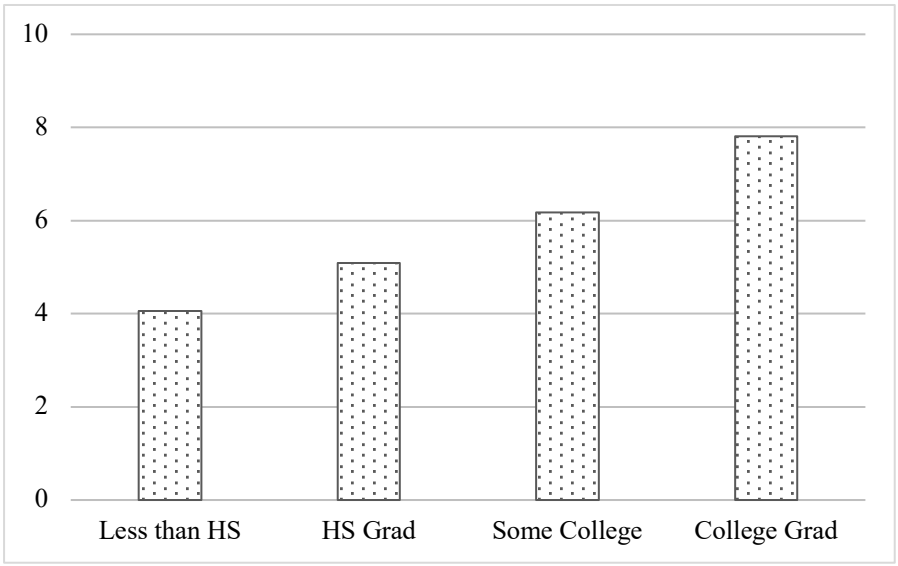


151. The U.S. Sentencing Guidelines Manual identifies many offense characteristics that can increase or decrease the advisory sentencing range for a person convicted of a financial crime. For example, a person's offense level will increase if their conduct "resulted in substantial financial hardship" to multiple victims, or if it involved damage to "property from a national cemetery or veterans' memorial," or if it involved the misappropriation of a trade secret, among other things, U.S. SENT'G GUIDELINES MANUAL §§ 2B1.1(B)(2)(B)–(C), 2B1.1(B)(5), 2B1.1(B)(14) (U.S. SENT'G COMM'N 2021).

B. Share of Financial Crime Cases Involving Drugs



C. Average Aggravation in Financial Crime Cases



Note: Average aggregation is the average difference between defendants' base and final offense levels.

Figure 8 suggests that financial crime defendants who have attained more formal education are prosecuted for financial crimes that are more serious than the financial crimes prosecuted against defendants with less formal education. The median loss amount for defendants without a high school diploma is just $18,500, while the median loss amount for defendants with a college degree is $168,276. The amount of aggravation in the offense is also increasing in formal education, as Panel C shows. In contrast, Panel B shows that the presence of illegal drugs in financial crime cases is roughly equal across all education groups.

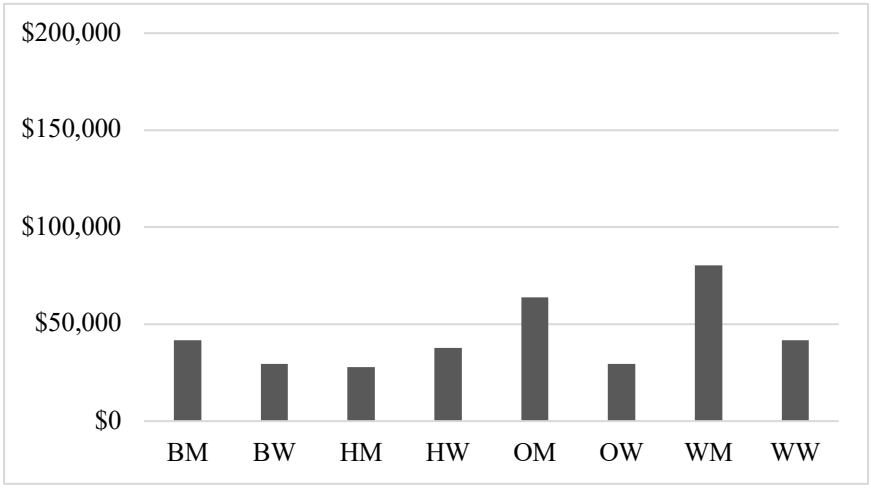
Figure 9 plots the same three variables by defendant race-gender group. Figure 9 demonstrates that Black men and women—who Part II showed are prosecuted for financial crimes at the highest rates—do not commit the most serious financial crimes. Cases involving female defendants also tend to be less severe than those against male defendants. Median loss amounts for female financial crime defendants are lower than for male financial crime defendants in all racial groups except Hispanic defendants, in which loss amounts are roughly equal between male and female defendants. In all racial groups, female financial crime defendants are less likely to have drugs involved in their cases. Finally, financial crime cases against women involve fewer aggravating characteristics.

In all measures, financial crime cases brought against White men appear to be the most serious. They involve by far the largest losses—the median loss amount for financial crime prosecutions of White men is $80,150; for Black women and women who are not White, Hispanic, or Black, the amount is $29,520 and $29,416, respectively. Financial crime cases against White men are also the most likely to involve drugs and the largest average aggravation.

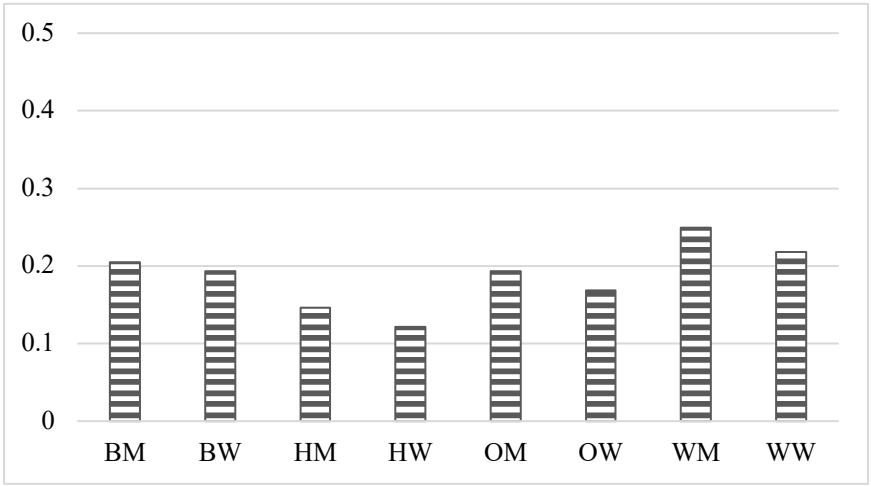
Given that differences in offense conduct do not appear to justify the inequalities documented in Part II, the remaining sections explore alternative explanations for the findings. The data do not allow me to disentangle whether the inequalities documented in this Article are created by intentional discrimination, subconscious bias, are a byproduct of systemic incentives that shape prosecutorial and investigative decisions about which cases to prioritize, or are some combination of all these (or other) reasons. Sections III.B, III.C, and III.D consider many explanations for the findings.

