REPORT OF THE NEW YORK STATE WHITE COLLAR CRIME TASK FORCE

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REPORT OF THE NEW YORK STATE WHITE COLLAR CRIME TASK FORCE

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I. Executive Summary

A. Introduction

The criminal law in New York State has not undergone a comprehensive revision since the Bartlett Commission drafted the "new" Penal Law in 1965, which was intended to be a "complete reconstruction" of the existing Penal Law dating back to 1909.[1] Derived from the American Law Institute's Model Penal Code, but still very much New York's own product, the Bartlett Commission's Penal Law was regarded as "the most sophisticated legislation yet achieved in the evolution of a twentieth century criminal code."[2]

With respect to white-collar crime, however, the 1965 Penal Law was relatively rudimentary. It contained provisions against Larceny, Forgery, False Written Statements, Bribery, and Fraud Against Creditors, but little else. This is understandable, as neither New York nor federal prosecutors had yet made the concerted and widespread efforts against fraud and corruption that started in the 1960s, but did not gain full steam until much later. Nor did we have the benefit of the experience gained during the last five decades in the history of fraud, corruption, and chicanery of all sorts. And with the 21st century, of course, has come a revolution of commerce and technology, taking us from an industrial world where large corporations were beginning to exploit expensive computer technology, to a technological one where almost everyone – including criminals – has access to once-unimaginable electronic marvels.

In short, although in 1965 there did not seem to be much reason to go further than the basic crimes recommended by the Bartlett Commission, the intervening years have brought an evolution of crimes and factual scenarios not contemplated by the Commission: transnational cybercrime rings, the rise in value of intellectual property and the corresponding activities of thieves, billion-dollar securities fraud schemes, computer hacking, and increasingly-sophisticated corruption schemes at every level of state government. And as our population has aged, so, too, have the number of scams targeting the elderly increased in every corner of the state. These new breeds of white-collar crime have victimized individuals, businesses, and government entities alike. Some of them have made national headlines; most have not. But despite its multifarious forms, all modern white-collar crime in New York shares one feature: it costs our taxpayers dearly.

The Legislature has, of course, amended the Penal Law on a number of occasions since its inception. The last time that it made significant changes with respect to white-collar

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[1] Richard J. Bartlett, *Memorandum of the Commission on Revision of the Penal Law and Criminal Code on the Penal Law in* 39 MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED, at xxxii (1967).

[2] B.J. George, Jr., *A Comparative Analysis of the New Penal Laws of New York and Michigan*, 18 BUFF. L. REV. 233, 233 (1968).

crime was in 1986, as part of Governor Mario Cuomo's Criminal Justice Program.[3] The years since have brought a relative paucity of new or amended laws relating to fraud and corruption, far outpaced by the explosion in both technical innovation and criminal deviousness. The words of former Governor Cuomo are undoubtedly as true today as they were in 1986:

> The incidence of white-collar crime has not abated in the last decade; instead, it has spiraled ever-upward as economic crime has become increasingly profitable and sophisticated. The effects of major economic crime can be devastating: the whole society suffers as crimes against business become crimes against consumers. Greedy, white-collar profiteers will not be stopped until we adopt strong measures to stop them.[4]

This continuing problem led to the creation of the New York State White Collar Crime Task Force in October 2012 by Cyrus R. Vance, Jr., the 2012-13 President of the District Attorneys Association of the State of New York (DAASNY). In an essay published in the *New York Law Journal,* DA Vance observed that although Congress and the United States Sentencing Commission had addressed financial issues on a regular basis for well over a decade, in recent years "the near-silence from New York has been striking."[5] While acknowledging that New York's policymakers had, to be sure, made a few "modifications to a handful of laws," Mr. Vance concluded that "New York State prosecutors are fighting 21st Century crime with 1970s-era tools."[6]

In recognition of "the traditional primary role of District Attorneys in New York law enforcement," the Task Force was asked "to analyze thoroughly the tools available to law enforcement in New York, and make legislative recommendations to strengthen our laws, as needed."[7] For the first time in DAASNY's history, the membership of one of its consultative bodies was not limited to New York State prosecutors, but included private defense attorneys; academics, including a retired Judge of the New York Court of Appeals; a state tax official; and a federal prosecutor. Four of its members, including a co-Chair, were elected District Attorneys; the other co-Chair and several other members were Assistant District Attorneys.[8]

As DA Vance observed in a speech at the New York City Bar Association on May 20, 2013, although the public often thinks about financial crimes on Wall Street when it thinks of white-collar crime, New Yorkers throughout the state are victims or potential victims of a

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[3] *See* discussion *infra* pp. 12-13.
[4] Governor's Approval Memorandum, Bill Jacket, L.1986, c.515.
[5] Cyrus R. Vance, Jr., *What is New York Doing About White-Collar Crime?*, N.Y.L.J., Oct. 24, 2012, at 6.
[6] *Id.*
[7] *Id.*
[8] A complete list of the members, staff, and advisers to the Task Force can be found at the end of this report and in Appendix A.

wide range of scams that do not necessarily "attract the attention of the international financial press."[9] The Task Force would thus be giving due attention to issues that affect the entire panoply of white-collar crime, such as, for example, elder fraud, counterfeit trademarking, tax fraud, and public corruption, to name a few.

B. Organization and Methodology

With those issues in mind, the Task Force split into five committees: Procedural Reforms, Fraud, Cybercrime and Identity Theft, Anti-Corruption, and Tax and Money Laundering. The Fraud Committee included an Elder Fraud Working Group, tasked with examining legal and procedural issues relating to fraud against the elderly, an issue of growing importance to several areas of the state with aging populations of retirees.

Early on, the Task Force settled on three key principles to guide its work. First, we determined not to consider the political viability of ideas that were presented. This would be a "good government" effort that judged each idea on its own merits, and not based on how likely or unlikely it was to garner support in the Legislature.

Second, the Task Force decided to proceed by consensus rather than by majority votes on each issue or sub-issue. Therefore, every recommendation submitted has been made after careful deliberation and, where necessary, compromise for the purpose of achieving consensus. Those ideas that did not achieve consensus – and there were a good number – were discarded.

Finally, we did not examine sentencing in white-collar cases, a topic we acknowledge is of crucial importance to New Yorkers. In 2010, Chief Judge Jonathan Lippman formed the New York State Permanent Commission on Sentencing. Because that body is charged with reviewing New York's sentencing laws, the Task Force strongly believed that it should not duplicate efforts. We understand that the Sentencing Commission is examining New York's indeterminate sentencing scheme for non-violent crimes.

The Task Force met as a body 10 times between October 2012 and July 2013. Each of the five committees and the working group met multiple times on an as-needed basis, as determined by each committee Chair. As described more fully below, the Task Force benefited greatly from guest speakers, experts in various fields, and the diverse experiences of the members and their staffs and colleagues. The Task Force also solicited input from various

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[9] Cyrus R. Vance, Jr., Remarks at the New York City Bar Association's Second Annual White Collar Institute, New York White Collar Crime Policy in 2013: Too Late to Enter the 21st Century? (May 20, 2013), *available at* www.manhattanda.com/da-vance-delivers-keynote-address-new-york-city-bar-associations-2nd-annual-white-collar-crime-insti.

governmental bodies and bar associations, and benefited as well from those who lent their expertise.[10]

In examining its mission, the Task Force made two overarching observations that influenced its conclusions and recommendations: (1) well-drafted statutes that attack fraud, theft, and corruption are generally preferable to narrower laws, which the Task Force characterized as "boutique" laws, aimed only at particular harms in particular industries, and (2) where consistent with fairness and proportionality, the potential punishment for more serious crimes should be greater than that for less serious crimes. We discuss these principles in the following subsections.

1. Boutique Statutes

Early in its work, the Task Force noticed the proliferation of crimes that it came to refer to as boutique laws. These statutes were aimed at narrow slivers of criminal conduct, and had often been heralded by supporters as important tools for prosecutors to use in combating white-collar crime.[11] The key examples are Residential Mortgage Fraud,[12] Health Care Fraud,[13] Life Settlement Fraud,[14] Defrauding the Government,[15] and, to a much lesser extent, Insurance Fraud.[16] A look at the data reveals that far from supplying the answer to the fraud problem, many of these tools are gathering dust.

Health Care Fraud is a case in point.[17] When it was enacted in 2006, one official predicted that the law would "send a clear message to health care providers that the state remains vigilant and will punish fraud against the health care system."[18] The message delivered ended up being more muted: between 2007 and 2011, only 16 defendants were charged with felony-level Health Care Fraud.[19] Although that figure is vanishingly low, it towers in comparison to the number of defendants charged with Life Settlement Fraud since that crime's 2009 enactment: zero.[20] And as for Defrauding the Government, a law that had great promise to protect the public fisc, 41 defendants were charged in the five years between 2007 and

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[10] We were encouraged by a communication from Mylan Denerstein, Counsel to Governor Andrew M. Cuomo, who advised the Task Force that "Governor Cuomo has made reform in this area a priority," and "this is an area that warrants study, new ideas and meaningful action." (on file with the Task Force).

[11] For example, one official opined that the package of health care fraud legislation containing the new criminal penalties would "prove to be one of the best things" the Legislature did during the 2006 session. N.Y. Senate Debate on Senate Bill S8450, June 21, 2006 at 5466.

[12] PENAL LAW §§ 187.00 *et seq*.

[13] PENAL LAW §§ 177.00 *et seq*.

[14] PENAL LAW §§ 176.40 *et seq*.

[15] PENAL LAW §§ 195.20.

[16] PENAL LAW §§ 176.00 *et seq*.

[17] PENAL LAW §§ 177.00 *et seq*.

[18] Bill Jacket, L.2006, c.442.

[19] New York State Division of Criminal Justice Services, SCI and Indictment Database (DCJS Data) (on file with the Task Force).

[20] *Id*. These numbers account for the most recent indictment statistics available, which are through the year 2011.

2011.[21] As a point of comparison, the general anti-fraud law, Scheme to Defraud, was charged 1,348 times as a felony in the same period. A central recommendation of this report, as discussed in Section IV(B), is to greatly strengthen the Scheme to Defraud law.

Another example of a boutique law is Residential Mortgage Fraud, enacted in 2009 in response to the sub-prime mortgage crisis.[22] Although the law eliminates certain obstacles posed by the law of Larceny by false promise,[23] like most of its sister boutique laws, Residential Mortgage Fraud is rarely used. In the three-year period from 2009 through 2011, only 35 defendants – in only four counties – were charged with felony-level Residential Mortgage Fraud.[24] Of those, only two received prison sentences.[25] In the right case, to be sure, the statute can be valuable. But it is very narrow. The Task Force concluded that a better way to eliminate the obstacle to mortgage fraud caused by current law is to enact a gradated version of Scheme to Defraud, as we propose in Section IV(B). Scheme to Defraud has the flexibility of Residential Mortgage Fraud, but it applies beyond this narrow category, to any kind of fraud.

We note that at least some boutique fraud laws have enjoyed some success. Insurance Fraud, enacted in 1981 as "an indication by the Legislature that the State will no longer tolerate crime in the insurance field," is an example.[26] The gravamen of the crime is the submission of a false claim to an insurance carrier, and it "is complete upon an attempted taking."[27] During the five-year period between 2007 and 2011, a total of 749 defendants were charged with felony Insurance Fraud, but only fifteen of those were charged with the most serious level, Insurance Fraud in the First Degree.[28]

Having studied these laws carefully, the Task Force is of the view that, although the boutique laws may offer some marginal added benefit to our core anti-fraud laws, a better approach would be to strengthen the basic statutes – Larceny and Scheme to Defraud – rather than enact laws piecemeal to address particular categories of fraud more seriously. If, for example, a future malefactor were found to have defrauded a thousand immigrants of $10,000 each, the answer should not be to create a new law called Immigration Fraud. The better course of action would be, long before such crime occurs, to ensure that the existing crime of Scheme to Defraud properly measures culpability by, among other things, the number of victims targeted by the scheme. We propose exactly that in Section IV(B).

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[21] *Id.*
[22] PENAL LAW §§ 187.00 *et seq.*
[23] *See* Section IV(B), *infra.*
[24] DCJS Data.
[25] *Id.*
[26] Memorandum filed with Assembly Bill No. 8737-A, Bill Jacket, L.1981, c.720.
[27] *Id.*
[28] The data also suggest that the state courts have not necessarily heeded the Legislature's call to take the crime of Insurance Fraud seriously. The vast majority of all defendants sentenced for Insurance Fraud (71%) are sentenced to conditional discharge or probation. DCJS Data.

2. Gradation of Crimes According to Level of Harm

In our discussions around the state, a common theme resounded: the key laws against fraud and theft in New York are not always calibrated to a defendant's culpability. Put another way, our laws often treat serious crime no more seriously than relatively minor crime. In the words of former Attorney General Robert Abrams in 1986: "Sophisticated criminals, who frequently weigh the risks they face before commencing their criminal enterprise, are rarely deterred by the minimal danger, under current law, that substantial penalties might be imposed upon them if they are caught."[29]

The Task Force did not believe that the answer to the white-collar crime problem is necessarily to increase penalties.[30] But we found a number of examples of crimes where both serious and less-serious violations were treated the same or similarly. An example is the crime of Identity Theft, meant to be the prosecutor's sharpest tool in the fight against the fastest-growing crime in the United States. Under our current Penal Law, Identity Theft in the First Degree is a Class D felony, and applies whether the defendant obtained $2,001 or $2 million, and whether he assumed the identities of two or two thousand victims. As a consequence, what should be a sharp tool is blunted substantially. The same is true of Scheme to Defraud, which is limited to a Class E felony no matter the size and scope of the fraud, and Computer Tampering, which is limited to a Class C felony no matter how great the harm caused. As explored throughout this report, these limitations lead to anomalous, unjust, and unjustifiable results.

As Blackstone put it, "a scale of crimes should be formed, with a corresponding scale of punishments."[31] The law provides a mechanism to do so: gradation. Larceny is an excellent example. The different degrees of Larceny, from Petit Larceny, a Class A misdemeanor, to Grand Larceny in the First Degree, a Class B felony, are triggered by monetary thresholds determined by the amount of property the defendant wrongfully obtained. Those thresholds – substantially upgraded in 1986 as part of the last major legislative effort against white-collar crime in New York – measure the defendant's relative culpability. Plainly, the thief who steals $100 million deserves more severe punishment than the one who steals $1. Gradation thus reflects "the fundamental principle that the criminal law should provide a graduated set of punishments to reflect graduated levels of blameworthiness."[32]

That principle guided the Task Force's work. In this report, we propose new gradation levels for the following crimes: Scheme to Defraud, Trademark Counterfeiting, Identity Theft, Computer Tampering, Bribery, and Defrauding the Government. Some of these crimes are already gradated, but, in our view, do not adequately measure a defendant's cul-

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[29] Memorandum to the Governor, Bill Jacket, L.1986, c.515.

[30] The standard penalties for non-violent felonies under current law are set forth in Appendix I.

[31] 4 WILLIAM BLACKSTONE, COMMENTARIES *18.

[32] James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396, 1403 (2002); *see also* Frank O. Bowman, III, *The 2001 Federal Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 IND. L. REV. 5, 27 (2001) ("No one disputes the notion that stealing more is worse than stealing less").

pability. To take the Identity Theft example, we propose that it be gradated up to a Class B felony, and that thresholds be set by the amount of property wrongfully obtained *or* the number of identities assumed by the defendant. For other crimes, gradation represents a new concept; however, borrowing from existing law, we suggest that culpability be measured (and thresholds be set) according to the amount of property wrongfully obtained or the number of victims harmed.

The details of our recommendations are set forth in the body of this report. A table delineating existing and proposed gradations is included in Appendix I.

C. Summary of Recommendations

The Task Force's recommendations were suggested by each of the five committees and one working group. Those that achieved consensus with the full Task Force were adopted, without dissent, and are summarized in this subsection. They are discussed in greater detail in Sections III through VIII of this report.

1. Procedural Reforms

- Reform grand jury procedure to lower the cost to taxpayers of grand jury presentations, reduce lost productivity of employees of private businesses, and reduce wear and tear on civilian witnesses.

  - Expand the Criminal Procedure Law to allow all businesses to authenticate by certification any records they keep and maintain in the ordinary course of business.

  - Allow witnesses located out of state or more than 100 miles from the grand jury to testify via videoconference under a secure connection.

  - Allow lack of consent for Identity Theft prosecutions to be established by sworn certification, as it currently is in Larceny, Forgery, and Criminal Possession of Stolen Property cases.

- Amend the Criminal Procedure Law to authorize a grant of use immunity rather than transactional immunity, thereby conforming New York law to federal law and the law of most other states and allowing for fuller use of the grand jury to investigate complex crime.

- Amend, but do not eliminate, the accomplice corroboration requirement of the Criminal Procedure Law to allow cross-corroboration by a separate accomplice.

2. Fraud

- Gradate the crime of Scheme to Defraud to punish more serious fraud schemes more seriously, based on the amount of money wrongfully obtained or the number of victims the defendant intended to defraud. The gradations would range from the existing Class E felony for schemes that obtain more than $1,000 or intend to defraud 10 or more victims, up to a new Class B felony for schemes that obtain more than $1 million or intend to defraud 1,000 or more victims.

- Eliminate the requirement that a Scheme to Defraud must target more than one victim in all instances.

- Expand the crime of Larceny to cover theft of personal identifying information, computer data, computer programs, and services.

- Provide state jurisdiction and county venue over cases involving Larceny of personal identifying information, computer data and computer programs where the victim is located in the state or the county.

- Gradate Trademark Counterfeiting based on the number of counterfeit goods possessed, maintaining the current cap of a Class C felony.

3. Cybercrime and Identity Theft

- Strengthen the laws against computer intrusions:

  - Expand the definition of "computer material" to allow for the prosecution of Computer Trespass cases that do not necessarily involve an "advantage over competitors."

  - Upgrade Computer Tampering and create a first-degree crime (Class B felony).

- Gradate the existing crime of Identity Theft, up to a Class B felony, based on dollar threshold amounts or the number of victims.

- Upgrade the crime of Unlawful Possession of a Skimmer Device.

- Amend the crime of Enterprise Corruption under the Organized Crime Control Act to add Identity Theft as a predicate crime.

4. Elder Fraud

- Amend the Criminal Procedure Law to allow for the conditional examination of victims who are 75 years old or older.

- Incorporate the holding of *People v. Camiola*[33] into the definition of Larceny so that purported consent by a victim with diminished mental capacity is not a defense to Larceny.

- Amend the Criminal Procedure Law to permit a caregiver to accompany a vulnerable victim into the grand jury. The definition of "caregiver" would include both informal caregivers and professional social workers.

- Allow prosecutors to obtain medical records of mentally impaired victims of financial exploitation, without requiring a waiver from those very victims.

- Amend the crime of Larceny by false promise to make clear that partial performance, standing alone, does not defeat a prosecution that is otherwise legally sufficient. This aims to clarify the rulings of some courts, in reliance on *People v. Churchill*.[34]

5. Anti-Corruption

- Strengthen the laws against bribery:

  - Replace the "agreement or understanding" requirement in New York's Bribery law with a requirement of an "intent to influence" the public servant, legislatively overruling *People v. Bac Tran*.[35] Make clear that where the alleged bribe is a campaign contribution, an "agreement or understanding" would still be required.

  - Remove the $250 economic harm requirement from the felony Commercial Bribery statutes.[36] The economic harm element has made felony-level prosecution all but impossible, and allowed private corruption schemes to go unpunished.

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[33] 225 A.D.2d 380 (1st Dept. 1996).
[34] 47 N.Y.2d 151 (1979).
[35] 80 N.Y.2d 170 (1992).
[36] *See* People v. Wolf, 98 N.Y.2d 105, 110 (2002).

- Enact a new crime of Undisclosed Self-Dealing by public servants. This would deal with courses of conduct where public servants have secret interests in government business above a certain threshold.

- Upgrade the existing crime of Official Misconduct, currently only a misdemeanor, to create two new crimes of Official Misconduct in the Second and First degrees (Class E and D felonies, respectively).

- Enact a sentencing enhancement for Abuse of Public Trust, to increase sentence ranges by one crime level in cases where public servants use their position to commit crimes that are not otherwise defined as corruption crimes.

6. Tax and Money Laundering

- Enact a law, based on the existing federal statute, that criminalizes structuring of cash transactions to avoid a reporting requirement.

- Enact a state statute analogous to 18 U.S.C. § 1957, which criminalizes the knowing spending and depositing of criminal proceeds, with an express carve-out for bona fide attorneys' fees.

- Amend the Tax Law to permit aggregation of tax loss across multiple years in prosecutions for Criminal Tax Fraud.

- Provide access to tax returns in non-tax cases with a showing of necessity and court approval.

- Amend "particular effect" jurisdiction to allow for prosecution in any county of New York City of schemes to defeat City taxes, and in Albany County for schemes to defeat state taxes.

- Amend the crime of Defrauding the Government to cover schemes that defraud government agencies of government revenue. Gradate the statute to treat more serious schemes more seriously.

II. Historical Background

In the years since the 1965 enactment of the Penal Law, the Legislature has amended the Penal Law and other titles several times to combat white-collar crime. These revisions, however, have been largely *ad hoc*: some were made in response to the particularized facts of a single case; others in an incomplete effort to keep pace with federal criminal law. No systematic review has been undertaken. As a consequence, in the white-collar context, the Bartlett Commission's simplified, modern Penal Law is in some ways, like the law it replaced, "[e]ncrusted with sporadic amendments [and] burdened with archaic provisions."[37]

The most notable addition to the 1965 tools was the new crime of Scheme to Defraud, added to the Penal Law in 1976.[38] Modeled to an extent on the federal mail fraud statute,[39] Scheme to Defraud targeted consumer fraud schemes in which numerous victims were induced to pay for goods and services that were promised but never delivered. At that time, the threshold for felony Larceny was $250 and, as now, different victims' losses could not be aggregated. Consequently, a defendant who stole less than $250 from each of his victims faced only misdemeanor Petit Larceny charges. Additionally, a prosecution for Larceny by false promise required the jury to exclude, "to a moral certainty, any hypothesis except that of the defendant's intention or belief" that he would not perform on his promise.[40] Thus even if Petit Larceny charges were brought, the requisite jury instruction made it difficult to obtain a conviction against a defendant whose consumer fraud scheme entailed false promises.

The 1976 Scheme to Defraud provision addressed these issues. Like the federal mail fraud statute,[41] it reached false promises as to future events, but without the onerous "moral certainty" requirement of Larceny by false promise.[42] Scheme to Defraud in the First Degree, an E felony, required a systematic, ongoing course of conduct, ten or more intended victims, and the obtaining of property as a result of the scheme. Scheme to Defraud in the Second Degree, an A misdemeanor, contained the same elements as the felony but required more than one intended victim (rather than 10).

In part because of its flexibility and its ability to tackle the wide variety of frauds that the human imagination can conjure, the mail fraud statute has been described by one commentator as the federal prosecutor's "Stradivarius, our Colt .45, our Louisville Slugger, our Cuisinart – our true love."[43] For the assistant district attorney, Scheme to Defraud was no such thing. Unlike the federal mail fraud statute, it allowed a defendant whose scheme defrauded a single victim – a city agency, for example – to elude punishment altogether. And

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[37] Note, *The Proposed Penal Law of New York*, 64 COLUM. L. REV. 1469, 1469 (1964).
[38] L.1976, c.384, § 1; PENAL LAW §§ 190.60, 190.65.
[39] People v. First Meridian Planning Corp., 86 N.Y.2d 608, 616 (1995).
[40] PENAL LAW § 155.05(2)(d).
[41] 18 U.S.C. § 1341.
[42] PENAL LAW § 155.05(2)(d).
[43] Jed S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980).

the punishment it did mete out was weak: whether a defendant obtained $50 or $50 million, he faced punishment only for a Class E felony. Unless a defendant had a prior felony conviction – a rarity in white-collar cases – a jail sentence was optional, and rarely imposed. Finally, in contrast with the federal statute, Scheme to Defraud required that the fraud defendant be successful: he must have obtained property from at least one victim. Anything shy of that would be merely an attempt, a misdemeanor.[44]

After enacting Scheme to Defraud, the Legislature sought to make the law more useful against certain types of securities fraud. For example, the need for a systematic, ongoing course of conduct and ten or more intended victims precluded its use against limited securities frauds that did not involve large markets. The Legislature, accordingly, added two E felonies for intentional securities fraud to the Martin Act in 1982.[45] One targeted ongoing securities fraud schemes; the other, individual acts.[46] Neither was gradated above an E felony.

The Legislature subsequently expanded the scope of Scheme to Defraud, but failed to ameliorate the statute's shortcomings. In 1986, as part of Governor Mario Cuomo's Criminal Justice Program, a second Class E felony-level Scheme to Defraud provision was added.[47] This one required proof of a systematic, ongoing course of conduct, more than one intended victim, and the obtaining of over $1,000. To reach the $1,000 threshold, the losses of individual victims could be aggregated.[48]

That same year, for the first time since the Penal Law's adoption in 1965, the Legislature adjusted the gradation for Larceny. The Bartlett Commission had suggested three levels of felony Grand Larceny: Third Degree, a Class E felony, for thefts of over $250; Second Degree, a D felony, for thefts of over $1,000, and First Degree, a C felony, for thefts of any dollar amount committed by extortion under certain circumstances. Two decades of legislative silence rendered this gradation both too harsh and too lenient. At the low end, police resources were wasted on thefts between $250 and $1,000, which were routinely downgraded to misdemeanors. At the high end, a defendant who stole millions of dollars faced prosecution for a Class D felony, with no mandatory incarceration – hardly an effective deterrent for such a serious crime. The result was that in cases involving complex fraud schemes, prosecutors had little leverage to induce cooperation, or even guilty pleas.

The 1986 amendments dealt with both ends of the spectrum. The Legislature created four levels of Grand Larceny, which remain in existence today: Fourth Degree, a Class E felony, for thefts over $1,000; Third Degree, a D felony, for thefts over $3,000; Second Degree, a C felony, for thefts over $50,000 (or certain types of extortion); and First Degree, a B

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[44] PENAL LAW §§ 190.60, 190.65.

[45] Committee Bill Memorandum, Bill Jacket, L.1982 c.146 (explaining that the amendment to the General Business Law "would provide for a higher penalty, that of a class E felony, for those who intentionally engage in . . . fraudulent conduct in securities transactions.").

[46] GEN. BUS. LAW §§ 352-c(5), (6).

[47] L.1986, c.515, § 10.

[48] PENAL LAW § 190.65(1)(b).

felony, for thefts over $1 million.[49] (The Legislature simultaneously adjusted the gradation for Criminal Possession of Stolen Property.[50]) As a result of these changes, a conviction for stealing more than $1 million carried a mandatory prison sentence of at least one to three years, and those who conspired to commit either Grand Larceny in the First or Second Degrees faced felony-level conspiracy charges.

The 1986 Cuomo Criminal Justice Program also amended the anti-corruption provisions of the Penal Law. First, it created two new Class C felonies for Bribery and Bribe-Receiving where the benefit conferred (or received) was greater than $10,000.[51] Second, it foreclosed the defense of second-hand bribery,[52] which arose in cases where a public servant without authority to act in the matter at hand took a bribe with the understanding that he or she would influence a different public servant, who did have that authority. Lastly, it created the crime of Defrauding the Government, a Class E felony.[53] Similar to Scheme to Defraud, the basic elements of Defrauding the Government were a systematic, ongoing course of conduct; the intent to defraud the government; and the obtaining of over $1,000 from the government. Notably, however, only public servants and their accomplices could be charged with Defrauding the Government, thereby confining the new law to insider schemes and, consequently, limiting its utility.

Also in 1986, the Legislature created a new set of offenses targeting criminal acts related to computers, including Unauthorized Use of a Computer and Computer Tampering.[54] The penalties for these new offenses ranged from a Class A misdemeanor to a Class E felony.[55] Additionally, the Penal Law and the CPL were revised to cover conduct related to computers, both by revising existing statutes and creating other new ones.[56] For example, the definition of "property" in section 155.00 of the Penal Law was amended to include "computer data" and "computer program[s]."[57]

Two years later, in 1988, New York enacted its first money laundering statute. The statute required the "exchange" of a "monetary instrument" for another monetary instrument or "equivalent property" – in other words, a completed cleansing of illegal monies.[58] Not surprising, given its constrained definition, the statute's ineffectual 12-year existence

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[49] L.1986, c.515; PENAL LAW §§ 155.30, 155.35, 155.40, 155.42.
[50] L.1986, c.515.
[51] L.1986, c.833, § 3, eff. Nov. 1, 1986; PENAL LAW §§ 200.03, 200.11.
[52] L.1986, c.834, § 1; PENAL LAW § 200.15(2).
[53] L.1986, c.833, § 1; PENAL LAW § 195.20.
[54] L.1986, c.514, § 1; PENAL LAW §§ 156.00, 156.05, 156.10, 156.20, 156.25, 156.30, 156.35, 156.50.
[55] *Id.*
[56] L.1986, c.514, §§ 5-9; PENAL LAW §§ 155.00(1), 155.00(8), 165.15(10), 170.00(1), 175.00(2), 175.00(3); CPL §§ 20.60(3), 240.20(j), 250.30.
[57] L.1986, c.514, § 2; PENAL LAW § 155.00. The definitions of "computer data" and "computer program" are located at PENAL LAW §§ 156.00(2), 156.00(3).
[58] L.1988, c.280, § 1.

produced only two reported decisions: one reduced the money laundering charge to an attempt; the other dismissed it.[59]

In 2000, New York adopted a new money laundering statute. This one had teeth. Patterned on the federal money laundering statute,[60] it targeted both concealment and transport money laundering without the cumbersome requirement of an "exchange."[61] With respect to concealment money laundering, the statute defined "financial transaction" and "financial institution" broadly, capturing the movement of money through 25 different types of entities ranging from banks to pawnbrokers to casinos.[62] The statute also deployed potent investigatory tools against money laundering by including a sting provision for undercover operations and allowing the offense to be used as a basis for court-authorized electronic eavesdropping.[63] Finally, new penalties provided meaningful deterrence: Money Laundering in the First Degree is a Class B felony. Still, the new statute did not address two crimes often committed with illicit proceeds, both of which are punishable under federal law but are currently perfectly legal in New York: structuring (conducting cash transactions with the intent to evade currency reporting requirements); and spending or depositing tainted money.[64]

In 2002, the Legislature addressed the growing problem of identity theft by creating two new crimes: Identity Theft and the Unlawful Possession of Personal Identification Information. Identity Theft ranged from Third Degree, a Class A misdemeanor, to First Degree, a Class D felony,[65] with the degree driven by the amount of proceeds obtained by the defendant, the loss suffered by the victim, or the defendant's previous conviction for certain enumerated crimes.[66] Unlawful Possession of Personal Identification Information likewise had three degrees ranging from an A misdemeanor to a D felony, the degree determined by the number of items of "personal identifying information" possessed or the defendant's previous conviction for certain enumerated crimes.[67] Both crimes benefited from an expanded venue provision that permitted prosecution in the county where the crime occurred (even if the defendant never set foot in that county) or the county where the victim resided.[68]

2008 marked two changes in the law: the creation of a third type of felony Scheme to Defraud, and the rewriting of the Tax Law's criminal provisions.

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[59] People v. Capparelli, 158 Misc.2d 996, 1009-12 (Sup. Ct. N.Y. Co. 1993); People v. Keller, 176 Misc.2d 466, 470-471 (Sup. Ct. N.Y. Co. 1998).
[60] 18 U.S.C. 1956.
[61] L.2000, c.489, § 3, eff. Nov. 1, 2000; PENAL LAW §§ 470.00 *et seq.*
[62] PENAL LAW §§ 470.00(6), (7).
[63] L.2000, c.489, § 5, eff. Nov. 1, 2000; PENAL LAW §§ 470.05(3), 470.10(3), 470.15(3), 470.20(3); CPL § 700.05(8)(o).
[64] 31 U.S.C. § 5324; 18 U.S.C. § 1957.
[65] PENAL LAW §§ 190.78, 190.79 190.80.
[66] PENAL LAW §§ 190.79 190.80.
[67] PENAL LAW §§ 190.81, 190.82, 190.83.
[68] CPL § 20.40(4)(l).