FIGURE 9. Financial Crime Case Characteristics by Race-Gender Group

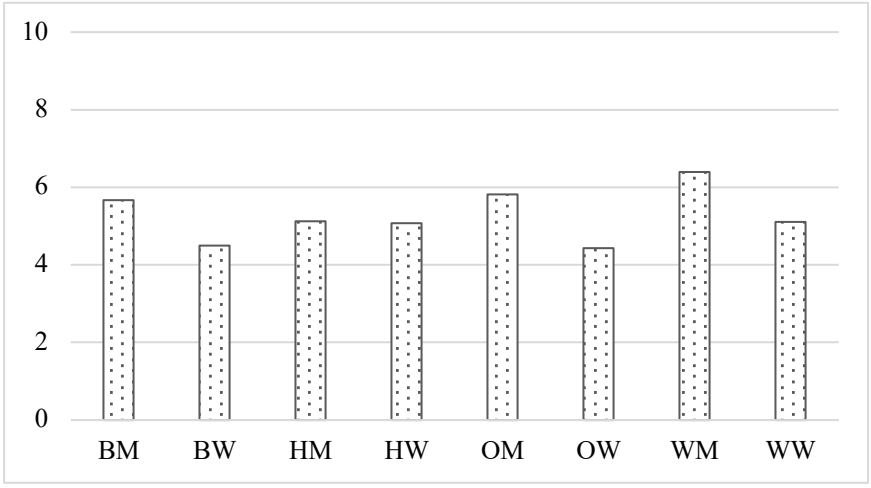
A. Median Loss Amount in Financial Crime Case



B. Share of Financial Crime Cases Involving Drugs



C. Average Aggravation in Financial Crime Cases



Note: Race-gender groups are labeled as listed in Figure 2. Average aggregation is the average difference between defendants' base and final offense levels.

B. SYSTEMIC AND STRUCTURAL EXPLANATIONS

In many areas of law, the government struggles to aggressively prosecute or pursue legal claims against sophisticated lawbreakers. This section focuses on systemic explanations for why federal prosecutors might focus on lower-level financial crime cases. It argues that complicated financial crimes are difficult to detect, hard to investigate, and burdensome to prove. As Jesse Eisinger put it, "Embezzlement is as easy to understand as purse snatching. But securities manipulation is a more abstract concept."[152] The workplace realities that prosecutors and investigators confront could create the inequalities documented in Part II.

The inequalities in financial crime prosecutions might reflect structural realities that have been documented in many other settings. In an article examining how the federal government prosecutes drug crime, for example, Lauren Ouziel lays bare the "disconnect between [federal criminal] law's ambition and fruition."[153] Ouziel shows that in federal drug prosecutions, the substantive criminal law is explicitly designed to target the most serious defendants—those whose crimes involve large quantities of illegal drugs and

152. EISINGER, *supra* note 6, at 59.
153. Ouziel, *supra* note 78, at 1077.

acts of physical violence, and those who have significant prior criminal records.[154] But despite this ambition, the federal government nonetheless prosecutes many defendants who do not fall into these categories.[155] Ouziel argues that the pressure and incentives that federal prosecutors face in their work—among other things—contribute to this ambition/fruition divide.[156]

Examples of the ambition/fruition divide are not limited to the criminal setting. In the context of environmental enforcement, Nathan Atkinson shows that the Environmental Protection Agency ("EPA") imposes fees on corporate pollution that are roughly one-fifth the size necessary to make polluting unprofitable *ex ante*.[157] In another example, ProPublica journalists Paul Kiel and Jesse Eisinger showed a perhaps illogical disparity in the Internal Revenue Service ("IRS") enforcement efforts: taxpayers who receive the Earned Income Tax Credit ("EITC")—mostly low-income wage earners—are audited at higher rates than households with much larger earnings.[158] Along the same lines, a county-level analysis by ProPublica's Paul Kiel and Hannah Fresques found that America's poorest counties are our most audited.[159] Yet recent research shows that despite the lower costs to carry them out, IRS audits of low-income people yield less net revenue than audits of wealthy taxpayers at the top of the income distribution.[160] IRS's choice to focus much of its enforcement activity on EITC filers also contributes to racial inequality in audits.[161]

154. *See id.* at 1079.

155. *See id.*

156. *See id.* at 1110–11 (arguing that because it is difficult for the federal government to monitor prosecutors' "performance" in enforcing federal drug laws, it turns to "proxies" such as arrests and seizures).

157. Nathan Atkinson, *Profiting from Pollution*, 41 YALE J. REGUL. 1, 5–6 (2023); *see also* Roy Shapira & Luigi Zingales, *Is Pollution Value-Maximizing? The Dupont Case* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23866, 2017) (showing that DuPont's toxic pollution—which ultimately led to a roughly one billion-dollar judgment against the company—was a rational, profit-maximizing choice rather than the result of ignorance or poor governance).

158. Paul Kiel & Jesse Eisinger, *Who's More Likely to be Audited: A Person Making $20,000—or $400,000?*, PROPUBLICA (Dec. 12, 2018, 5:00 AM), https://www.propublica.org/article/earned-income-tax-credit-irs-audit-working-poor [https://perma.cc/5CF6-YGWB] (showing that in 2017, EITC recipients were audited at twice the rate of taxpayers with incomes between $200,000 and $500,000).

159. Paul Kiel & Hannah Fresques, *Where in the U.S. Are You Most Likely to Be Audited by the IRS?*, PROPUBLICA (Apr. 1, 2019), https://projects.propublica.org/graphics/eitc-audit [https://perma.cc/DH7Q-ER5A].

160. William C. Boning, Nathaniel Hendren, Ben Sprung-Keyser & Ellen Stuart, *A Welfare Analysis of Tax Audits Across the Income Distribution* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31376, 2023).

161. This is because Black taxpayers are more likely to claim the EITC than non-Black taxpayers, EITC claimants are audited at high rates, *and* because among EITC recipients, Black taxpayers are more likely to be audited than non-Black taxpayers. *See* Hadi Elzayn, Evelyn Smith, Thomas Hertz, Arun Ramesh, Robin Fisher, Daniel E. Ho & Jacob Goldin, *Measuring and Mitigating Racial Disparities in Tax Audits* 3–4 (Stanford Inst. for Econ. Pol'y Rsch., Working Paper, 2023), https://dho.stanford.edu/wp-content/uploads/IRS_Disparities.pdf [https://perma.cc/D8QN-W35Y] (analyzing around 150 million

Like the drug crime and IRS contexts, prosecutors and law enforcement agents working on financial crimes face incentives and constraints that likely lead them to focus their efforts on straightforward, uncomplicated, and winnable prosecutions.[162] Of course, what kinds of cases and defendants an agent or prosecutor thinks are "winnable" requires judgments that will be filtered through and reinforced by the agent or prosecutor's individual biases, as described in Section III.D.

How do prosecutors decide which potential cases are winnable? They likely consider the evidentiary strength of their case, the resources necessary to investigate and prosecute the case, and how a jury is likely to view the case.[163] These assessments are likely shaped by biases, as described in the next section.

All these factors—the strength of the evidence, the resources necessary to bring the case, and how a jury is likely to view the case—militate toward prosecuting low-level cases. As described in Sections I.B and III.C, a financial crime prosecution typically requires a prosecutor to prove beyond a reasonable doubt that the defendant intended to defraud someone. In simplistic cases, such as when an employee uses a company credit card to buy personal items, the evidence of fraud will often be straightforward and easily attainable: typically, the victim (the employer) will have records showing unauthorized purchases and can turn those records over to prosecutors.

In contrast, the task of building a case will be much more difficult in frauds for which there is no victim who can provide evidence of the fraud, such as when a fraud is carried out in a large corporate organization with many diffuse victims. As Miriam Baer describes, "[l]ife within corporate settings is remarkably compartmentalized and siloed. Information and responsibility fractures among multiple units and departments, allowing criminal targets to claim that the left hand did not know what the right hand was doing, or at very least, that an intent to harm or deceive was absent."[164]

tax returns and estimating that Black taxpayers are audited at higher rates than non-Black taxpayers and that this difference is primarily driven by the difference in audit rates among taxpayers who claim the EITC). *See generally* Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 N.Y.U. L. REV. 1 (2022) (arguing that IRS enforcement decisions are vulnerable to racial bias even though the IRS does not ask taxpayers to identify their race or ethnicity when they file tax returns).

162. *See* Stuntz, *supra* note 72, at 535 ("[Unelected line prosecutors] are likely to seek to make their jobs easier, to reduce or limit their workload where possible. That inclination means two things: limiting the number of cases on their dockets, and limiting the cost of the process per case." (citation omitted)).

163. *See* Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019) (presenting ethnographic research showing that federal prosecutors think about how hypothetical jurors will view their cases when making investigative and plea bargaining decisions).

164. BAER, *supra* note 6, at 110.

In such cases, the government will typically need to rely on a whistleblower for evidence and may have a hard time proving that any particular person involved had the requisite intent to defraud. Whistleblowers can be hard to recruit because, although they are occasionally rewarded for bringing wrongdoing to light, more often they are fired and struggle to find a new job in their industry.[165] This is precisely what happened to Alayne Fleischmann, the whistleblower in Case D.[166]

Second, building and bringing complex cases takes a lot of work and resources. It uses up prosecutors' and investigators' time. The more witnesses there are to interview, the more documents there are to review, and the more expertise is required to understand the fraud—all these tasks require a lot of resources. A straightforward case can move forward more quickly and easily.

Relatedly, the resource differences on each side of a criminal case can strain the government's ability to prosecute. Charging a person who will hire a large law firm to represent them in defense will create a different resource dynamic than prosecuting a person who will rely on appointed counsel.[167] These resource differences could easily lead the federal government to disproportionately prosecute indigent defendants.

165. William D. Cohan, *High Risk but Little Reward for Whistle-Blowers*, N.Y. TIMES (Mar. 26, 2015), https://www.nytimes.com/2015/03/27/business/dealbook/high-risk-but-little-reward-for-whistle-blowers.html [https://perma.cc/22RX-N2PG]; *see also* William D. Cohan, *Wall St. Whistle-Blowers, Often Scorned, Get New Support*, N.Y. TIMES (Feb. 11, 2016), https://www.nytimes.com/2016/02/12/business/dealbook/wall-st-whistle-blowers-often-scorned-get-new-support.html [https://perma.cc/ZHR4-XUYS] (describing an advocacy group, Bank Whistleblowers United, "that aims to improve the status of Wall Street whistle-blowers and change the way Wall Street is regulated"); Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. REGUL. 688, 707–09 (2023).

166. *See* Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 269 (2014) (describing likely difficulties in bringing criminal charges against individuals involved in the 2008 financial crisis). *But see* MIRIAM BAER, *supra* note, 6, at 15 ("[W]hite-collar crimes are not always as difficult to prove as some commentators suggest . . . . When the government feels like it, it mobilizes its extensive resources.").

167. Of course, there are many talented attorneys who work as appointed counsel, but they do not have the same level of resources as a large law firm. Some research has found that attorneys who are retained rather than appointed appear to achieve better outcomes for their clients. *See*, *e.g.*, Amanda Agan, Matthew Freedman & Emily Owens, *Is Your Lawyer a Lemon? Incentives and Selection in the Public Provision of Criminal Defense*, 103 REV. ECON. & STAT. 294, 294 (2021) (finding worse outcomes for criminal defendants represented by appointed rather than retained counsel); Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. J. POL'Y REV. 29, 29 (2014). Several studies also show that federal public defenders outperform Criminal Justice Act panel attorneys. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13187, 2007); *see also* Michael A. Roach, *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, 16 AM. L. & ECON. REV. 577, 615 (2014).

C. FORMAL LAW AND POLICY

The substantive laws and rules that define financial crimes and govern how they are prosecuted and sentenced favor sophisticated criminal lawbreakers in many ways. We see examples of this phenomenon in other contexts, too. For example, by far the largest source of theft in the United States is wage theft, which some researchers estimate accounts for more than $15 billion stolen every year.[168] An employer commits wage theft when they do not pay an employee wages to which the employee is legally entitled, such as by paying less than the minimum wage, not paying required overtime wages, or asking employees to work "off the clock" before or after their shifts.[169] But wage theft is almost never prosecuted.[170] The primary way that stolen wages are recovered is through civil actions brought by the U.S. Department of Labor's Wage and Hour Division, state departments of labor, state attorneys general, and civil class actions. In contrast, larceny and auto theft each steal around $5 billion per year and robbery steals around $380 million.[171] Unlike wage theft, these crimes *are* frequently prosecuted.[172]

There are myriad ways that federal criminal law and formal policy similarly benefit sophisticated people who commit higher-value, more complex crimes. Here, I focus on two: the mens rea requirements of fraud statutes, and the way restitution is calculated and prioritized.