Since its amendment in 2002, Scheme to Defraud in the First Degree had covered two types of schemes: those with ten or more intended victims where the defendant obtained property of any dollar amount, and those with more than one intended victim where the defendant obtained over $1,000. The 2008 amendment created a new Class E felony for schemes with more than one intended victim where more than one such person was a "vulnerable elderly person" and the defendant obtains property.[69] "Vulnerable elderly person" was defined as someone 60 years or older who, as a result of a physical, mental or emotional dysfunction, could no longer care for himself or herself.[70] The purpose of the bill – to deter those who would prey on weak and helpless elderly people – was noble. Its language, however, was ambiguous. Must property be obtained from a vulnerable elderly person, or is it enough that a vulnerable elderly person was one target of the scheme? Must the victim identified at trial (a requirement of any Scheme to Defraud) be the vulnerable elderly person? No reported opinion has answered these questions.

The 2008 changes to the Tax Law were significant. The 1985 incarnation contained a separate crime for each of the thirteen types of taxes administered by New York State. Most of those crimes were punishable only as misdemeanors. Because it lacked any gradation based upon lost revenues, the law failed to distinguish between a taxpayer who cheated the state of millions and one who misrepresented a few hundred dollars' worth of deductions.

The 2008 amendments streamlined the statute and eliminated its inequities. They created a new offense – Criminal Tax Fraud – committed when a defendant willfully engaged in one of eight "tax fraud acts," including failing to file a return, making a false filing, or failing to remit taxes collected on behalf of the state.[71] Criminal Tax Fraud was made punishable in its basic form as a Class A misdemeanor.[72] Where the defendant acted with the intent to evade any tax, the crime became a felony, the level of which was based upon monetary thresholds determined by the revenues lost by the state in a single year. Criminal Tax Fraud in the Fourth Degree, a Class E felony, applied where the state was deprived of more than $3,000; Criminal Tax Fraud in the Third Degree, a D felony, applied where the state was deprived of more than $10,000; Criminal Tax Fraud in the Second Degree, a C felony, applied where the state was deprived of more than $50,000; and Criminal Tax Fraud in the First Degree, a B felony, where it was deprived of more than $1 million.[73]

While a great improvement over the old law, the new Tax Fraud law was marred by a limitation not found in federal tax law: the tax loss could not be aggregated beyond a single year.[74] Additionally, only losses suffered by the state government, not any local government entity, were counted. As a consequence, the current punishment for multi-year tax fraud

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[69] L.2008, c.291, § 1, eff. Sept. 19, 2008; PENAL LAW § 190.65(1)(c).
[70] PENAL LAW § 260.31.
[71] L.2009, c.57, pt. V-1, subpt. I, § 15, eff. Apr. 7, 2009; TAX LAW § 1801.
[72] L.2009, c.57, pt. V-1, subpt. I, § 16, eff. Apr. 7, 2009; TAX LAW § 1802.
[73] TAX LAW §§ 1803, 1804, 1805, 1806.
[74] TAX LAW § 1807; U.S. SENTENCING GUIDELINES MANUAL § 2T1.1 (2012).

schemes, or those that target multiple levels of government, does not reflect the seriousness of the crime.

In 2010, the Legislature responded to the prosecution of former State Senate Majority Leader Joseph Bruno by expanding the crime of Defrauding the Government to include schemes intended to defraud the state of resources for non-governmental purposes.[75] The following year, the New York State Bar Association's Task Force on Government Ethics recommended the adoption of statutes criminalizing unlawful gratuities to, and self-dealing by, public servants. That Task Force also suggested that the intent element of bribery be modified to require only an intent to influence, rather than the "agreement or understanding" required under current law. Although the Legislature enacted an ethics reform package based in part on this report in 2011, penal legislation was not included in the package.[76]

The recitation above is not meant to be exhaustive. It does not include many smaller measures enacted over the past 50 years that also relate in some way to white-collar crime. But the history of legislative activity since the Bartlett Commission provides an important backdrop to the recommendations we make below. The Task Force aims to build on these legislative efforts in an attempt to make modern fraud and corruption enforcement in New York more effective.

[75] L.2010, c.1, § 2, eff. Feb. 12, 2010; PENAL LAW § 195.20(a)(ii).
[76] Public Integrity Reform Act of 2011, 2011 N.Y. Sess. Laws 5679.

III. Procedural Reforms

The rules applicable to the New York grand jury system, particularly evidentiary rules, were designed primarily with complainant-based crimes in mind. In the overwhelming majority of cases, these consist of relatively simple fact patterns. If a woman is robbed at knifepoint, the presentation will generally consist of her retelling of the events, and a police officer testifying about the arrest and linking the victim's identification to the person arrested. In a narcotics buy-and-bust, an undercover officer will testify about buying drugs from an individual, a different officer will speak to the arrest of the defendant, and a laboratory report confirms the nature of the substance purchased. Even murder cases are often presented to the grand jury based on eyewitness testimony, admissions to the police or others, or a combination of those.[77]

With respect to these types of crimes, a system, like ours, which applies the rules of evidence to the grand jury (with limited exceptions), is well-grounded in common sense and fairness.[78] Such cases turn on subtle aspects of the witness's testimony: ability to perceive, bias, and motive to fabricate, as well as many other factors. So, too, where probable cause turns on the testimony and credibility of police officers, it is not unreasonable to ask that the grand jury evaluate that testimony in advance of a formal charge. If the statements of these types of witnesses were presented purely through the testimony of an investigating detective, the grand jury would lose an important factor by which to make its decision.[79]

White-collar cases are invariably different. The cases typically do not turn on the identity of the defendant as the perpetrator of the crime, as there is rarely a question that the defendant engaged in the business transaction at issue or solicited a particular payment. Rather, the intent of the defendant is key in almost all cases. For that reason, fraud and corruption prosecutors generally rely on various types of circumstantial evidence to establish the crime. These include business records of companies, bank and brokerage records, audio recordings, telephone calling records, emails, and various types of computer transaction records from internet service providers (ISPs) and other sources. Direct evidence, when available, often comes in the form of the testimony of accomplices or others who have potential criminal exposure.

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[77] *See, e.g.*, People v. Avilla, 234 A.D.2d 45, 45 (1st Dept. 1996) (robbery); People v. Connelly, 35 N.Y.2d 171, 173-74 (1974) (drug sale); People v. Banks, 42 A.D.3d 574, 575 (2d Dept. 2007) (murder).

[78] New York is in the distinct minority of states that generally require non-hearsay evidence before grand juries. 15 states require a grand jury to return an indictment for all felonies. BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004 215-17 (2006), *available at* www.bjs.gov/content/pub/pdf/sco04.pdf. Of those, only New York and Alaska generally adhere to the rules of evidence in grand jury proceedings. CPL § 190.30; Alaska R. Crim. P. 6(r); *see generally* SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 4:21 (1997).

[79] *See* John C. Jeffries, Jr., & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTING L. J. 1095, 1111-12 (1995) (arguing that the New York no-hearsay rule "makes sense in the ordinary state prosecution, involving a one-on-one confrontation between a civilian complainant and a defendant charged with assault, robbery, or some other crime," and contrasting the ordinary case with organized crime cases, which "consider a broad array of activity over an extended period of time").

In sharp contrast to their federal counterparts, New York prosecutors face extraordinary hurdles when presenting complex white-collar cases to the grand jury. For example, the rule against hearsay applies not only to those with first-hand knowledge of relevant facts, but also, with limited exceptions, to the custodians of records who merely authenticate documents kept and maintained by their companies or employers. Additionally, and again in contrast to the rule in federal court and in most states, all witnesses receive full transactional immunity for any responsive matter about which they testify, unless they formally waive that immunity.[80]

Together, these rules have a chilling effect on undertaking complex investigations. For example, a wide-ranging identity theft case might involve email communications kept on ISPs' servers in California and Washington, unauthorized transactions on countless credit cards, and victims who reside in a dozen states. Under current law, a prosecutor must call live witnesses from each ISP to authenticate their records, along with each individual victim. Each of these witnesses' testimony might last no more than five minutes, but may require the county prosecutor to spend thousands of dollars on travel expenses (and the witnesses to lose productivity). In short, the rule involves a burden with no corresponding benefit to anyone other than the fraudsters who undoubtedly avoid prosecution because of resource allocation within District Attorney's Offices.

Corruption cases are likewise impaired by New York's antiquated grand jury rules. As discussed in more detail below, prosecutors often avoid calling the very witnesses with first-hand knowledge of corruption for fear of immunizing them for all of their transgressions.[81] And if witnesses who have done no wrong do testify, they are vulnerable to impeachment at trial through the suggestion that their testimony was colored by the full immunity they received before the grand jury. The prosecutor thus faces a Hobson's choice: forego critical testimony (and thereby weaken the prosecution case), or rely on the testimony of a witness who has been given a free pass (and thereby weaken the prosecution case, or worse, unwittingly immunize a more serious criminal). The state's criminal procedure should not encourage such an unseemly result when use immunity under well-established Supreme Court precedent provides a well-balanced alternative.

Drawing from the experiences of prosecutors throughout the state, former federal prosecutors, and legal academics, the Task Force sets forth below three core proposals: (1)

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[80] CPL § 190.40(2).

[81] It is a common practice in New York State corruption investigations to request that public officials waive the automatic immunity that is granted when they testify before grand juries. This is an imperfect solution, for a number of reasons. In the first instance, many public officials refuse to waive immunity, thereby returning the prosecutor to her dilemma. But more importantly, a practice that treats one class of citizens – public servants – differently than all others is not good public policy in the long-run and brings with it claims of unfairness. *Cf.* Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (refusing to treat New York public employees differently than others for purposes of Fifth Amendment self-incrimination). The Task Force believes that doing away with transactional immunity for all is a better solution than requesting waivers from some.

lower the financial and logistical cost of presenting a complex white-collar case to the grand jury through simple procedural rule changes, (2) replace transactional immunity with use immunity, and (3) reform the antiquated accomplice corroboration rule to allow the testimony of one accomplice witness to corroborate the testimony of another.

Although we have taken some guidance from federal law in this area, we note that the Task Force does not believe that federal law is in all cases preferable to New York State law, nor that state prosecutors must be given all of the procedural tools that federal prosecutors have. To the contrary, many members of the Task Force would be concerned if federal law and procedure were transplanted wholesale to New York, and believe that New York has its own traditions that inform its public policy. But the Task Force was conscious of its mandate to examine whether New York law is adequate in addressing fraud and corruption. It could not help but note federal prosecutors' numerous successful corruption prosecutions of high-ranking New York State officials in recent years.[82] Consequently, we examined federal procedures to inform what might make New York more effective.

What should be clear to those reading this report is that in all three areas where we make proposals below – grand jury procedures, immunity, and accomplice corroboration – the Task Force's recommendations do not go nearly as far as federal law. Thus, we recommend streamlining the presentation of evidence to grand juries without eliminating the general requirement of non-hearsay testimony, we suggest replacing transactional immunity with use immunity but stop short of recommending the elimination of automatic immunity before grand juries, and we recommend that accomplices be able to corroborate each other without proposing the elimination of the accomplice corroboration rule altogether.

A. Lower the Cost of Grand Jury Presentations

The Task Force identified three simple but essential changes to the law that would streamline grand jury presentations in white-collar cases, without affecting the substantial rights of defendants. Each of these changes would preserve counties' budgets for far greater uses. First, the Task Force proposes that documents kept and maintained in the regular course of business be admissible through sworn certifications by a custodian of records, without the need to call a live authenticating witness. Second, a sworn certification should be admissible in lieu of live testimony to show a defendant's lack of consent to use or possess a victim's personal identifying information. Third, witnesses located outside New York State (or more than 100 miles from the grand jury) should be permitted to testify via long-distance video.

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[82] Cyrus R. Vance, Jr., *Unleash State's District Attorneys to Attack Corruption*, NEW YORK DAILY NEWS, June 19, 2013 ("[R]eliance on the federal government to police our corrupt public servants is risky public policy."), *available at* www.nydailynews.com/opinion/unleash-state-district-attorneys-attack-corruption-article-1.1376201.

1. Permit All Business Records to be Admitted via Sworn Certification

In 2008, the Legislature revised Criminal Procedure Law section 190.30 to make certain business records of financial institutions, telephone companies and ISPs admissible in the grand jury when accompanied by a sworn statement attesting to the authenticity of the records.[83] The amendment was grounded in pragmatism: vast money and resources are required to secure record custodians to recite the robotic incantation of the business record exception to the hearsay rule.[84] The burden on businesses was likewise significant, particularly for those located out-of-state. These concerns were particularly potent in identity theft cases, which often entail unauthorized transactions at numerous financial institutions.

But as useful as the change was, the exception applies only to the transactional and subscription records of communication carriers, such as telephone and internet providers, and certain financial services companies, such as banks, brokerages, and insurance companies.[85] It does not allow for the authentication of other types of documents – for example, the content of emails obtained from ISPs. As a consequence, even if emails are otherwise subject to an exception to the hearsay rule, a witness from the ISP must authenticate them in the grand jury.

Notably, this modest New York change came eight years after the Federal Rules of Evidence were amended in 2000 to allow for the authentication of any business record, by a similar procedure, for use *at trial*.[86] Since then, at least twenty-six states have followed suit,

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[83] L.2008, c. 279, § 14, eff. Aug. 6, 2008; CPL § 190.30(8).

[84] CPLR § 4518(a).

[85] CPL § 190.30(8) provides:

> (a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein:
>
> (i) a person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and
>
> (ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law.

[86] FED. R. EVID. 902(11). This rule has survived challenges brought under *Crawford v. Washington*, 541 U.S. 36 (2004). The question of whether such certifications would be considered "testimonial" for purpose of the Confrontation Clause of the Sixth Amendment was largely resolved by *Melendez-Diaz v. Massachusetts*, where the Court wrote that "[a] clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not . . . create a record for the sole purpose of providing evidence against a defendant." 557 U.S. 305, 322-23 (2009). Circuits have accordingly confirmed that business records certified under Rule 902(11) are generally nontestimonial, and thus do not violate the Confrontation Clause. Rule 902(11). *See, e.g.*, United States v. Ellis, 460 F.3d 920, 927 (7th Cir. 2006) (certification under Rule 902(11) is nontestimonial because it is "too far removed from the 'principal evil at which the Confrontation Clause was directed'" (internal citation omitted)); United States v. Jackson, 636 F.3d 687 (5th Cir. 2011) ("In general, after *Crawford*, business records are not testimonial in nature and their admission at trial is not a violation of the Confronta-

allowing for the introduction of business records at trial through a sworn certification.[87] Notwithstanding this trend, the Task Force does not go as far, opting instead to recommend applying the existing certification procedure of CPL 190.30(8) to business records before the grand jury. But the Task Force strongly believes that if 26 states and 94 federal districts can dispense with custodians of records at criminal *trials*, surely New York can do so for *grand jury* proceedings.[88]

Specifically, we propose that the Legislature apply the existing certification procedure to all business records before the grand jury.[89] Although the justification for such a change has been evident for years, as business and commerce become more sophisticated and the variety of white-collar crime has grown, the problem has become more severe. Many white-collar prosecutions require documents kept and maintained by businesses, including internet providers and other technology companies, located outside New York State: for example, the content of emails of co-conspirators found on an ISP's servers in California; the records of a stock transfer agent in Nebraska; or the minutes of a Florida corporation's board meetings.

Consider an email sent from a Yahoo! account, obtained from Yahoo! pursuant to a search warrant issued by a New York State judge. The hearsay rule poses no obstacle to its admission. The email's content will usually be admissible pursuant to one of several hearsay exceptions.[90] The email itself, and its transmission metadata, constitute "[a]ny . . . record made as a . . . record of any . . . occurrence or event" made in the regular course of business, and is therefore ordinarily admissible as a business record pursuant to CPLR § 4518.

Authentication is the rub. Under current law, documents reflecting the "use of . . . communication equipment and services" are admissible via sworn certification; a live witness, however, is required to authenticate "recorded conversations or images communicated

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tion Clause."(internal quotation marks omitted)). *Crawford* and its progeny have no bearing on our proposal because "[i]n a Grand Jury proceeding, there is no right of cross-examination." People v. Scalise, 70 A.D.2d 346, 350 (3d Dept. 1979).

[87] ALASKA R. EVID. 902(11); ARIZ. R. EVID. 902(11); COLO. R. EVID. 902(11); DEL. R. EVID. 902(11); FLA. STAT. ANN. § 90.902(11); GA. CODE ANN. § 24-9-902(11); HAW. REV. STAT. § 626-1, RULE 902(11); IOWA CODE ANN. RULE 5.902(11); IDAHO R. EVID. 902(11); ILL. COMP. STAT. EVID. RULE 902(11); IND. R. EVID. 902(9); KY. R. EVID. 902(11); MD. RULE 5-902(B); ME. R. EVID. 902(11); MICH. R. EVID. 902(11); MISS. R. EVID. 902(11); N.H. R. EVID. 902(11); N.M. R. EVID. 11-902(11); NEV. REV. STAT. ANN. § 52.260; OKLA. STAT. ANN. TIT. 12, § 2902(11); PA. R. EVID. 902(11); TENN. R. EVID. 902(11); TEX. R. EVID. 902(10); UTAH R. EVID. 902(11); VT. R. EVID. 902(11); WIS. STAT. ANN. § 909.02(12).

[88] Federal grand juries typically do not receive business records at all, but instead hear either testimony about their contents or simply review summaries of records never introduced themselves. *See* FED. R. EVID. 1101(d)(2) (rules of evidence do not apply to "grand-jury proceedings").

[89] Under CPLR section 4518, "[t]he term business includes a business, profession, occupation and calling of every kind."

[90] If the author is a defendant, the content is, of course, an admission as well as a reflection of the defendant's state of mind. But even if not, the content often has independent legal significance and qualifies as a non-hearsay verbal act.

thereby."[91] The result: to introduce the email before a New York State grand jury, a Yahoo! employee must fly across the country at taxpayer expense to testify that yes, that is a Yahoo! email taken from the servers of Yahoo!

The Task Force believes that New York can no longer afford rules that require such a result, nor procedures that elevate form over function. Not only are the budgets of state prosecutors being depleted in the service of ministerial matters, but more importantly, budgetary concerns are deterring prosecutors from bringing complex cases that require voluminous records. Members of the Task Force spoke to prosecutors in District Attorney's Offices large and small about this problem. Some of the small offices could not conceive of working on these cases because of the cost of transporting custodians of records, and the large ones report that they are often deterred from presenting certain charges for the same reason.

Significantly, leaders in the social media industry, including AOL, Facebook, Google, The Internet Alliance, NetChoice, Yahoo!, and the State Privacy and Security Coalition, also support the Task Force's proposed amendment CPL 190.30(8), referring to it as "a much-needed update to current law."[92] These noted social media companies further observed that "[b]roadening the set of business records that can be presented through an affidavit would not impair the ability of grand juries to evaluate evidence in any way," while the proposed amendment would simultaneously alleviate the financial burden on the state as well as the resource drain on the social media company.[93]

Finally, some traditional business records also fall outside the narrow strictures of the current law, and are likewise deserving of authentication by sworn attestation. Calling live witnesses to authenticate records of any sort comes with steep costs, both financial and logistical: plane tickets, hotel rooms and meals, to say nothing of the time it takes to plan a trip. Even a records custodian located in the same county – as many bank and telephone company witnesses were before the 2008 amendments to the CPL – should not be forced to lose a day's worth of productivity simply to lay a foundation that no one would challenge.[94] Most Task Force members who were state prosecutors in that era recall such witnesses asking in bewilderment why their testimony was necessary at all.

For these common-sense reasons, the Task Force proposes that Criminal Procedure Law § 190.30(8) be amended to permit any record kept and maintained by a business to be

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[91] CPL § 190.30(8)(a).

[92] Letter from Facebook, Yahoo!, Google, AOL, NetChoice, The Internet Alliance, and the State Privacy and Security Coalition to Daniel R. Alonso and Frank A. Sedita, III (July 8, 2013). *See* Appendix B.

[93] *Id.* Although not part of the Task Force's recommendations, it is worth noting that these social media companies additionally "encourage[d] the Task Force to look at amending the evidentiary rules for authentication and admission of content at trial." *Id.*

[94] Our proposal would not change the exception contained within section 190.30(8)(d), which disallows authentication of business records by certification before the grand jury in cases where a preliminary hearing was held and the court, upon application of the defendant, previously required that the custodian testify in person. *See* CPL § 180.60(8).

admitted in the grand jury through a sworn certification. Proposed language for the change is contained in Appendix C.

2. Permit Sworn Certifications in Identity Theft Cases

New York law has recognized for decades that certain crime victims may not even be present at the scene of the crime and, consequently, have no useful information to impart to a grand jury about the perpetrator. Their testimony, instead, would be limited to resolving the question of a legal right or status of the witness or her property. Examples include the owner of a stolen car, the owner of a home that was burglarized, the ostensible maker of a forged check, or the owner of a credit card. For these types of cases and others, a grand jury may, in lieu of the in-person testimony of such witnesses, receive a sworn attestation of the relevant facts.[95]

When the identity theft laws were enacted in 2002, no provision was made for a person whose "personal identifying information" or "personal identification number" was stolen, as those terms are defined in Penal Law section 190.77, to submit an affidavit indicating lack of a grant of consent or permission to the alleged perpetrator.[96] For that reason, grand juries today must hear personally from identity theft victims in order to properly allege the crime, notwithstanding that many, if not most, identity theft schemes span city, state, and international borders.[97] This leads to an incongruous result: an identity theft crime, which "will likely also involve a larceny or attempted larceny,"[98] requires a victim to testify personally, whereas the Larceny itself does not.[99]

Even more so than victims of Larceny, most identity theft victims typically know nothing about the thief. In a typical identity theft scheme, an unwitting victim might open his mail to discover a credit card statement demanding payment for goods and services never bought.[100] Or increasingly common "spoofing" or "phishing" frauds lead Internet users to believe they are receiving e-mails from a trusted source, or that they are securely connected to a trusted website, only to discover that their personal or financial information has been

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[95] CPL § 190.30(3).

[96] L. 2002, ch. 619, § 3, eff. Nov. 1, 2002. Subsequent amendments have not addressed this issue, either.

[97] Jonathan Stempel, *U.S. Charges Eight for Cybercrime Targeting Banks, Government*, REUTERS, June 12, 2013 (conspiring hackers gained unauthorized access to computer networks, diverted customer funds to bank accounts and pre-paid debit cards and used "cashiers" to make ATM withdrawals and fraudulent purchases in Georgia, Illinois, Massachusetts, and New York), *available at* www.reuters.com/article/2013/06/12/us-cybercrime-arrests-idUSBRE95B0YD20130612; Terri Eyden, *Alabama Man Indicted for Multistate Stolen Identity Refund Fraud*, ACCOUNTINGWEB CRIME WATCH (June 21, 2013), www.accountingweb.com/article/crime-watch-june-21-2013/221982.

[98] WILLIAM C. DONNINO, PRACTICE COMMENTARY TO PENAL LAW § 190.77 (McKinney 2013).

[99] CPL § 190.30(3)(c).

[100] Catherine Pastrikos, Comment, *Identity Theft Statutes: Which Will Protect Americans the Most?*, 67 ALB. L. R. 1137, 1137 (2004).

stolen. Personal identifying information now travels across the globe at lightning speed, with criminals close behind.[101]

Simply stated, identity thieves use personal information – not just dates of birth, social security numbers, and checking account numbers – to commit fraud in the names of innocent people. Identity theft victims are left with damaged credit, a criminal record, or worse. For those reasons, the Task Force believes that the same financial and prudential concerns that support allowing certifications for business records also support permitting an identity theft victim's lack of consent to be established through a sworn certification.

The proposed certification is similar to those permitted under current law, in which an owner swears to ownership of or possessory right in property.[102] Under our proposal, which is set forth in Appendix C, the certificate would attest that the affiant's identity is as she states, that her personal identifying information[103] is as she states, that she did not give her consent to the defendant to use her personal identifying information at the time of the crime or at any other time, and that the defendant lacks superior or equal right to use or possess such personal identifying information. This proposal would save countless hours of witnesses' time for a grand jury visit that is little more than a formality.

A prosecutor's limited resources are better spent investigating the crime of identity theft rather than tracking down its victims – who are sometimes thousands of miles away – and coaxing them to travel to the grand jury for a few minutes of testimony. For that reason, the Task Force supports this change in grand jury procedure.

3. Allow Distant Witnesses to Testify via Videoconference

Courts, government agencies and private law firms have embraced videoconferencing. As one commentator noted, "the confluence of greatly improved technology at decreasing cost and increasing travel costs and difficulty now make videoconferencing especially

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[101] *See generally* Michael Higgins, *Identity Thieves*, 84 A.B.A.J. 42 (Oct. 1998).

[102] CPL § 190.30(3)(a), (b), (c).

[103] "Personal identifying information," under current law, "means a person's name, address, telephone number, date of birth, driver's license number, social security number, place of employment, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, taxpayer identification number, computer system password, signature or copy of a signature, electronic signature, fingerprint, voice print, retinal image or iris image of another person, telephone calling card number, mobile identification number or code, electronic serial number or personal identification number, or any other name, number, code or information that may be used alone or in conjunction with other such information to assume the identity of another person." PENAL LAW § 190.77(1). Current law also defines "personal identification number" as "any number or code which may be used alone or in conjunction with any other information to assume the identity of another person or access financial resources or credit of another person." Under the Task Force's proposals to amend the law of Larceny, Scheme to Defraud, and Identity Theft, these definitions would be slightly altered. *See* Sections IV and V, *infra*.

appealing."[104] Indeed, as users of Facetime, Skype, and other simple computer applications have come to realize, the world is changing into one where face-to-face telecommunication is becoming the norm.

These technological advances could do much to preserve state budgets and witnesses' time. To make that a reality, the Task Force proposes an amendment to the Criminal Procedure Law that would allow witnesses located either outside New York State or more than 100 miles from the grand jury to testify, voluntarily, by secure videoconference. Like the proposal to expand authentication via sworn statements described above, this measure would conserve financial and personnel resources,[105] and reduce wear and tear on private citizens. It would also put New York State at the forefront of modernizing grand jury procedure. Thus far, only a handful of other states have adopted similar measures, some of which are considerably narrower.[106]

The proposal addresses two concerns raised by members. The first related to where venue would lie over perjury and contempt prosecutions arising from videoconference testimony. Witnesses, after all, would be testifying outside the county (and likely the state) of the grand jury that receives the testimony. Under current law, "[a]n oral or written statement made by a person in one jurisdiction to a person in another jurisdiction by means of telecommunication . . . is deemed to be made in each such jurisdiction."[107] The plain language of this provision suggests that a grand jury witness who testifies remotely could be prosecuted for perjury or contempt in the county where the grand jury sat. But the Task Force's proposal would authorize something novel: formal testimony in a New York tribunal given while a witness is outside New York, or at least the county where the grand jury sits. To address these issues, the Task Force recommends that, in addition to authorizing videoconferencing, the Criminal Procedure Law be separately amended (in section 20.60(1)) to clarify that one who testifies before a grand jury via videoconference may be prosecuted for perjury in the county and state where the grand jury heard the testimony. The proposed language is set out in Appendix C.

Members also voiced concerns about grand jury secrecy. Members agreed that the standard of security for videoconferencing should be on par with the federal government's encryption standard. Known as the Advanced Encryption Standard ("AES"), it is used by virtually all entities that send private information over the internet.[108] The algorithm

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[104] Frederic Lederer, *The Legality and Practicality of Remote Witness Testimony*, THE PRACTICAL LITIGATOR, Sept. 2009, at 19.

[105] Lynn Helland, *Remote Testimony: A Prosecutor's Perspective*, 35 U. MICH. L. J. 719, 747 n.95 (2002).

[106] Alaska (which, like New York, generally disallows hearsay testimony in grand jury proceedings) allows grand jury witnesses to testify by phone if they live more than 50 miles away, or if the witness "lives in a place from which people customarily travel by air to the situs of the grand jury." ALASKA R. CRIM. P. 6(u). Texas and Alabama allow police officers to testify in front of a grand jury using a video teleconferencing system. TEX. CODE CRIM. PROC. ANN. art. 20.151; ALA. CODE § 15-26-5.

[107] CPL § 20.60(1).

[108] NATIONAL SECURITY AGENCY, ENCRYPTING FILES WITH WINZIP (2013), *available at* www.nsa.gov/ia/_files/factsheets/I735-002-08.pdf; NATIONAL SECURITY AGENCY, SUITE B CRYPTOG-

associated with AES is a symmetric-key algorithm, which means that the same key is used to encrypt and decrypt the data. Users normally do not need to know the key; rather, it is a component of the software used for the encryption and decryption. At present, AES is used by federal government agencies, international law firms, and the healthcare industry. In fact, many software applications developed in recent years have incorporated the AES algorithm.[109]

In addition to protecting the testimony against electronic intrusions, the proposal would protect it against physical intrusions, through two mechanisms. First, a witness testifying via videoconference would be obligated to state under oath (a) that no person other than the witness is capable of hearing his or her testimony; and (b) that the witness's testimony is not being recorded or otherwise preserved by any person at the location from which the witness is testifying.[110] Second, a witness would testify via videoconference only at the office of a county prosecutor, state Attorney General, or an arm of the U.S. Department of Justice. In the event the witness is located outside New York State or the United States, local prosecutors may use a standard Memorandum of Agreement to arrange for appropriate venues in other prosecutors' offices. The Task Force suggests developing a pilot project between New York State prosecutors, the U.S. Department of Justice and the National District Attorneys Association to establish the locations, contacts and protocols that would make this proposal a reality.[111]

The Task Force's entire proposal for videoconferencing in the grand jury is set forth in Appendix C.

B. Replace Transactional Immunity with Use Immunity

The Task Force believes that the grand jury's promise as a tool to investigate serious crime in New York is unfulfilled due to the requirement that all witnesses automatically receive transactional immunity from prosecution for any crime they mention while testifying, as long as their answers are responsive.[112]

RAPHY, www.nsa.gov/ia/programs/suiteb_cryptography (last visited July 13, 2013) (NSA announces policy in 2005 on use of AES to protect national security systems and national security information).

[109] TOWNSEND SECURITY, AES ENCRYPTION STRATEGIES: A WHITE PAPER FOR THE IT EXECUTIVE 2 (2010) (AES is accepted by the Health Insurance Portability and Accountability Act ("HIPAA"), and all credit card issuers for data security such as Visa, MasterCard, Discover, American Express, JCB and others), *available at* web.townsendsecurity.com/white-paper-download-aes-encryption-strategies---a-white-paper-for-the-it-executive/. In addition to a high level of security, AES would all but eliminate the risk of hacking.

[110] These security provisions are drawn from the Texas statute. TEX. CODE CRIM. PROC. ANN. art. 20.151.

[111] We recognize the funding implications of installing telecommunications equipment, but believe that the long-term savings will far outweigh the cost outlay. Moreover, because the law is not mandatory, funding sources could be identified by the state and the relevant counties in the longer term.

[112] CPL § 190.40(2).

The promise of grand juries is great. Cases are legion that extoll the virtues of "society's interest [in a grand jury's] thorough investigation."[113] The Court of Appeals has strongly affirmed the grand jury's status as "an investigatory body with broad exploratory powers,"[114] and the Supreme Court has gone as far as to declare that "[a] grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'"[115] Notably, with respect to public corruption, this mandate is especially strong: Article I, section 6 of the State Constitution (the state Bill of Rights) requires that "[t]he power of grand juries to inquire into the wilful misconduct in office of public officers . . . shall never be suspended or impaired by law."[116]

But high hopes for grand juries are deeply diminished by the New York rule, which differs in two ways from the immunity grants given in most other states and the federal system. First, most states and the federal system protect witnesses who are compelled to testify in the face of a claim of self-incrimination by granting them absolute protection from any use, or derivative use, of their testimony.[117] Second, although some states and the federal government require an invocation of the Fifth Amendment and a subsequent affirmative immunity grant,[118] New York *automatically* confers immunity simply by a witness's questioning before a grand jury. The result is a uniquely New York problem: every witness appearing before a grand jury is granted *both* automatic and transactional immunity.