1. Mens Rea Elements

As described in Section I.B, most financial crimes contain mens rea elements that require the government to prove the defendant's intent to

168. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year [https://perma.cc/K74Q-7Q92].

169. Ihna Mangundayao, Celine McNicholas, Margaret Poydock & Ali Sait, *More than $3 Billion in Stolen Wages Recovered for Workers Between 2017 and 2020*, ECON. POL'Y INST. (Dec. 22, 2021), https://www.epi.org/publication/wage-theft-2021 [https://perma.cc/R7W4-ZBVY]. For a comprehensive examination of efforts to criminalize wage theft, see generally Levin, *supra* note 111.

170. *See* Chris Opfer, *Prosecutors Treating 'Wage Theft' as a Crime in These States*, BLOOMBERG L. (June 26, 2018, 3:31 AM), https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states [https://perma.cc/4QSZ-RKX8] (noting that "[w]hen a business doesn't pay workers minimum wages or overtime, it usually risks a government investigation or private lawsuit," but that "[p]rosecutors in New York and California are starting to view wage violations as an actual crime more often, as opposed to a matter for civil courts").

171. *Table 23: Offense Analysis, Number and Percent Change, 2018–2019*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, 2019 CRIME IN THE UNITED STATES, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-23 [https://perma.cc/2UTR-ZPPV].

172. According to FBI statistics, police clear around thirty-one percent of robberies, fourteen percent of auto thefts, and eighteen percent of larceny offenses. *Table 25: Percent of Offenses Cleared by Arrest or Exceptional Means, by Population Group, 2019*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, 2019 CRIME IN THE UNITED STATES, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-25 [https://perma.cc/SNG9-GJNQ].

defraud. In a relatively straightforward fraud—such as Cases A, B, and C described in Section I.C—it is easy to see how a jury could view the defendants' conduct and conclude that they intentionally deceived their victims. But in a complex fraud case involving many parties, such as Case D, proving a deceitful intent or scheme on the part of any particular participant could be very difficult for prosecutors.[173] As a result, complicated and sophisticated financial crimes—which Table 1 shows are more likely to be perpetrated by people who are high-income, male, and White—are likely much more difficult to prosecute.

2. Restitution Calculations

The rules around restitution calculations also benefit defendants who commit complex crimes. As described in Section I.B, federal law (like the law in all states) requires courts to order restitution in any case "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss."[174]

One might imagine this means people who commit more complex, higher-value crimes will have to pay more restitution and could therefore be *more* desirable to prosecute from a prosecutor's perspective. But this is not the case because the restitution statute contains two exceptions. First, it does not require restitution in cases in which "the number of identifiable victims is so large as to make restitution impracticable."[175] Second, it does not require restitution in cases in which "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."[176] In other words, financial crimes that are more complex, for which losses are harder to calculate, and for which there are more victims are much less likely to involve restitution. Thus, even if JPMorgan Chase or any of its employees had been convicted of a crime in connection with the financial crisis, they

173. Daniel Richman is more skeptical of claims that proving criminal intent is a significant hurdle to white-collar prosecutions in the context of the financial crisis, noting that mens rea elements "are far from trivial burdens, but prosecutors regularly meet them in any number of mundane white-collar cases." Richman, *supra* note 166; *see, e.g.*, Danielle Kurtzleben, *Too Big to Jail: Why the Government Is Quick to Fine but Slow to Prosecute Big Corporations*, VOX (July 13, 2015, 10:52 AM), https://www.vox.com/2014/11/16/7223367/corporate-prosecution-wall-street [https://perma.cc/N4AM-H57C] (quoting Brandon Garrett as explaining that in the aftermath of the 2008 financial crisis, prosecutors preferred to focus on "crimes that seem tangential to the crisis . . . . where it [was] easier to show that a small number of people had intent . . . versus some of the mortgage fraud, where there [were] sophisticated actors working with each other, where to show intent to defraud [prosecutors would] have to show that there [was] a clearly deceptive scheme that misled someone else").

174. 18 U.S.C. §§ 3663A(a)(1), 3663A(c)(1)(B).

175. *Id.* § 3663A(c)(3)(A).

176. *Id.* § 3663A(c)(3)(B).

would have had a strong argument that the statute did not require them to pay restitution. In contrast, the defendants in Cases B and C were ordered to pay restitution because their crimes were not complex enough to trigger a statutory exception.

3. Restitution Policy

Notwithstanding the statutory exceptions, federal prosecutors and judges tend to be highly committed to ensuring as much restitution as possible for victims of financial crimes. For example, the federal sentencing statute instructs judges to consider "the need to provide restitution to any victims of the offense" when sentencing defendants.[177] The Justice Manual tells prosecutors that when "determining whether it would be appropriate to enter into a plea agreement," they should consider (among other factors) "[t]he interests of the victim, including any effect upon the victim's right to restitution."[178] Similarly, the Manual instructs prosecutors to "take[] into account the need for the defendant to provide restitution to any victims of the offense" when making sentencing recommendations.[179] Assistant Attorney General for the Criminal Division Kenneth A. Polite, Jr. described federal white-collar efforts in a recent speech, telling the audience, "[c]onsidering victims must be at the center of our white-collar cases. . . . Though we cannot always recover every cent, we deploy all tools at our disposal to restrain assets, obtain restitution, and when possible, repatriate assets for victims."[180]

One consequence of prosecutors' and judges' desire to provide restitution to victims of financial crimes is that defendants with more resources can argue (either as a pitch to prosecutors before charging or to a judge at sentencing) that they should not be prosecuted or incarcerated because a criminal case or prison sentence will interrupt their ability to earn income to pay toward restitution. For example, a financial advisor convicted of fraud in the District of Massachusetts made this argument in his sentencing memo, writing:

> If incarcerated, [the defendant] will not be able to contribute to restitution; he will lose his job and have to start all over upon his release. Whereas in his current position, where he has advanced to a management position in a relatively short amount of time, he will be able to contribute immediately toward a restitution award.[181]

177. *Id.* § 3553(a)(7).
178. U.S. Dep't of Just., *supra* note 73, at § 9-27.420.
179. *Id.* at § 9-27.730.
180. Polite, *supra* note 23.
181. Def.'s Sentencing Mem. at 9, United States v. Cody, No. 17-CR-10291 (D. Mass. Mar. 9, 2019); s*ee also, e.g.*, Def.'s Sentencing Mem. at 2, United States v. Luna, No. 19 CR 902-1 (N.D. Ill.