As the Supreme Court has recognized, use immunity adequately protects an individual's self-incrimination rights.[119] Use immunity forbids a prosecutor from using a witness's grand jury testimony in a subsequent case. If the prosecutor wishes nevertheless to charge a witness with a crime after that prosecutor has elicited use-immunized testimony – virtually unheard of in the collective experience of the current and former federal prosecutors on the Task Force – the prosecutor must prove that *all* of the evidence has been derived independently of the grand jury testimony.[120] If a defendant who has testified in the grand jury is later convicted on independent and untainted evidence, he has lost nothing as a consequence of his testimony: it is as if he never testified at all.

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[113] Matter of Keenan v. Gigante, 47 N.Y.2d 160, 170 (1979).
[114] Matter of Virag v. Hynes, 54 N.Y.2d 437, 443 (1981).
[115] United States v. Calandra, 414 U.S. 338, 344 (1974).
[116] N.Y. CONST., Art. I, sec. 6.
[117] New York is one of only a few states with a transactional immunity rule. By contrast, federal law and thirty-three states provide "use" immunity to witnesses. 18 U.S.C. §§ 6002 – 6003; *see* New York County District Attorney's Office, Survey of Statewide Immunity Statutes (2013) (on file with the Task Force). Thirteen states (including New York) provide witnesses complete transactional immunity, and four other states provide for a hybrid application of either transactional or use immunity, either at the discretion of the prosecutor or for certain enumerated offenses. *Id.*; *see also* James B. Jacobs, *Get Out of Jail Free*, CITY JOURNAL (1991), *available at* www.city-journal.org/article01.php?aid=1590.
[118] 18 U.S.C. §§ 6002 – 6003.
[119] Kastigar v. United States, 406 U.S. 441, 453 (1972).
[120] *Id.* at 461-62.

The draconian New York rule has led to twin problems: miscarriage of justice and a chilling effect on prosecutors. Indeed, the law is rife with horror stories of prosecutors who have been blindsided by criminals whom they unintentionally immunized. Examples include *Matter of Carey v. Kitson*,[121] in which a business executive was questioned by a Suffolk County grand jury in connection with his company's possible victimization in an extortion scheme. He was indicted years later by a grand jury, working with a different prosecutor, for sales tax evasion. Because the executive's description before the earlier grand jury had included a discussion of his company's financial status, the court held that he could not be prosecuted in the tax case.[122]

Similarly, in *People v. Henderson*, the complaining witness in a police brutality case had also been arrested and charged with assault for his participation in a bar fight.[123] A Special Prosecutor handled the police investigation and called the complainant to the grand jury. Because the witness's description of his post-arrest assault "touched upon" the fight, the assault case – handled by a different prosecutor – had to be dismissed because of transactional immunity.[124]

Stories of these and other injustices[125] were legion in the past, but have dwindled because of transactional immunity's undeniable chilling effect on prosecutors. The Task Force heard from prosecutors around New York, who report that they regularly refrain from calling witnesses before the grand jury for fear of unwittingly immunizing someone who is either a serious criminal or is the subject of an investigation in another county. In corruption and white-collar cases, "the testimony of involved persons or potential accomplices is critical to support more serious charges against others."[126] But it is these witnesses, who have the most knowledge about crime – and who, therefore, would be most useful in running down "every available clue" and fulfilling society's interest in a "thorough and extensive investigation"[127] – who are least likely to be called before modern New York grand juries. Indeed, the difference between federal and New York grand jury immunity rules is regularly cited as one reason why organized crime prosecutions (of both the white collar and non-white collar variety) are more easily pursued in federal, rather than state, court.[128]

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[121] 93 A.D.2d 50 (2d Dept. 1983).
[122] *Id.* at 60-64.
[123] 257 A.D.2d 213, 214 (3d Dept. 1999).
[124] *Id.* at 215-216.
[125] Even witnesses who voluntarily waive immunity may avoid prosecution if their waivers are impaired by legal error. One defendant, for example, was charged with child sexual abuse in a felony complaint. After discharging his assigned counsel, the defendant signed a waiver of immunity and testified before the grand jury. Because the defendant's indelible right to counsel had attached, his waiver of immunity was held ineffective, and the court dismissed the indictment. Matter of Trudeau v. Cantwell, 31 A.D.3d 844, 844-46 (3d Dept. 2006).
[126] People v. Chapman, 69 N.Y.2d 497, 505 (1987) (Simons, J., dissenting).
[127] United States v. Calandra, 414 U.S. 338, 344 (1974); Matter of Keenan v. Gigante, 47 N.Y.2d 160, 169 (1979).
[128] *See* Jeffries & Gleeson, *supra* note 79, at 1116.

Former Governor Mario Cuomo, who during his tenure supported replacing transactional immunity with use immunity, recognized this problem, declaring in a 1986 speech that the change was "especially important to white-collar and organized crime prosecutions."[129] Criminals are well aware of this problem, too. In the words of an individual surreptitiously recorded by the New York County District Attorney's Office 33 years ago: "I never knew about this thing, immunity. . . . They can't throw you before the grand jury 'cause they don't know what's gonna come out. That's the name of the game."[130]

Prior to the enactment of the Criminal Procedure Law's transactional immunity statute in 1971, the Court of Appeals recognized that "there is not a single sound policy reason, nor is there a constitutional compulsion, requiring that a grant of immunity gain a witness complete freedom from criminal liability for his wrongful acts because the acts were at some point mentioned to the grand jury."[131]

History suggests that the state's transactional immunity rule is the product not of policy, but of timing. When the Bartlett Commission recommended that the Criminal Procedure Law provide for transactional immunity, the scope of immunity provided by the Fifth Amendment was in flux.[132] As one account explains:

> [B]oth Judge Denzer and Justice McQuillan confirm that the 1970 decision to retain transactional immunity was made because of uncertainty as to whether use immunity was constitutional, not because it was perceived as better or more just on the merits.[133]

That uncertainty, of course, was resolved by the Supreme Court just one year after the CPL went into effect. In the seminal decision in *Kastigar v. United States*,[134] the Court upheld the federal use immunity law as consistent with the Fifth Amendment. The Court of Appeals has since reaffirmed this principle as a matter of state constitutional law.[135] Unfortunately, the Legislature has not, as of yet, revisited the choice it made when there was uncertainty about the issue in 1970.

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[129] NEW YORK STATE DIST. ATTORNEYS ASS'N, THE CASE FOR A NEW IMMUNITY LAW IN NEW YORK ("CASE") 53 (1988) (Remarks to Citizens Crime Commission, May 15, 1986).

[130] Conversation quoted in CASE, *id.*, at preface.

[131] People v. LaBello*,* 24 N.Y.2d 598, 602 (1969); *rev'd on other grounds,* Matter of Gold v. Menna*,* 25 N.Y.2d 475 (1969). *Labello* was overruled by *Matter of Gold* as a matter of statutory interpretation, but *Matter of Gold* left undisturbed was the *LaBello* court's observation that New York's "'transaction' immunity…statute [is] unnecessarily broad" and that it "gives witnesses an immunity not required by the Constitution." 24 N.Y.2d at 602. The Court of Appeals later clarified that the New York Constitution does not require transactional immunity. *See* Matter of Anonymous Attorneys, 41 N.Y.2d 506, 509-10 (1977).

[132] The prior version of the statute was plagued with the same problem. *See Labello*, *id.*

[133] CASE, at 23.

[134] Kastigar v. United States, 406 U.S. 441, 453 (1972).

[135] 41 N.Y.2d at 509-10 (federal and state constitutional provisions against self-incrimination use the same language, and both permit "testimony to be compelled if neither it nor its fruits are available for such use").

Notably, the havoc wreaked by transactional immunity is not limited to the grand jury. Another unfortunate quirk of New York law is that those who are either under indictment or under investigation are able to deprive *trial* courts, and by extension the public,[136] of their testimony when they assert the Fifth Amendment in a trial against *another* defendant, even in the face of Constitutionally-required assurances that neither the testimony nor its fruits will ever be used against them. This is so because New York law also requires the trial court to go further than the Fifth Amendment. If the prosecutor (or, for that matter, the court or the defense, with the prosecutor's consent) wants the testimony, the witness must be granted full transactional immunity and, therefore, absolution from any pending investigation or charge.[137] Not only is that not required by the Fifth Amendment or the New York Constitution,[138] it is ill-advised public policy, depriving trial juries of relevant testimony.

Based on these and other arguments, then-Governor Mario Cuomo and a host of officials, editorial boards, bar associations, and good government groups proposed to replace transactional immunity with use immunity on a number of occasions during the 1980s.[139] Supporters included former Governor Cuomo, Attorney General Robert Abrams, Mayor Edward Koch, then-Dean David Trager of Brooklyn Law School, the New York City Bar Association, the Citizens Crime Commission, the *New York Times*, the *New York Daily News*, the *New York Post*, *Newsday*, *El-Diario – La Prensa*, the *Buffalo Evening News*, the *Binghamton Press*, and the *Rochester Democrat and Chronicle*, among others.[140] The proposal was defeated in the Legislature.

Notable observations by these authorities include:

- "We need a law to remove this misplaced shield. In doing so, we must neither infringe upon an individual's civil liberties nor foreclose a legitimate prosecution. This can be done by adopting the rule currently used in the federal system."[141] (Former Governor Cuomo)
- "[I]t is a shame that because of these obstacles, federal authorities, over and over again, have to clean up messes in the state system. If I could change one rule in an effort to bring reason into the state system, it would be the immunity rule."[142] (Dean Trager)

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[136] United States v. Bryan, 339 U.S. 323, 331 (1950) ("For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence.") (quoting WIGMORE, EVIDENCE § 2192 (3d ed. 1942)).

[137] Under CPL § 50.20(1), a witness in a legal proceeding other than the grand jury who asserts the Fifth Amendment right against self-incrimination may nonetheless be compelled to testify if ordered to do so by the court, CPL § 50.20(2)(a), "but only when expressly requested by the district attorney." CPL § 50.30. A compelled trial witnesses receives transactional immunity. CPL § 50.10(1).

[138] U.S. CONST. amend. VI; N.Y. CONST. art I, § 6; *see also* 41 N.Y.2d at 510.

[139] CASE, at 39-59.

[140] *Id.*

[141] *Id.* at 53.

[142] *Id.* at 55.

- "I believe that the public interest is substantially impeded – not protected – by the anachronism of forcing prosecutors to obtain essential . . . testimony at the price of immunity . . . for the entire event."[143] (Mayor Koch)
- "Statistics don't tell the story because many cases never get prosecuted for fear that immunity might be granted to an individual who later turns out to be the major player."[144] (Attorney General Abrams)
- "A more sensible system would forbid prosecutors to use such grand jury testimony in a subsequent proceeding, but still allows them to proceed . . . with independently obtained evidence."[145] (*New York Times*, November 26, 1985)
- "The basic reform the district attorneys seek is simple and logical . . . [T]he legislature will be doing law enforcement an injustice if it adjourns without adopting this reasonable and needed change."[146] (*Buffalo Evening News*, May 31, 1984)
- "Why doesn't Morgenthau . . . just *order* everyone to testify [in the Bernhard Goetz case]? Because he would run smack into New York's so-called transactional immunity law."[147] (*New York Daily News*, January 12, 1985)
- "Unquestionably, the current law discourages prosecutors from calling witnesses with criminal exposure before the grand jury, except under the most compelling circumstances."[148] (New York City Bar Association)

The law remains unchanged.

Governor Cuomo's Public Trust Act, which was not acted on during the 2013 legislative term, proposed, among other things, to eliminate transactional immunity for those who testify in cases that involve public malfeasance or fraud against government entities.[149] Although the Task Force would go further, the Public Trust Act is an excellent start, and represents the first serious effort to effect a sensible change in the CPL immunity provisions in more than 20 years.

For all these reasons, the Task Force recommends that New York amend the Criminal Procedure Law to replace grants of transactional immunity with grants of use immunity for witnesses who testify before grand juries and at trial.

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[143] *Id.* at 54.
[144] *Id.*
[145] *Id.* at 51.
[146] *Id.* at 45-46.
[147] *Id.* at 49.
[148] *Id.* at 56.
[149] L.2013, Governor's Program Bill No. 3 at 3-6, *available at* www.governor.ny.gov/assets/documents/GPB3-PUBLIC-TRUST-ACT-BILL.pdf.

C. Amend the Accomplice Corroboration Requirement

The testimony of accomplices, particularly in fraud and corruption cases, is often crucial for a conviction. It reveals intimate, first-hand details of the defendant's plan, conspiracy or intent to commit the crime. In New York, however, a legally sufficient case requires evidence independent of the accomplice's testimony that tends to connect the defendant to the crime in such a way as to assure that the accomplice is telling the truth – that is, "corroborat[ing] evidence."[150] At first blush, this seems like a reasonable rule – what prosecutor, state or federal, would file charges based *solely* on the uncorroborated testimony of a criminal, with no other evidence?

The question answers itself, but does not end the inquiry. New York courts have long restricted the kind of evidence that may serve as corroboration under the CPL, and have repeatedly held that the testimony of a different accomplice is insufficient to corroborate the first accomplice.[151] This gives rise to a number of anomalies, the most significant being that the uncorroborated testimony of a jailhouse informant regarding a confession made behind bars constitutes legally sufficient evidence of the crime, but the testimony of 10 accomplices to the same crime does not.[152] New York is among a minority of states that require corroboration of accomplice testimony.[153]

The Task Force believes that this anomaly has hamstrung prosecutors, with the result that "many strong cases cannot be brought in state court."[154] In 1939, a New York Law Revision Commission suggested repeal of the law because it represented a "refuge of organized crime and protects the principals in racketeering cases."[155] A second longstanding complaint is that the statute "arbitrarily determines in advance of testimony and without considering demeanor, that an accomplice is not credible."[156] As recently as 2006, in a comprehensive report on gang activity, the former Temporary State Commission of Investigation, while noting the inherently suspect nature of such testimony, recommended that the Legislature "consider either eliminating the state's accomplice corroboration requirement or amending the

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[150] CPL § 60.22(1).

[151] People v. Morhouse, 21 N.Y.2d 66, 74 (1967) ("[T]he corroboration requirement of section 399 of the Code of Criminal Procedures is fully met when there is some nonaccomplice evidence fairly tending to connect the defendant with the commission of the crime.") (internal quotation marks omitted).

[152] People v. O'Farrell, 175 N.Y. 323, 327 (1903) ("If two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same rule is applied, and the same confirmation is required, as if there were but one.") (quoting SIMON GREENLEAF, 1 EVIDENCE § 381 (1842)); People v. Mullens, 292 N.Y. 408, 414 (1944).

[153] "Eighteen states require corroboration of an accomplice's testimony." AM. BAR ASS'N, ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 70 n.22 (2006), *available at* apps.americanbar.org/crimjust/committees/innocencebook.pdf. Typically, such corroboration requirements are statutory. *See*, *e.g.*, CAL. PENAL CODE § 1111; ALA. CODE § 12-21-222; MINN. STAT. ANN. § 634.04. They may also be found in case law. *See* State v. Shaw, 37 S.W.3d 900, 903 (Tenn. 2001).

[154] *See* Jeffries & Gleeson, *supra* note 79, at 1105.

[155] Lester B. Orfield, *Corroboration of Accomplice Testimony in Federal Criminal Cases*, 9 VILL. L. REV. 15, 35 (1963), *available at* digitalcommons.law.villanova.edu/vlr/vol9/iss1/3.

[156] *Id.* (additional citations omitted).

requirement to allow one accomplice's testimony to serve as sufficient corroboration for another accomplice's testimony."[157]

Unfortunately, little has changed. Corrupt public officials, corporate criminals, gang members, and many others continue to reap the benefit of New York's outdated and overly restrictive law. To be sure, accomplice testimony deserves sharper scrutiny, but it is not necessarily untrustworthy. But New York's rule codifies a blanket judgment that an accomplice is *per se* unreliable because he participated in the defendant's crimes, when there are myriad factors that make witnesses unreliable. The law should not deny "juries the opportunity to hear testimony that is often decisive and true, nor should [it] deny society this most useful tool for convicting the guilty."[158] With proper safeguards, such as an instruction from the trial court on the inherent dangers of accomplice testimony,[159] such factors ought to be for the jury to weigh in assessing credibility. A cellmate who committed assault should not be presumed more trustworthy, as he is under current law, than a self-confessed accomplice to forgery.