Indeed, federal courts routinely justify low or probation-only sentences for financial crime defendants by stating their desire to allow the defendant to work and provide restitution.[182] In one of the Yale Studies that surveyed federal district court judges about how they sentence white-collar defendants, one judge was asked about his decision not to impose a prison sentence on a person convicted of not reporting large amounts of income. The interviewer asked the judge, "[Y]ou must have considered sending him to a term in prison. What made you decide that that wasn't appropriate in this case?" The judge responded,

> Well, the restitution. There is half a million dollars back in the coffers that we wouldn't have got if I had sent him to prison. He would have served his term, and there would have been no way of getting it, and eventually some day or other he would have gotten out of the country somehow or other and gotten that money. That was it.[183]

A defendant with fewer resources or without stable employment will have a harder time making this argument to a prosecutor, which could explain why wealthy defendants are less likely to be prosecuted for financial crimes.[184]

D. BIAS

As described in Section I.B, federal investigative agencies and DOJ have nearly absolute discretion in deciding which cases to investigate and prosecute. Although individual agents and federal prosecutors might be constrained formally and informally by office policies and norms, there are almost no formal legal constraints on how enforcement agents decide which

Nov. 11, 2020) (noting that the defendant already paid some restitution to the victim, was working full-time in a new job and wanted to continue to repay the victim, and arguing that "paying the victim back is a goal the Court should consider in fashioning a non-custodial sentence" for the defendant).

182. *See* United States v. Menyweather, 447 F.3d 625, 634 (9th Cir. 2006) (affirming a probation-only sentence for a defendant convicted of fraud and observing "that the district court's goal of obtaining restitution for the victims of Defendant's offense . . . is better served by a non-incarcerated and employed defendant"); United States v. Bortnick, No. 03-CR-0414, 2006 U.S. Dist. LEXIS 11744, at *14, *19 (E.D. Pa. Mar. 15, 2006) (imposing a seven-day sentence to a defendant in an $8 million fraud case with a 51–63 month advisory Guidelines range because "[d]efendant owes a substantial amount of restitution, which he will be able to pay more easily if he is not subjected to a lengthy incarceration period"); United States v. Peterson, 363 F.Supp.2d 1060, 1063 (E.D. Wis. 2005) (imposing a one-day sentence so defendant would not lose his job and could pay restitution to the bank he defrauded). *But see* United States v. Mueffelman, 470 F.3d 33, 40 (1st Cir. 2006) (affirming a 27-month sentence despite the defendant's argument that "anything beyond a probationary sentence would impair his ability to provide restitution for victims" and his promise to "earn $120,000–175,000 per year to pay toward restitution, with a friend promising to make up any short fall").

183. Mann et al., *supra* note 51, at 492.

184. Indeed, federal prosecutors often decline or defer prosecution of corporations for this reason. *See supra* notes 85, 109, 110 and accompanying text.

cases to investigate and how prosecutors decide which cases to pursue.[185] Wide discretion often allows decisionmakers to make discriminatory decisions, either consciously or subconsciously.

1. Stereotypes About Dishonesty

Deceit is the central characteristic of financial crime. Social psychologists have documented consistent stereotypes that associate honesty with social class, race, and gender in the United States. For example, literature in psychology finds that participants often view people of low socioeconomic status as lazy, incompetent, and prone to substance abuse, while viewing people of high socioeconomic status as more competent and intelligent.[186]

Stereotypes characterizing women—and, in particular, women of color—as dishonest are pervasive in the United States, which might explain why Black women are overrepresented among financial crime defendants despite being underrepresented in federal prosecutions overall. Women have long been viewed as dishonest in criminal cases,[187] and Marilyn Yarbrough and Crystal Bennett describe "a hierarchy when credibility issues arise in the courts. It is not only a simple hierarchy of men over women, but it is one where White women are found to be more credible than African American women."[188] And as Chan Tov McNamarah explains, "[S]kepticism of Black credibility is part of a larger, historically created space in which those who are deemed rational, reliable, and worthy of belief are White and male."[189]

185. *See supra* note 71 and accompanying text.

186. Federica Durante & Susan T. Fiske, *How Social-Class Stereotypes Maintain Inequality*, 18 CURRENT OP. PSYCH. 43, 43 (2017).

187. *See, e.g.*, Diana L. Payne, Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the* Illinois Rape Myth Acceptance Scale, 33 J. RSCH. PERSONALITY 27 (1999).

188. Marilyn Yarbrough & Crystal Bennett, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. GENDER RACE & JUST. 625, 634 (2000) (citing Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127, 165 (1996)). The rhetoric and law of welfare reform in the 1990s also surfaced and magnified already prevalent gender- and race-based stereotypes about dishonesty. GUSTAFSON, *supra* note 14, at 1 ("[W]hile welfare use has always carried the stigma of poverty, it now also bears the stigma of criminality."); *see also* Julilly Kohler-Hausmann, *Welfare Crises, Penal Solutions, and the Origins of the "Welfare Queen,"* 41 J. URB. HIST. 756, 757 (2015) (arguing that "opponents of welfare programs recruited the penal system to discredit public aid beneficiaries and administration"); Franklin D. Gilliam, Jr., *The "Welfare Queen" Experiment: How Viewers React to Images of African-American Mothers on Welfare*, NIEMAN REPORTS (June 15, 1999), https://niemanreports.org/articles/the-welfare-queen-experiment [https://perma.cc/3EX2-FLW3] (finding that when White subjects viewed a television story about welfare reform, they were more likely to believe that "welfare recipients cheat and defraud the system" when exposed to a segment that depicted a female benefits recipient as Black compared to one that depicted the female benefits recipient as White).

189. Chan Tov McNamarah, *White Caller Crime: Racialized Police Communication and Existing While Black*, 24 MICH. J. RACE & L. 335, 372 (2019) (citing Sheri Lynn Johnson, *The Color of Truth:*

These kinds of prejudices could affect how agents decide which people to investigate and prosecutors decide which cases to bring.

2. In-Group Favoritism

I. Bennett Capers argues, "[T]o understand mass incarceration, we must not only understand overcriminalization and overenforcement in minority communities. We must also understand the role played by under-enforcement, and privilege, in nonminority communities."[190] Consciously or not, prosecutors and agents might be less willing to prosecute people with whom they have more in common, a phenomenon often referred to as "in-group favoritism."