For these reasons, the Task Force proposes that CPL 60.22 should be amended to add a new subsection 4, to read as follows: "For purposes of this section, 'corroborative evidence' includes evidence from one or more other accomplices." The full text of the proposed bill is set forth in Appendix C.

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[157] STATE OF NEW YORK COMM'N OF INVESTIGATION, COMBATING GANG ACTIVITY IN NEW YORK 71 (2006), *available at* www.nysl.nysed.gov/scandoclinks/ocm70135226.htm.

[158] Graham Hughes, *Agreements for Cooperation in Criminal Cases,* 45 VAND. L. REV. 1, 34 (1992).

[159] *See generally* LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS para. 7.01, Instruction 7-5 (2005); *see also* United States v. Hamilton, 538 F.3d 162, 172-73 (2d Cir. 2008); United States v. Vaughn, 430 F.3d 518, 523-24 (2d Cir. 2005).

IV. Fraud

In many respects, our Penal Law is a creature of an analog era, when a personal computer was considered a luxury item and the Internet, a thing of imagination. But today, we live in a digital age: smart phones are ubiquitous; digital information is stored on the cloud; and social networks extend invisibly around the globe.

Of course, criminals also live in the digital age. They use computers to stalk or harass via e-mail or social networking sites; to traffic in stolen identities or child pornography; or to steal a company's invaluable proprietary data by surreptitiously installing software that allows a hacker to copy information, or even destroy or damage it.[160] A hacker can steal millions of credit card numbers,[161] and in a matter of minutes, sell those numbers on a black market that thrives on underground websites.[162] The buyers can then use the numbers to make unauthorized purchases around the world. In short, the trafficking and exploitation of stolen data cause enormous harm.

Companies spend millions of dollars to protect customer data from attack, and even more in fines and fees when breaches occur.[163] The affected customers, in turn, lose trust in the institutions that hold their personal information. They also lose time and money. One study found that it "takes the average victim an estimated $500 and 30 hours to resolve each identity theft crime."[164] To combat this criminal conduct, the Task Force believes that the law must target both the traffickers who make their trade in stolen data and the thieves who use that data and other means to steal money and property. It must render this conduct prohibitively expensive by imposing serious penalties for serious harm.

The hypothetical hacking case highlights some weaknesses of the current Penal Law, which does not allow different victims' losses to be aggregated for the purpose of a Larceny charge.[165] The trafficker who has stolen one million credit card numbers would be guilty of

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[160] *See, e.g.*, Tom Zeller, Jr., *Black Market in Stolen Credit Card Data Thrives on Internet*, N.Y. TIMES (June 21, 2005), www.nytimes.com/2005/06/21/technology/21data.html?_r=0; Brian Krebs, *Stolen Identities Sold Cheap on the Black Market*, WASH. POST (Mar. 19, 2007), voices.washingtonpost.com/securityfix/2007/03/stolen_identities_two_dollars.html; Grant Gross, *Online Seller of Counterfeit Credit Cards Gets Prison Time*, PC WORLD (Sept. 9, 2011), www.pcworld.com/article/239770/online_seller_of_counterfeit_credit_cards_gets_prison_time.html.

[161] Michael S. Schmidt and Nicole Perlroth, *Credit Card Data Breach at Barnes & Noble Stores*, N.Y. TIMES, Oct. 23, 2012, at A3, *available at* www.nytimes.com/2012/10/24/business/hackers-get-credit-data-at-barnes-noble.html?smid=pl-share; Aaron Smith, *Citi: Millions Stolen in May Hack Attack*, CNN MONEY (June 27, 2011, 9:30 AM), money.cnn.com/2011/06/27/technology/citi_credit_card/; *Justice: Hackers Steal 40 Million Credit Card Numbers*, CNN.COM (Aug. 5, 2008), www.cnn.com/2008/CRIME/08/05/card.fraud.charges/

[162] *See* note 160, *supra*.

[163] Sasha Romanosky & Alessandro Acquisti, *Privacy Costs and Personal Data Protection: Economic and Legal Perspectives*, 24 BERKELEY TECH L. J. 1061, 1066-67 (2009).

[164] *Identity Theft Facts*, TRANSUNION, www.transunion.com/personal-credit/identity-theft-and-fraud/identity-theft-facts.page (last visited July 13, 2013).

[165] People v. Cox, 286 N.Y. 137, 142 (1941) ("Where the property is stolen from the same owner and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a sep-

only Grand Larceny in the Fourth Degree, a Class E felony – the same offense of which he would be guilty had he stolen but one number. Nor does Identity Theft, discussed in greater detail in Section V, solve the problem. That crime requires proof that he (a) used the credit card numbers to assume the identity of another *and* (b) thereby obtained property or services, or caused a loss to another, or committed a further crime.[166] The only computer crimes with which the hacker could be charged are Unlawful Duplication of Computer Related Material and Computer Trespass – both limited to Class E felonies.[167] As with Larceny, that result holds no matter how many credit card numbers the hacker takes, nor how valuable such numbers might be on the black market.

Nor does the Penal Law proportionately punish the thieves who buy and use stolen credit card numbers. They can be charged under New York's Identity Theft laws, but those statutes are gradated only according to the amount of property obtained (or loss caused) by the thief, taking no account of the number of identities assumed. More problematic, the highest level crime, Identity Theft in the First Degree, is only a Class D felony.[168] This statutory scheme produces some obvious anomalies. One thief buys a single stolen credit card number on the black market and uses it to purchase a new handbag for $2,001. Another buys one thousand stolen credit card numbers and uses each one to purchase a handbag for $2,001. The first thief victimized one account holder, and thereby obtained $2,001 worth of property; the second victimized one thousand account holders, and thereby obtained more than $2 million worth of property. Under our law, both criminals would face the same top count.

This hypothetical also demonstrates the inadequacies of New York's other primary weapon against fraud, the crime of Scheme to Defraud. That law requires more than one victim, and is capped at a Class E felony, regardless of how many people are defrauded or how much property is obtained.[169] In our hypothetical case, the first thief cannot be charged with Scheme to Defraud because he stole from only one victim. The second thief could be charged with Scheme to Defraud, but because the statute is not gradated, it would only be a Class E felony, even though he victimized one thousand people and stole more than $2 million. Indeed, the statute's insensitivity to the magnitude of the fraud has no limits; even the multimillion dollar Ponzi scheme that solicits $25,000 investments from multiple victims would still count as only a Class E felony. In none of these cases would a reasonable New

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arate crime; but if the successive takings are all pursuant to a single, sustained, criminal impulse and in execution of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse.").

[166] PENAL LAW §§ 190.77 *et seq*.

[167] PENAL LAW §§ 156.10, 156.30. Enacted in 1986, Unlawful Duplication of Computer Related Material is not gradated based on the quantity or value of the digital materials duplicated. Thus, whether the defendant duplicated notes from a missed lecture in graduate school or the priceless secret formula for Coca-Cola, he would face a Class E felony.

[168] PENAL LAW § 190.80.

[169] PENAL LAW § 190.65.

Yorker believe that she was being adequately protected by a criminal justice system that assigns the lowest-level felony blame to highly blameworthy fraudsters.

Another example illustrates the shortcomings of current law with respect to computer data. Suppose a bank's computer programmer develops and maintains its proprietary trading system. The bank spent several million dollars to build, improve and maintain this extremely valuable system. Eventually, a competitor lures the programmer away from the bank with the promise of riches in exchange for a copy of the trading program's source code. The programmer has taken from his employer – any layperson would say "stole" – property worth well over $1 million, the threshold for Grand Larceny in the First Degree, a Class B felony.[170] But because the deprivation was not permanent – the programmer, by definition, only *copied* the code, leaving the original on the bank's network – he cannot be charged with Larceny. Again, like the hacker described above, he would face only Class E felony charges of Unlawful Duplication of Computer Related Material or Computer Trespass.

In Section V, below, the Task Force proposes several amendments to Computer Tampering and Identity Theft, which would treat intentional computer attacks for non-commercial purposes more seriously, and gradating Identity Theft according to either the number of identities assumed or the amount of property wrongfully obtained by the defendant, up to a Class B felony. In this section, we describe how we would change the basic, but essential, crimes of Larceny and Scheme to Defraud.

We recommend that Larceny be amended to cover thefts of information, including personal identifying information, computer data or computer programs, whether done through digital or physical means. To implement that change fully, we recommend extending New York's jurisdiction to criminal conduct that occurs outside the state but impacts residents within it. And, to cure the proportionality problems described above, we propose that the Scheme to Defraud statute be gradated based on the value of property obtained or the number of intended victims, from a Class E felony to a Class B felony. We further suggest that the multiple victim requirement be eliminated.[171]

As part of our mission to streamline the Penal Law, we also address an oddity: the Larceny statute defines the term "services," but it does not criminalize the theft of services. Instead, Theft of Services is covered by a separate statute, which, except in certain narrow instances, cannot be prosecuted above the misdemeanor level, and, in the main, is used against "turnstile jumpers."[172] While the Task Force acknowledges that the current provision is as an important tool to address quality of life issues, it is hardly adequate to address the theft of services whose value in the modern world can easily approach – or exceed – that of traditional "property" as defined under current law. Accordingly, we recommend extending

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[170] PENAL LAW § 155.42.
[171] PENAL LAW §§ 190.60, 190.65.
[172] PENAL LAW § 165.15; *see, e.g.*, People v. Lang, 14 Misc.3d 869, 869-870 (Crim. Ct. N.Y. Co. 2007).

the Larceny statute to cover theft of services. This change would require that the current Theft of Services law be repealed.

Finally, the Task Force proposes to gradate the Trademark Counterfeiting statute[173] based on the number of counterfeit goods possessed by the defendant.

A. Larceny

Under the current Penal Law, Identity Theft applies to defendants who *use* personal identifying information for criminal purposes, but not to those who steal identities and sell them for profit. Put simply, traffickers get a free pass. To attack both sides of the market – supply *and* demand – we would gradate the crime of Identity Theft up to a Class B felony, as we describe in Section V, and we would expand Larceny to cover the theft of personal identifying information, computer data and computer programs. By properly categorizing that conduct as Larceny, with its concomitant gradation scheme, New York can cut off the market for stolen data at its source.

1. Protect Personal Identifying Information

Criminals do not care what form stolen property takes; they only care if it is valuable to them. Although the current Larceny statute applies to the theft of "secret scientific material," "credit card[s]," and "debit card[s]," those things are defined primarily as physical objects, rather than as the information they store.[174] The Task Force believes that the anachronistic limitation on treating the thefts of victims' identities as a Larceny should be lifted, even if the perpetrator never assumed those identities.

The Penal Law already defines "personal identifying information" for purposes of the Identity Theft statute.[175] Under our proposal, that definition would be added to "property" under Larceny, [176] with some minor modifications. The current definition of "personal identifying information" is too broad: it includes "a person's name, address, telephone number . . . place of employment [and] mother's maiden name."[177] Plainly, taking such information should not constitute Larceny. Accordingly, the Task Force recommends pruning those terms from the definition. Second, because theft of personal identifying information could occur either digitally (*e.g.*, by download) or physically (*e.g.*, by taking a laptop), our proposed definition covers both the information and the physical embodiment of the information.[178]

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[173] PENAL LAW §§ 165.70 *et seq.*
[174] PENAL LAW §§ 155.00(6), (7), (7-a).
[175] PENAL LAW § 190.77(1).
[176] PENAL LAW § 155.00(1).
[177] PENAL LAW § 190.77(1).
[178] We would propose as a conforming change to delete the existing definitions of "credit card," "debit card," and "access device," located at PENAL LAW §§ 155.00 (7), (7-a) and (7-c). As we have also included the definition of "public benefit card" within the proposed definition of personal identifying information, the existing definition of public benefit card should be deleted as well. PENAL LAW § 155.00(7-b).

Several other provisions require modification to implement this change. The law defines Larceny as occurring when, "with intent to deprive another of property or to appropriate the same to himself or to a third person, [a person] wrongfully takes, obtains or withholds such property from an owner thereof."[179] Because it is unclear whether the current definition of "obtain" covers the ways modern thieves steal information, we propose amending the definition of "obtain" as follows:

> 2. Obtain includes, but is not limited to, the bringing about of a transfer or purported transfer of property or of a legal interest therein, whether to the obtainer or another. <u>With regard to personal identifying information, computer data or computer program, obtain includes duplicating, recording, copying, downloading, uploading or printing out the information, data, or program, or obtaining a physical object containing such information. With regard to service, obtain includes, but is not limited to, using or accessing a service</u>.[180]

We propose similar amendments to the definition of "deprive" and "appropriate." The full text of those proposals can be found in Appendix D. Additionally, the following amendment to the provision on the "ways" of committing Larceny is necessary:

> 2. Larceny includes a wrongful taking, obtaining or withholding of another's property <u>or a service</u>, with the intent prescribed in subdivision one of this section, committed in any of the following ways:
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> (c) By committing the crime of issuing a bad check, as defined in section 190.05, <u>or by obtaining property or service by using or presenting a form of payment or personal identifying information the actor knows he or she is not authorized to use or knows is expired or forged or otherwise not valid</u>

This language would cover the use of forged or otherwise fraudulent credentials to duplicate information online. It would also allow Larceny of more traditional forms of property to be charged, based on the new and multiple "ways" of committing theft now available to thieves of all stripes through society's technological advances. Larceny has easily covered the person who obtains property by writing a bad check, and it should similarly cover the person who obtains property using, say, forged or fraudulent credit information. Notably,

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[179] PENAL LAW § 155.05.

[180] *See infra* pp. 39-40 for a discussion of thefts of computer data, computer programs, and service.

this amendment has a built-in limiting principle in addition to the general *mens rea* applicable to Larceny: the charge would be viable only upon proof the defendant used credentials or a form of payment he or she *knew* to be unauthorized, expired, forged, or otherwise invalid.

Finally, we propose to gradate all levels of Larceny based upon the number of identities reflected in the stolen personal identifying information. This is specifically aimed at the hacker who steals such information and the trafficker who sells it: small thefts would be treated less seriously and major thefts, more so. The Task Force considered and rejected a gradation scheme based upon the value of the stolen personal identifying information, having concluded that, in the absence of a legitimate market for such information, valuation would be difficult, if not impossible.

Grand Larceny in the Fourth Degree already applies to thefts of, among other things, credit or debit cards and access devices, which are punishable as Class E felonies without regard to value.[181] We would expand the offense to apply to the theft of any amount of personal identifying information, whether embodied in plastic or not. Additionally, our proposal would apply Grand Larceny in the Third Degree, the Class D felony, to the theft of personal identifying information concerning 25 or more people; Grand Larceny in the Second Degree, the Class C felony, to the theft of personal identifying concerning 100 or more people; and Grand Larceny in the First Degree, the Class B felony, 1,000 or more people.

Expanding Larceny to cover the theft of personal identifying information would not only improve the Penal Law, it would streamline it. Part of the Task Force's mission was to suggest amendments that broadly attack fraud and theft, and thereby render most boutique statutes unnecessary. Our Larceny proposal would do that in this case. If stealing personal identifying information were treated as a Larceny, as we propose, it follows that criminal possession of that information would constitute Criminal Possession of Stolen Property,[182] thus rendering unnecessary the crime of Unlawful Possession of Personal Identification Information.[183]

2. Protect Computer Data and Computer Programs

Although the terms "computer data" and "computer program" are included in the definition of "property" under the Larceny statute,[184] it is practically impossible to steal either as the law is currently constituted. These terms are defined in the computer crime statute, located not in Article 155 but in Article 156 of the Penal Law.[185] Because computer data

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[181] PENAL LAW §§ 155.30(4), (10).
[182] PENAL LAW §§ 164.45 *et seq*.
[183] PENAL LAW §§ 190.83, 190.82, 190.81.
[184] PENAL LAW § 155.00(1).
[185] "'Computer program' is property and means an ordered set of data representing coded instructions or statements that, when executed by computer, cause the computer to process data or direct the computer to perform one or more computer operations or both and may be in any form, including magnetic storage media, punched cards, or stored internally in the memory of the computer." Penal Law § 156.00(2). "'Computer

and computer programs are typically stolen by copying, the owner will generally not have been permanently deprived of its property, as required by Larceny – except in rare cases where, say, the perpetrator physically takes the only copy of a computer program located on physical media like a flash drive, or just takes the whole computer. Those examples are a vanishingly small subset of digital thievery.