In-group favoritism occurs when a decision-maker gives preferential treatment to those who share a salient trait with the decision-maker, such as by being a member of their gender, racial, ethnic, or religious group.[191] For many years, there was a growing consensus that the majority of discrimination in the United States takes the form of in-group favoritism,[192] although in recent years overt racism and sexism have grown increasingly prevalent.[193]

In-group favoritism is well-documented in the criminal system. In prior work, I showed that federal prosecutors exhibit gender-based in-group favoritism, treating defendants of their own gender relatively more leniently

Race and the Assessment of Credibility, 1 MICH. J. RACE & L. 261 (1996)); *see also* Kurtis Haut, Caleb Wohn, Victor Antony, Aidan Goldfarb, Melissa Welsh, Dillanie Sumanthiran, Ji-ze Jang, Md. Rafayet Ali & Ehsan Hoque, *Could You Become More Credible by Being White? Assessing Impact of Race on Credibility with Deepfakes*, ArXiv, Feb. 16, 2021, at 1, 1–2, https://arxiv.org/pdf/2102.08054.pdf [https://perma.cc/E9BJ-XQUG] (displaying Deepfake still photos and video clips that used the same audio but altered the speaker's race and finding that speaker race had a negligible effect on credibility when presented as a static image but a statistically significant effect when presented as a video (with a White speaker viewed as more credible than a South Asian speaker)).

190. I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 609 (2016).

191. Jim A.C. Everett, Nadira S. Faber & Molly Crockett, *Preferences and Beliefs in Ingroup Favoritism*, FRONTIERS BEHAV. NEUROSCIENCE, Feb. 13, 2015, at 1. In this subsection, I do not mean to rule out that *conscious* class-, gender-, or race-based bias is also a potential cause of the inequalities documented in Part II.

192. *See, e.g.*, Anthony G. Greenwald & Thomas F. Pettigrew, *With Malice Toward None and Charity for Some: Ingroup Favoritism Enables Discrimination*, 69 AM. PSYCH. 669, 669 (2014); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 125 (1998).

193. *See*, *e.g.*, Charles R. Lawrence III, *Implicit Bias in the Age of Trump*, 133 HARV. L. REV. 2304, 2311 (2020) (reviewing JENNIFER L. EBERHARDT, BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO (2019)) (reflecting on the choice to review "a book about hidden bias when the active threat is self-proclaimed racists marching in the streets[] . . . . [and] when the President of the country was holding rallies and building walls to proclaim himself the protector of a white nation"); *see also* Griffin Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes* (Jan. 2019) (working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [https://perma.cc/2J38-N6P6].

than other-gender defendants.[194] New research suggests that firms risking prosecution appear to strategically leverage in-group favoritism to help improve negotiations with federal prosecutors.[195] Other scholars have previously documented in-group favoritism among other actors in criminal legal systems, including judges[196] and police officers.[197] As an important caveat, however, some research finds evidence of a phenomenon called the *black-sheep effect*, in which people punish in-group members more harshly than out-group members for bad behavior.[198]

Perhaps more than in other types of federal cases (most of which involve immigration, drugs, or firearm possession), prosecutors and federal agents might feel affinity for financial crime defendants who work as business professionals due to cultural or social proximity. This hypothesis is not new. Over 40 years ago, one of the Yale Studies described in Section I.B.2 surveyed federal district judges and found sentiment of in-group favoritism when judges were asked about sentencing white-collar defendants. For example, one federal judge described his views on sentencing white-collar defendants to prison this way:

194. Stephanie Holmes Didwania, *Gender Favoritism Among Criminal Prosecutors*, 65 J.L. & ECON. 77, 77 (2022). CarlyWill Sloan has also shown that state-level prosecutors demonstrate race-based favoritism in prosecuting property crimes in New York County. CarlyWill Sloan, *Racial Bias by Prosecutors: Evidence from Random Assignment* (Jan. 10, 2022) (working paper), https://github.com/carlywillsloan/Prosecutors/blob/master/sloan_pros.pdf [https://perma.cc/7AZT-SF99].

195. Brian D. Feinstein, William R. Heaston & Guilherme Siqueira de Carvalho, *In-Group Favoritism as Legal Strategy: Evidence from FCPA Settlements*, 60 AM. BUS. L.J. 5 (2023).

196. *See*, *e.g.*, David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, 41 J. LEGAL STUD. 347, 350 (2012) (finding that African American judges exhibit smaller racial disparities in sentencing than their White counterparts); Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403, 403, 421 (2010) (finding that Arab and Jewish judges in Israel are less likely to detain defendants who share their ethnicity). *But see* Briggs Depew, Ozkan Eren & Naci Mocan, *Judges, Juveniles, and In-Group Bias*, 60 J.L. & ECON. 209, 209 (2017) (finding that judges exhibit "negative in-group bias" toward juvenile defendants of the judge's race); Claire S.H. Lim, Bernardo S. Silveira & James M. Snyder, Jr., *Do Judges' Characteristics Matter? Ethnicity, Gender, and Partisanship in Texas State Trial Courts*, 18 AM. L. & ECON. REV. 302, 305 (2016) (finding that "matches between judges' and defendants' ethnicity, race, and gender . . . have negligible effects" on sentence length).

197. *See*, *e.g.*, Bocar A. Ba, Dean Knox, Jonathan Mummolo & Roman Rivera, *The Role of Officer Race and Gender in Police-Civilian Interactions in Chicago*, 371 SCIENCE 696, 696 (2021) (showing that "Hispanic and Black officers make far fewer stops and arrests and they use force less [often than White officers], especially against Black civilians"); John J. Donohue, III & Steven D. Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367, 367 (2001) (finding that police departments with more minority officers are more likely to arrest White suspects, with little impact on the arrests of non-White suspects); Mark Hoekstra & CarlyWill Sloan, *Does Race Matter for Police Use of Force? Evidence from 911 Calls*, 112 AM. ECON. REV. 827, 827 (2022) (finding that "White officers increase force much more than minority officers when dispatched to more minority neighborhoods").

198. *See* José M. Marques, Vincent Y. Yzerbyt & Jacques-Philippe Leyens, *The "Black Sheep Effect": Extremity of Judgments Towards Ingroup Members as a Function of Group Identification*, 18 EUR. J. SOC. PSYCH. 1 (1988); *see also* Depew et al., *supra* note 196, at 233 (finding in-group disfavoritism on the basis of race in juvenile sentencing).

> I think the first sentence to a prison term for a person who up to now has lived and has surrounded himself with a family, that lives in terms of great respectability and community respect and so on, whether one likes to say this or not I think a term of imprisonment for such a person is probably a harsher, more painful sanction than it is for someone who grows up somewhere where people are always in and out of prison. There may be something racist about saying that, but I am saying what I think is true or perhaps needs to be laid out on the table and faced.[199]

The authors believe the judge's previous comment is the result of increased *empathy* toward wealthy and professional class white-collar defendants.[200] Indeed, in-group favoritism often takes the form of empathy toward in-group members, and, in experimental settings, people are often more likely to feel empathy in observing the pain of an in-group member compared to an out-group member.[201] It is plausible that prosecutors and FBI agents are more empathetic about the harms of federal prosecution when it comes to potential defendants with similar levels of formal education and wealth.

CONCLUSION

This Article has shown that, contrary to popular wisdom, financial crime is frequently prosecuted in the United States. Part II showed that federal financial crimes are prosecuted in ways that replicate inequalities that exist throughout American criminal law. Black men and women are more likely to be prosecuted for financial crimes than any other racial and gender group. Unlike the traditional view of white-collar crime, which posits that it is a form of crime largely perpetuated by economic elites, the findings also show that federal financial crime defendants are likely to have fewer resources than most U.S. adults.

Part III offered many explanations for these findings. It argued that systemic incentives, formal law and policy, and individual biases could all

199. Mann et al., *supra* note 51, at 486–87.

200. *Id.* at 500.

> The [judges'] interview responses repeatedly give evidence of the judges' understanding, indeed sympathy, for the person whose position in society may be very much like their own. In places, the interviews exude the pain that judges feel in seeing the offender uprooted from his family, humiliated before his friends, and exposed to the degradation of imprisonment.

Id.; *see also* Bibas, *supra* note 80 ("[J]udges may prefer to look ex post at the sympathetic, white, educated offender who reminds judges of themselves and seems to pose no danger.").

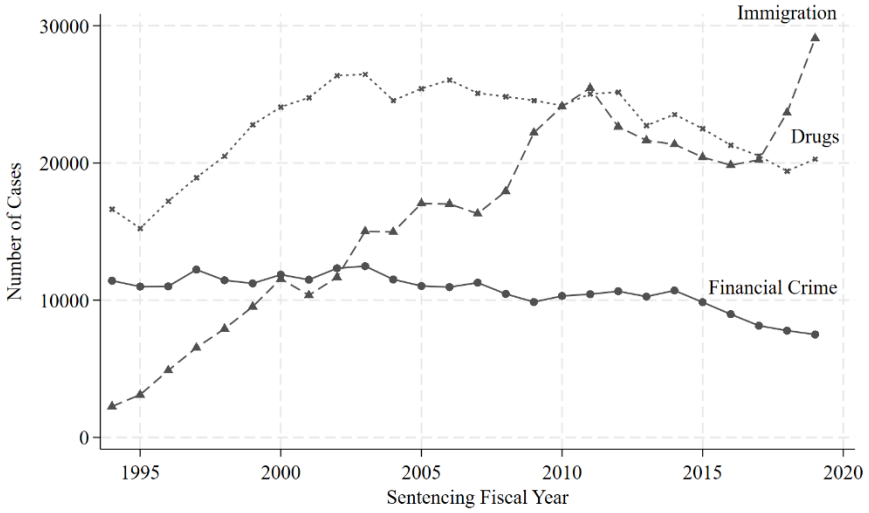
201. *See* Mina Cikara, Emile G. Bruneau & Rebecca R. Saxe, *Us and Them: Intergroup Failures of Empathy*, 20 CURRENT DIRECTIONS IN PSYCH. SCI. 149, 149 (2011); Jennifer N. Gutsell & Michael Inzlicht, *Intergroup Differences in the Sharing of Emotive States: Neural Evidence of an Empathy Gap*, 7 SOC. COGNITION & AFFECTIVE NEUROSCIENCE 596, 596 (2012); Xiaojing Xu, Xiangyu Zuo, Xiaoying Wang & Shihui Han, *Do You Feel My Pain? Racial Group Membership Modulates Empathic Neural Responses*, 29 J. NEUROSCIENCE 8525, 8525 (2009).

drive inequality. It also showed that the overrepresentation of Black and low-income defendants does not appear to be because these defendants commit the most egregious forms of financial crime (in fact, the opposite is true).

The inequalities documented in this paper are concerning because they seem to be overlooked. The intense focus on elite white-collar criminals—by the media, the academy, and the federal government itself—seems to at best not understand the realities of the system in which they are operating. This Article hopes to address this mistake.

APPENDIX

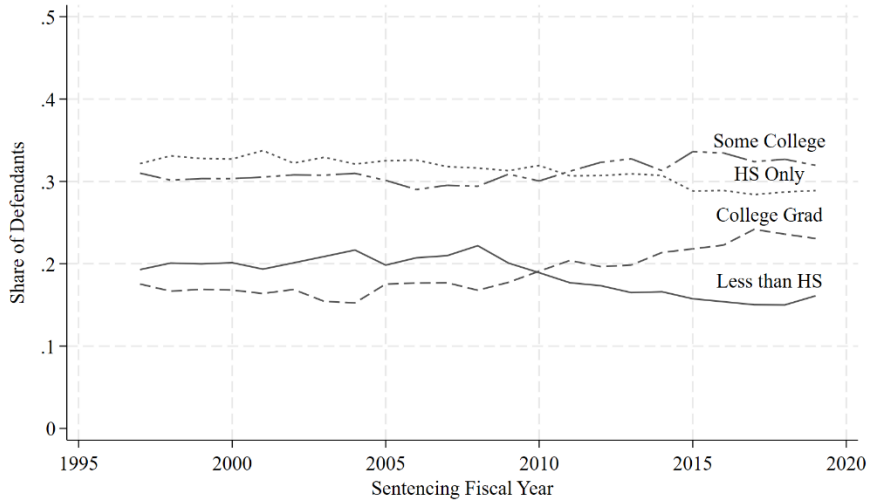
FIGURE A.1. Federal Criminal Cases: Three Most Common Offense Types, 1994–2019



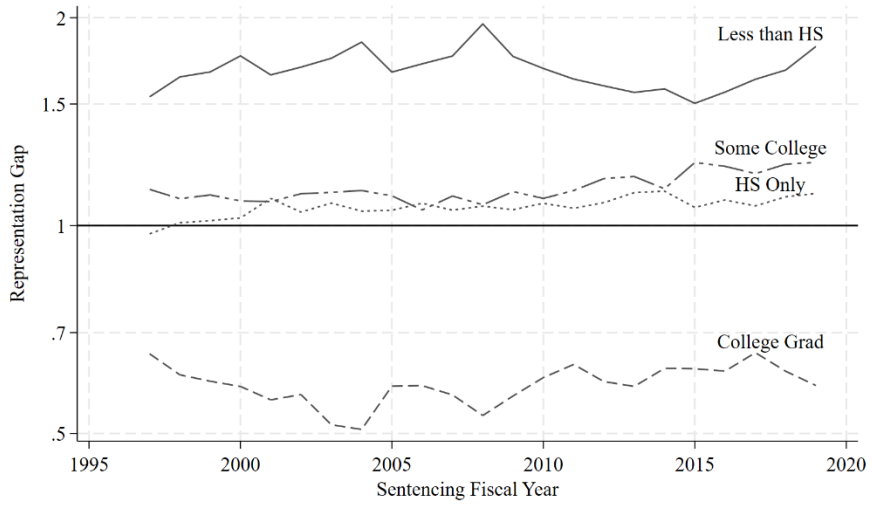
Note: This figure plots the number of cases sentenced each fiscal year between 1994 and 2019 for the three most commonly prosecuted types of federal crime: drug trafficking and possession, immigration, and financial crime.