The Task Force recommends that the law make clear that duplicating valuable digital information constitutes Larceny. The amendments with respect to the terms "obtain," "appropriate," and "deprive," as described above, would likely take care of the problem, but we additionally propose that the definitions of computer data and computer program be moved to the Larceny statute.[186] We further propose that the value of computer data or computer programs be specified in section 155.20 of the Penal Law as the replacement cost or market value of the computer data or computer at the time of the crime, whichever is greater.[187]

3. Expand Jurisdiction for Thefts of Digital Property

To realize the full potential of these laws, the Criminal Procedure Law must be amended. Imagine a simple case: a hacker in New Jersey steals personal identifying information from the email accounts of 2,000 New Yorkers. The servers that "host" those email accounts are located in California. Even if, as we propose, the hacker could be charged with Grand Larceny in the First Degree based on the number of people whose information was stolen, because none of the activity was committed within New York State, it is questionable whether prosecution could be brought here under our current Criminal Procedure Law.

Our proposed amendment to state jurisdiction draws directly from the special provision relating to county venue over digital crimes.[188] That provision authorizes the prosecution of digital crime in the county where the victim resided at the time of the crime, even if the perpetrator's actions did not directly touch that county.[189] Our proposal is to amend state jurisdiction to do precisely the same thing: authorize prosecution of digital crime within this state if the victim resided in the state at the time of the crime, even if the perpetrator's actions did not directly touch the state. This change is imperative to permit New York's prosecutors to protect the state's citizens from identity thieves across the country and around the globe. The proposed language would amend CPL § 20.20(2) as follows:

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data' is property and means a representation of information, knowledge, facts, concepts or instructions which are being processed, or have been processed in a computer and may be in any form, including magnetic storage media, punched cards, or stored internally in the memory of the computer." Penal Law § 156.00(3).

[186] The definitions would still apply to the computer crimes statutes in Penal Law §§ 156.00 *et seq.*, because the definition of "property" in Penal Law § 155.00 applies to the entire title.

[187] PENAL LAW § 155.20.

[188] CPL § 20.40(4)(l).

[189] As set out in Appendix D, we also propose to add larceny of personal identifying information to the list of crimes to which the special *county* venue provision applies.

> (e) An offense of identity theft, or unlawful possession of personal identifying information, or larceny or criminal possession of stolen property in which the property stolen or criminally possessed is personal identifying information or computer data or computer program, and all criminal acts committed as part of the same criminal transaction as defined in subdivision two of section 40.10 of this chapter may be prosecuted in the state (i) if any part of the offense took place in the state regardless of whether the defendant was actually present in the state, or (ii) if the person who suffers financial loss resided in the state at the time of the commission of the offense, or (iii) if the person whose personal identifying information was used, stolen or possessed in the commission of the offense resided in the state at the time of the commission of the offense.

In focusing on the victim of the crime, the proposed amendment would use concepts already found in the state jurisdiction statute in the provisions concerning "particular effect" and "result offense" jurisdiction, both of which provide a basis for state jurisdiction "[e]ven though none of the conduct constituting such offense may have occurred within this state."[190]

4. Expand Larceny to cover Thefts of Services (and Repeal Theft of Services)

The Task Force reviewed the current Theft of Services statute[191] and concluded that it is convoluted and ineffective. Although it consumes more than 150 lines of print in a standard statute book,[192] Theft of Services cannot be prosecuted above the misdemeanor level except in narrow circumstances relating to the theft of telephone service. Even then, the crime is capped at a Class E felony level no matter the value of the stolen service.[193] Certain thefts of service cannot be prosecuted above the violation level.[194] And it is hard to read section 165.15 of the Penal Law in its entirety without concluding that the law has become so unwieldy as to cry out for refinement or repeal. We suggest the former, by including thefts of services within the existing crime of Larceny, which is, after all, theft.

Theft of Services cannot, by itself, be prosecuted as a Larceny or a computer crime because neither of those statutes includes "service" in its definition of "property." Thus even

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[190] CPL § 20.20(2).
[191] PENAL LAW § 165.15.
[192] NEW YORK STATE CRIMINAL LAW REFERENCE 2013 (Looseleaf Law Publications 2013).
[193] The only theft of service that may be prosecuted as a felony (limited to a Class E felony) is the theft of telephone service, but even that is available only in limited (and somewhat convoluted) circumstances, beyond the scope of this report, spelled out in PENAL LAW §§ 165.15(5)(a), (b), and (c).
[194] Theft of cable television service of $100 or less, pursuant to PENAL LAW §§ 165.15(4)(a), (b), or (c), or theft of admission to a theater, regardless of value, are violations.

if a defendant has stolen services worth more than $1 million, the most serious possible charge is a Class E felony under Theft of Services, and then only if certain narrow conditions are satisfied. The theft of other valuable services – examples can include hotel stays, airline flights, and computer subscriptions – are simply not prosecutable as felonies. This anomaly can be eliminated with simple amendments to Larceny. In fact, the Larceny statute already defines the term "service," but the definition is vestigial: there is no operative provision that uses it.[195]

We suggest that the definition of "service" be modified slightly and added, alongside "property," as an object of the crime of Larceny. "Service" currently includes "labor" and "professional service." The Task Force concluded that prosecutions for theft of labor or professional services, without further limitations, could too easily shade into prosecutions of breaches of contract, and therefore recommends deleting those terms. We also suggest adding language relating to the theft of public and similar benefits, in order to address insurance fraud more broadly than under current law. The amended definition of "service" would read as follows:

> 8. Service includes, but is not limited to ~~labor professional service~~, computer service, transportation service, telecommunications service, cable or satellite television service, microwave transmission service, the supplying of service pursuant to a public or governmental benefit program, including housing and medical care, the supplying of service pursuant to an insurance policy or program, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam and water. A ticket or equivalent instrument which evidences a right to receive a service is not in itself service but constitutes property within the meaning of subdivision one.

The operative provision would be as follows:

> 2. Larceny includes a wrongful taking, obtaining or withholding of another's property or a service, with the intent prescribed in subdivision one of this section, committed in any of the following ways:
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> (f) By theft of service. Theft of service means either: (i) using or accessing a service in a manner that otherwise requires payment

[195] PENAL LAW § 155.00(8).

> and intentionally failing to pay for such use or access by either tampering without authority with a delivery, payment, or measurement device or mechanism, or by entering or leaving premises where the service is provided by stealth or by evading a physical barrier, or (ii) using or accessing a service in a manner that otherwise requires payment or the presentation of personal identifying information and using or presenting a form of payment or personal identifying information the actor knows he or she is not authorized to use or knows is expired or forged or otherwise not valid.

Under our proposal, theft of service would be gradated according to the same dollar values used for other thefts of property. In the existing Theft of Service statute, some thefts of service are prosecuted below the Class A misdemeanor level. Recognizing that policy determination, we propose a new Class B misdemeanor, "Petit Theft of Service," for thefts of service valued at $500 or less. We further suggest that thefts of service valued at more than $500 be punishable as a Class A misdemeanor under Petit Larceny.[196]

The definitions of "obtain," "deprive," and "appropriate" also require modification to allow for the prosecution of theft of service as a Larceny. With respect to valuation, we suggest that stolen service be valued at its market value at the time of the crime or, if that cannot be ascertained, the cost of providing the service at the time of the crime. The full text of all proposals can be found in Appendix D.

The addition of "service" to the scope of Larceny would require the repeal of the existing Theft of Services statute. The two sets of provisions would conflict, and therefore cannot coexist. Likewise, Criminal Use of an Access Device in the Second and First Degrees would also be rendered superfluous, because they, too, constitute theft of a narrow type of service.[197]

B. Scheme to Defraud

Unlike Larceny, a single count of Scheme to Defraud can reflect a perpetrator's wrongful acts against numerous victims, as long as they are part of a "systematic, ongoing course of conduct."[198] A paradigmatic case involves an advance-fee scheme: a fraudster might collect a $600 "application fee" from 100 different people, ask each to fill out an application for what turns out to be a bogus job or loan, and net $60,000. Were this scam charged as a Larceny, the lack of a multi-victim aggregation provision[199] would limit the

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[196] PENAL LAW § 155.25.
[197] PENAL LAW §§ 190.75, 190.76.
[198] PENAL LAW §§ 190.60, 190.65.
[199] *See* People v. Cox, 286 N.Y. 137, 142 (1941) ("Where the property is stolen from the *same owner* and from the same place by a series of acts, if each taking is the result of a separate, independent impulse, each is a separate crime; but if the successive takings are all pursuant to a single, sustained, criminal impulse and in execu-

charges to multiple counts of Petit Larceny, a Class A misdemeanor,[200] for each $600 "fee." By contrast, a single count of Scheme to Defraud could be charged based on either the number of intended victims (10 or more) or the value of the property obtained (more than $1,000).[201] Such a charge also avoids the evidentiary barrier to Larceny by false promise,[202] which requires proof at trial "wholly consistent with guilty intent or belief and wholly inconsistent with innocent intent or belief, and excluding to a moral certainty every hypothesis except that of the defendant's intention or belief that the promise would not be performed."[203]

Yet Scheme to Defraud has a downside that makes it only mildly effective as a tool against major fraud: no matter how great the value of the property obtained by the fraudster, and no matter how numerous the intended victims, it is limited to a Class E felony. So, whether the advance-fee artist obtains $6,000 or $6 million from his scheme, or whether he intends to defraud 10 persons or 10,000 persons, the highest level of Scheme to Defraud he faces is a Class E felony.

There is no shortage today of frauds in which criminals make off with millions of dollars or harm thousands of victims. A recent Nassau County prosecution underscores that point. The defendant, a financial advisor, bilked 53 victims – many of them senior citizens – of over $11 million.[204] He promised high rates of return on investments of stocks and annuities, and even convinced some victims to mortgage their homes and give him the proceeds to invest. Instead of distributing the promised returns, the defendant kept most of the money to fund his lavish lifestyle. Several of his victims were left fighting foreclosure as a consequence of the scam. Having reaped millions of dollars and engaged in truly egregious conduct, the top count against him was Grand Larceny in the Second Degree, a Class C felony. A quarter-century ago, the state made a policy choice that thefts of more than $1 million merit B felony treatment.[205] There is no reason why a Scheme to Defraud that reaps the same amount should not receive the same treatment.

Moreover, even as Scheme to Defraud allows aggregation of victim losses, as in our "application fee" scam, its inflexible demand that a scam involve at least two intended victims, even at the misdemeanor level,[206] can lead to strange results, and needs to be fixed. The difficulties posed by this rule may be illustrated with examples.

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tion of a general fraudulent scheme, they together constitute a single larceny, regardless of the time which may elapse.") (emphasis added).

[200] PENAL LAW § 155.25.

[201] PENAL LAW §§ 190.65(1)(a), (b).

[202] People v. Weiser, 127 Misc.2d 497, 502 (Sup. Ct. N.Y. Co. 1985) (In a prosecution for Scheme to Defraud, "[i]t is not necessary … to establish that each of the transactions at issue or the scheme in general constitutes a specific form of larceny.").

[203] PENAL LAW § 155.05(2)(d).

[204] People v. Dawson, SCI No. 2766N/07 (Sup. Ct. Nassau Co. 2007); Richard Weir, *Ponzi Scam Artist Gets 15 Years for Ripping Off Seniors*, N.Y. DAILY NEWS (June 17, 2008), www.nydailynews.com/new-york/ponzi-scam-artist-15-years-ripping-seniors-article-1.295939.

[205] L.1986, c.515.

[206] PENAL LAW §§ 190.60, 190.65.

Imagine a scheme perpetrated by defendants who obtain multiple loans under false pretenses from a single bank. To make it appear that each purported borrower intends to repay his or her loan, the defendants make at least one payment on each loan. A Larceny charge may be hard to sustain because the promise to repay and the evidence of some actual repayment make it difficult to satisfy the "moral certainty" standard described above and to prove the actor's intent to *permanently* deprive or appropriate the loan proceeds.[207] Scheme to Defraud presents neither of those barriers, but it could not be charged because there is only one victim. If the defendants engaged in precisely the same conduct but happened to get a loan from a second bank, Scheme to Defraud could be charged.

The defrauding of city or state governments also illustrates this phenomenon. Imagine a contractor who obtains one or more contracts with a city government by falsely representing that he complies with the requisite wage or diversity rules. He completes the work, and obtains millions of dollars from the city. Although the city receives the benefit of the contractor's labor, it has been cheated of an aspect of performance for which it contracted, and which may be required by statute or regulation. Case law indicates that Larceny cannot be charged, because the contractor has completed the work.[208] There is no doubt the city has been defrauded – after all, compliance with the violated proviso goes to the heart of the contract – and the contractor has obtained property by virtue of the fraud; however, Scheme to Defraud cannot be charged because there is no second victim.[209] As a consequence, although the conduct was serious and clearly fraudulent, it could well escape prosecution as either a Larceny and or a Scheme to Defraud.[210]

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[207] The definitions of "deprive" and "appropriate" are as follows:

> 3. 'Deprive.' To 'deprive' another of property means (a) to withhold it or cause it to be withheld from him *permanently or for so extended a period* or under such circumstances that the major portion of its economic value or benefit is lost to him, or (b) to dispose of the property in such manner or under such circumstances as to render it unlikely that an owner will recover such property.
> 4. 'Appropriate.' To 'appropriate' property of another to oneself or a third person means (a) to exercise control over it, or to aid a third person to exercise control over it, *permanently or for so extended a period* or under such circumstances as to acquire the major portion of its economic value or benefit, or (b) to dispose of the property for the benefit of oneself or a third person.

PENAL LAW §§ 155.00(3), (4) (emphasis added).

[208] *See, e.g.*, People v. Headley, 37 Misc.3d 815, 827 (Sup. Ct. Kings Co. 2012); People v. Bates, 160 Misc.2d 685, 695 (Sup. Ct. N.Y. Co. 1994).

[209] The offense of Defrauding the Government is inapplicable because it applies only to actions by public servants or party officers. PENAL LAW § 195.20. As explained in Section VIII, below, the Task Force proposes eliminating that restriction.

[210] Of course, a similar fraud could be perpetrated on a non-governmental party. For example, a private developer who needs plumbing in a billion-dollar project may require the contractor to represent it has the required license. Under current law, the unlicensed firm that obtains the work based on a knowingly false representation made as part of a scheme to obtain the contract, and performs, cannot be prosecuted for Larceny or

Another limitation of Scheme to Defraud is that it is capped at a Class E felony, even if the fraud targets dozens, hundreds, or thousands of persons. Two examples drive home how, even where a dollar value cannot be put on victim losses, the magnitude of a scam may be so great as to require (or at least allow for) more severe punishment.

In the internet age, multiple-victim frauds are a daily occurrence. Imagine an internet "phishing" scheme in which the fraudsters send emails to millions of people seeking their bank account information on the premise that there is a payment waiting to be made to them, or seeking to "confirm" their credit card information on the ironic premise that their credit card may have been used fraudulently. It may be possible to prove the number of intended victims – the recipients of the emails, every one of whom the sender intended to defraud – and that the defendant obtained some property (personal identifying information). But it may be impossible to determine the total value of the property obtained.

Of course, fraudsters do not confine themselves to the internet. In a recent prosecution, the defendants falsely represented that they operated a "security guard training school" that could place its graduates in high-paying jobs.[211] Thousands of victims paid $80 - $1,300 (often in cash) for "classes" based upon the defendants' false promises; some even quit their jobs in anticipation of lucrative future employment. Instead, the defendants simply referred their victims to security companies, where they could apply for jobs like any other applicant. The defendants could be charged only with Class A misdemeanors and Class E felony Larcenies and with Scheme to Defraud. Because most victims paid in cash, the total dollar amount obtained pursuant to the scheme was difficult to determine.

In cases like these, the Task Force believes that the criminal charge should reflect the number of intended victims. The Task Force therefore recommends several substantial amendments to the crime of Scheme to Defraud. First, we propose that the requirement of multiple victims be eliminated. Second, we propose that the crime be gradated, up to a Class B felony, based upon one of two measurements: the dollar value of the property or service obtained by the defendant or the number of intended victims.