FIGURE A.2. Educational Attainment in Federal Financial Crime Cases Over Time

A. Educational Attainment in Federal Financial Crime Cases

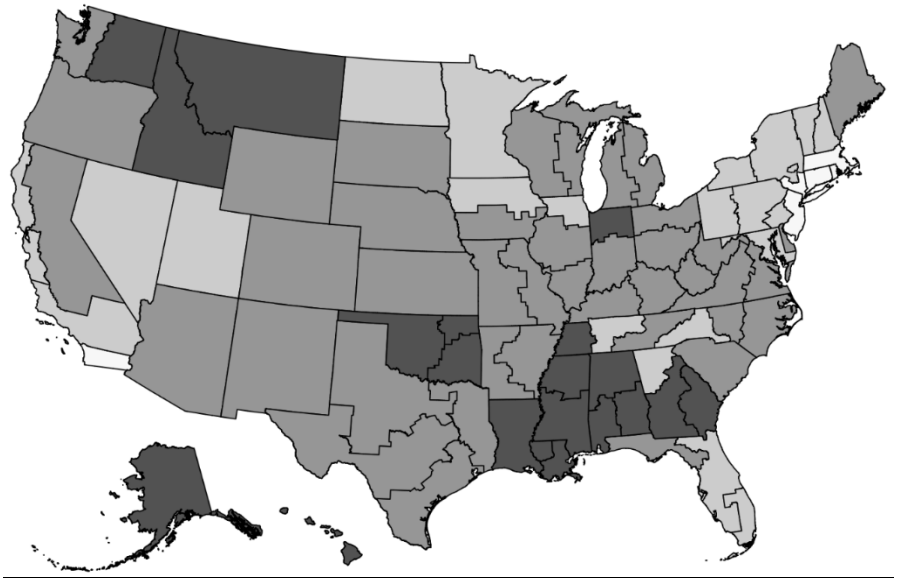


B. Educational Attainment Representation in Federal Financial Crime Cases



Note: For each year, the "Representation Gap" in panel B is computed as the share of financial crime defendants in the educational group divided by the share of the U.S. adult population between the ages of 25 and 54 in that educational group.

FIGURE A.3. Gender Inequality in Financial Crime Prosecutions (All Years)



Note: This figure maps the share of each district's financial crime cases that are prosecuted against women. Each shade represents an equal interval in the distribution. Lightest shading means roughly 15–22% of financial crime defendants in the district are women; second-lightest shading means 22–29% of financial crime defendants are women; second-darkest shading means 29–36% of financial crime defendants are women; and darkest shading means 36–43% of financial crime defendants are women.

TABLE A.1. Victim Coding: Most Prosecuted Financial Crimes

Crime (Short Description)	*Statute*	*Share of Cases*	*Victim*
Conspiracy or Defrauding the United States	18 U.S.C. § 371	0.185	U
Embezzlement or Theft of Public Money	18 U.S.C. § 641	0.079	G
Attempt or Conspiracy to §§ 1341-48	18 U.S.C. § 1349	0.074	P

Bank fraud	18 U.S.C. § 1344	0.073	P
Wire fraud	18 U.S.C. § 1343	0.072	P
Mail fraud	18 U.S.C. § 1341	0.065	P
Tax Fraud	26 U.S.C. § 7201	0.053	G
False Statements to Federal Officials	18 U.S.C. § 1001	0.050	N
Counterfeiting	18 U.S.C. § 472	0.046	P
Credit Card Fraud	18 U.S.C. § 1029	0.046	P
Identity Theft	18 U.S.C. § 1028	0.044	U
Mail Theft	18 U.S.C. § 1708	0.031	G
Accessory to a Crime	18 U.S.C. § 2	0.027	U
Social Security Fraud	42 U.S.C. § 408	0.021	G
Embezzlement by Bank Employee	18 U.S.C. § 656	0.015	P
Healthcare Fraud	18 U.S.C. § 1347	0.015	U
Conspiracy to Defraud the Government	18 U.S.C. § 286	0.013	G

Note: This table reports how victim status was coded for the most prosecuted federal financial crimes. G=government victim; N=no victim; P=private victim; U=unknown victim. The table is restricted to crimes constituting at least one percent of charged cases. Many additional types of financial crimes were also coded, and a complete crosswalk is available from the author by request.

TABLE A.2. Proxies for Poverty in Federal Fraud Prosecutions

	% of Financial Crime Defs (All)	*% of Financial Crime Defs (Citizens)*	*% of U.S. Adult Pop (if applicable)*
Less than HS	18.89	16.78	11.09
High School Only	31.49	31.59	29.43
Some College	31.02	32.24	27.42
College Graduate	18.60	19.40	32.06
Fines Waived	85.89	89.04	-
Retained Counsel	33.73	33.63	-
Observations	276,210	161,552	

Note: Computations are for federal defendants sentenced under the U.S. Sentencing Guidelines for financial crimes in fiscal years 1994–2019. U.S. adult population averages computed over the years 1994–2019.

TABLE A.3. Race-Gender Representation in Federal Fraud Prosecutions

	% of Financial Crime Defs	*% of All Defs*	*% of U.S. Adult Pop*
Black Men	18.62	19.51	5.55
Hispanic Men	10.86	40.37	7.11
Another Race Men	4.69	3.76	2.93
White Men	36.06	22.82	32.89
All Men	70.23	86.47	48.47
Black Women	10.70	3.34	6.41
Hispanic Women	3.85	4.26	6.97
Another Race Women	2.08	0.92	3.29
White Women	13.13	5.01	34.86
All Women	29.77	13.53	51.53
Observations	276,210	1,667,763	

Note: Computations are for federal defendants sentenced under the U.S. Sentencing Guidelines in fiscal years 1994–2019. U.S. adult population averages computed over the years 1994–2019.