Thus, the basic crime would remain a Class E felony, without the requirement of more than one victim, and new sections would be added to reflect the following gradation:

Scheme to Defraud regarding the money he thereby obtained, even though it has clearly used a scheme to cheat the owner out of something the owner contracted to get.

[211] People v. Owens, Ind. Nos. 4493/2012, 4823/2012 (Sup. Ct. N.Y. Co. 2012); *see also* Jessice Simeone et al., *NYPD Daily Blotter*, N.Y. POST (Oct. 17, 2012), www.nypost.com/p/news/local/nypd_blotter/nypd_daily_blotter_Vc2iflnRg0YhVWBx3hzf3M.

- Class E felony: More than $1,000 obtained from one or more persons, or intent to defraud 10 or more persons (consistent with current law).[212]
- Class D felony: More than $3,000 obtained from one or more persons, or intent to defraud 25 or more persons.
- Class C felony: More than $50,000 obtained from one or more persons, or intent to defraud 100 or more persons.
- Class B felony: More than $1 million from one or more persons, or intent to defraud 1,000 or more persons.

The definition of "scheme to defraud" would read as follows:

> A person engages in a scheme to defraud when he or she engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud at least one person or to obtain property or service from at least one person by false or fraudulent pretenses, representations or promises, and so obtains property or service from at least one person.

By way of example, the Class D felony, Scheme to Defraud in the Third Degree, would read:

> A person is guilty of Scheme to Defraud in the Third Degree when he or she engages in a scheme to defraud and
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> 1. intends to defraud or to obtain property or service from ten or more persons, or
>
> 2. the value of the property or service obtained exceeds three thousand dollars.

In sum, New York State deserves a robust fraud law that both captures the seriousness of traditional frauds and allows for protection of the public against new and evolving types of fraud. The Task Force believes that the proposed gradation scheme would fulfill that salutary purpose. The full proposed statute is set forth in Appendix D.

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[212] Subsection (1)(c) of section 190.65 is aimed at schemes that target vulnerable elderly persons. The Task Force's recommendation that single-person schemes be actionable would also apply to this subsection. *See infra* note 302.

C. The Martin Act

New York State has its own securities fraud law, originally enacted in 1921, more than a decade before the anti-fraud provisions of section 10(b) of the Securities and Exchange Act of 1934, and 44 years before the enactment of the current Penal Law. The Martin Act, as it is known, contains criminal and civil provisions prohibiting securities fraud.[213] Like Scheme to Defraud, however, those provisions are capped at a Class E felony, no matter the amount of money obtained or the number of victims targeted.

Obviously, securities fraud is a central concern of white-collar crime enforcement today, as shown by the extraordinary cases in the news in the last several years concerning massive accounting fraud and insider trading schemes.[214] The Task Force considered recommending amendments similar to those we suggest for Scheme to Defraud, and noted that such amendments have been proposed in the past.[215] We declined to do so at this time.

The Martin Act's criminal provisions are complex.[216] At the misdemeanor level, it sets forth a long list of prohibited acts in connection with securities or commodities transactions, including, for example, "any representation or statement which is false, where the person who made such representation or statement . . . made no reasonable effort to ascertain the truth."[217] In a separate provision, the Martin Act declares that any person committing one of the listed prohibited acts is guilty of a misdemeanor.[218] Because of this structure, the misdemeanor Martin Act offense is often described as a "strict liability" crime, as the statute does not by its terms require that the acts be committed intentionally.[219]

At the felony level, the Martin Act has two provisions. The wording of the first is very similar to the wording of Penal Law Scheme to Defraud.[220] The second provision, however, lists a series of prohibited acts and practices, which must be committed intentionally, but which do not necessarily require any further intent to defraud.[221] For example, this se-

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[213] GEN. BUS. LAW § 352-c.

[214] *See, e.g.*, People v. Mazzuto, Ind. No. 02503/2010 (Sup. Ct. N.Y. Co. 2010); *see also Yale Donor Goes to Prison for $110 Million Stock Scam*, REUTERS, April 9, 2012 ("John D. Mazzuto, former chief executive officer of Industrial Enterprises of America Inc., was sent to jail on Monday for running a $110 million stock scam."), *available at* www.reuters.com/article/2012/04/09/stockscam-sentencing-idUSL2E8F9IOS20120409; *see also* David S. Hilzenrath, *Hedge Fund Billionaire Guilty in Major Insider-trading Case*, WASH. POST (May 11, 2011), articles.washingtonpost.com/2011-05-11/business/35263566_1_raj-rajaratnam-galleon-management-rajaratnam-case.

[215] Maranda E. Fritz and Michael C. Miller, *The Martin Act: Securities Fraud Statute*, N.Y.L.J., Dec. 5, 1991, at 1.

[216] The Martin Act also provides for civil enforcement by the Attorney General, a topic that is beyond the scope of the Task Force's mission. GEN. BUS. LAW § 353(1).

[217] GEN. BUS. LAW §§ 352-c(1)(c)

[218] GEN. BUS. LAW § 352-c(4).

[219] Robert J. Anello, *The Martin Act: New York State Securities Fraud Statute*, *in* COMMERCIAL LITIGATION IN NEW YORK STATE COURTS § 90:17 (Robert L. Haig ed., 3d ed.); *see generally* Jeff Izant, Note, *Mens Rea and the Martin Act: A Weapon of Choice for Securities Fraud Prosecutions?*, 2012 COLUM. BUS. L. REV. 913.

[220] GEN. BUS. LAW § 352-c(5); PENAL LAW §§ 190.60, 190.65.

[221] GEN. BUS. LAW § 352-c(6).

cond provision makes it a felony to intentionally engage in any "deception, concealment, [or] suppression," or any "fictitious or pretended purchase or sale" in connection with a securities or commodities transaction, but does not require, in addition, an intent to defraud.[222]

Without further study, the Task Force was not prepared to propose higher felony grades for these offenses, which are based on a complex set of rules particular to the securities and commodities businesses, and which do not in many instances require the same intent to defraud as Scheme to Defraud. We are also confident that, if the Task Force's proposals are adopted, most serious forms of securities fraud will be addressed by the amended Scheme to Defraud. For those reasons, we make no recommendations with respect to the Martin Act.

D. Trademark Counterfeiting

The harm caused by counterfeit goods trafficking cannot be overstated. This crime causes financial losses to businesses and the tax system, puts consumers at risk of injury, and finances organized criminal enterprises. By some estimates, trademark counterfeit goods may account for as much as seven percent of all world trade, or up to $650 billion in sales per year.[223] New York City estimates that it loses more than $1 billion per year in revenue based upon the sale of counterfeit goods.[224] Counterfeit goods also pose a public safety concern: faked goods include automobile parts, airplane parts, and over-the-counter and prescription drugs.[225] In fact, by some estimates, up to 11 percent of all pharmaceuticals sold throughout the world are counterfeit.[226]

Of even greater concern is the well-documented connection between counterfeit goods and terrorist organizations. Informant sources have identified counterfeit goods as an important funding stream for world-wide terrorist activities, including the Madrid train bombing that killed 191 people,[227] the 1993 World Trade Center bombing,[228] the activities of Al-Qaeda,[229] the activities of Hezbollah,[230] and the attempt by Sheikh Omar Abdel Rahman

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[222] *Id.*

[223] Carl Bialik, *Efforts to Quantify Sales of Pirated Goods Lead to Fuzzy Numbers*, WALL ST. J. (Oct. 19, 2007), online.wsj.com/article/SB119274946863264117.html (citing figures from the U.S. Chamber of Commerce and the International Counterfeiting Coalition, but cautioning that accurate numbers are difficult to ascertain with certainty).

[224] CITY OF NEW YORK, OFFICE OF THE COMPTROLLER, BOOTLEG BILLIONS: THE IMPACT OF THE COUNTERFEIT GOODS TRADE ON NEW YORK CITY 4 (2004), *available at* www.comptroller.nyc.gov/bureaus/bud/04reports/Bootleg-Billions.pdf.

[225] Brian Grow et al., *Dangerous Fakes*, BUS. WK., Oct. 13, 2008, at 34; *see also* Brian Grow, *Questions Kill a Deal*, BUS. WK., Oct. 9, 2008, at 44.

[226] Michael M. DuBose, *Criminal Enforcement of Intellectual Property Laws in the Twenty-First Century*, 29 COLUM. J. L. & ARTS 481, 481 (2006) ("DuBose").

[227] Grow et al., *supra* note 225, at 34.

[228] *See* INT'L TRADEMARK ASS'N, COUNTERFEITING SPECIAL REPORT 11 (2004), *available at* www.inta.org/downloads/SpecialRpt_counterfeiting2004.pdf.

[229] Roslyn A. Mazer, *From T-Shirts to Terrorism: That Fake Swoosh May be Helping to Fund Bin Laden's Network*, WASH. POST, Sept. 30, 2001, at B2.

and his followers to blow up New York City landmarks.[231] In fact, an Al-Qaeda training manual touted the sale of trademark counterfeit products as a means of raising money for the organization.[232] It is not surprising that criminals have turned to the sale of counterfeit goods to fundraise for their criminal enterprises. With little chance of serious jail time, a rational criminal would sell counterfeit products instead of narcotics because the higher profit margins and lower risk make it a more appealing criminal enterprise.[233]

The Task Force proposes to streamline and clarify the Trademark Counterfeiting statute. Under current law, the gradation thresholds are triggered by the current value of the goods possessed or offered for sale by the defendant. Value is determined by the street value of the goods.[234] There is, however, a gap in the gradation. The second-degree crime is a Class E felony, and applies where the goods are valued over $1,000; the first-degree crime is a Class C felony, and applies where the goods are valued over $100,000. The law contains no Class D felony.[235] We propose to fill this gap by creating a Class D felony, which would apply where the defendant possessed goods with a value greater than $25,000. Under our proposal, the highest level offense would remain a Class C felony, with the same dollar threshold. The Task Force believes that this amendment would better reflect the differences between minor distributors, mid-level distributors, and major traffickers. The Task Force considered, but ultimately rejected recommending a B-felony Trademark Counterfeiting crime.

Additionally, we propose that the gradations be based not only on the street value of the goods, but alternatively, the total number of goods possessed by a defendant. The proposed thresholds are: more than 200 items for the Class E felony; more than 2,000 items for the Class D felony; and more than 10,000 items for the Class C felony. This design would further help delineate between low-level dealers and major traffickers.

The gradations would also give both the public and defendants certainty with respect to the applicable level of offense. The street value of counterfeit goods is frequently the subject of litigation, requiring expensive, time-consuming expert testimony from both sides to determine the level of the crime. But no expert testimony is needed to count the number of goods, which is a reasonable proxy for the defendant's level of culpability. This proposal would therefore simplify cases immensely, saving the time, money and resources of taxpayers and criminal defendants alike.

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[230] James M. Cooper, *Selected Essays and Transcripts from the Institute of Health Law Studies Conference on International Drug Importation: Issues in Public Policy, Patient Safety and Public Health*, 36 CAL. W. INT'L L.J. 89, 97 (2005).
[231] PAUL R. PARADISE, TRADEMARK COUNTERFEITING, PRODUCT PIRACY, AND THE BILLION DOLLAR THREAT TO THE U.S. ECONOMY (1999).
[232] DuBose, *supra* note 226, at 486.
[233] *Id.* at 482–83.
[234] PENAL LAW §§ 165.72; 165.73.
[235] *Id.*

Currently, the statute requires that *all* seized goods be stored and retained as evidence until after disposition of the case.[236] This requirement comes at a cost: the New York City Police Department reports that it maintains upwards of 200 trailers and holds nearly 3,000 tons of seized goods for extended periods of time. The Task Force proposes an amendment to allow the storage of only the number of goods needed to prove the offense being charged. This would save storage costs while still preserving the evidence necessary for trial.

The statute also requires that after the defendant is convicted, all seized goods must be destroyed and not distributed in any way.[237] The Task Force believes this rule leads to unnecessary waste. Under our proposal, the trademark holder could dispose of the goods as it sees fit, which would include giving the items to the poor or homeless.[238] This change would save the cost of destroying the goods and would potentially help others.

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[236] PENAL LAW § 165.74.
[237] *Id.*
[238] Tanya Batallas, *Program Will Donate Seized Counterfeit Goods to the Poor and Homeless Worldwide*, THE STAR-LEDGER (August 30, 2009), *available at* aww.nj.com/business/index.ssf/2009/08/program_will_donate_seized_cou.html.

V. Cybercrime and Identity Theft

Cybercrime is a pervasive and rapidly expanding threat, both nationally and in New York State.[239] Its definition includes any crime in which a computer, smart phone or the internet is used to commit or conceal a crime.[240] More and more, cybercrime includes identity theft, which is quickly reaching epidemic levels in New York State and elsewhere. According to a 2013 report by Transunion, every minute 19 people fall victim to identity theft.[241] The harm is substantial: Transunion further reported that "[i]t takes the average victim an estimated $500 and 30 hours to resolve each identity theft crime."[242] And strikingly, while incidents of violent crime continue to decrease in New York, identity theft is rapidly growing.[243] Among New York consumers, identity theft was the number one complaint in 2012.[244]

New York City is a particularly target rich environment for cyber criminals and identity thieves. For example, approximately 37% of all felony complaints drafted by the New York County District Attorney's Office in 2012 include charges related to identity theft or cybercrime.[245] New York City is a global hub of international business and commerce, and most major banks are headquartered or have a significant presence in New York State. The City also has more than 8.3 million residents, and is a top tourism destination, receiving as many as 52 million tourists a year.[246] The large populace, and the presence of so many banks and companies transacting business via the internet, naturally draws organized cyber criminals. In the largest cases prosecuted, hundreds – or even thousands – of individuals have their personal identifying information stolen via computer hacking or other data intru-

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[239] *Cybercrime*, INTERPOL, www.interpol.int/Crime-areas/Cybercrime/Cybercrime.

[240] Thomas A. Petee, *Defining "Cyber-Crime": Issues in Determining the Nature and Scope of Computer-Related Offenses*, *in* THE FUTURE CHALLENGES OF CYBERCRIME: VOLUME 5 PROCEEDINGS OF THE FUTURES WORKING GROUP 7-8 (Toby Finnie, Tom Petee, and John Jarvis, eds., 2010), *available at* futuresworking-group.cos.ucf.edu/publications/FWGV5Cybercrime.pdf.

[241] *Identity Theft Facts*, TRANSUNION (June 30, 2013, 9:10 AM), www.transunion.com/personal-credit/identity-theft-and-fraud/identity-theft-facts.page.

[242] *Id.*

[243] BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, IDENTITY THEFT REPORTED BY HOUSEHOLDS, 2005-2010 7 (2011), *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=2207.

[244] The FTC received 103,827 complaints from New York State consumers, up more than 10,000 from the previous year. Identity theft was again the top category with 21,538 consumers reporting some form of identity theft in 2012. In addition, Consumer Sentinel recorded 82,289 other complaints originating from New York consumers. *See* Press Release, Federal Trade Commission, FTC's Northeast Region Releases Top Complaint Categories in 2012 (Mar. 5, 2013), *available at* www.ftc.gov/opa/2013/03/ny_ncpw.shtm.

[245] Internal Records of the New York County District Attorney's Office, Office of Planning and Management (2013).

[246] *See, e.g.*, Michael Howard Saul, *New York City Breaks Tourism Record*, THE WALL STREET JOURNAL ONLINE (Jan. 4, 2011, 3:20 PM), blogs.wsj.com/metropolis/2011/01/04/new-york-city-tourism-bounces-back/; Sam Roberts, *Fewer People Are Abandoning the Bronx, Census Data Show*, N.Y. TIMES, Mar. 14, 2013, at A29, *available at* www.nytimes.com/2013/03/14/nyregion/more-people-moving-to-bronx-census-shows.html?_r=0.

sions.[247] Because identity thefts are frequently committed in the cyber world, the victims and perpetrators are often located outside New York State, and indeed, outside the country.[248]

In combating the scourge of identity theft crime, law enforcement confronts certain consistent obstacles. For example, criminal activity linked to one victim routinely spans many jurisdictions. Additionally, accomplices located around the world can work together to steal, fraudulently use, and traffic in personal data. And criminals, working both domestically and abroad, take advantage of the anonymity that computers offer by perpetrating large-scale frauds, scams, and computer intrusions. Because some criminals use advanced techniques to conceal their identities and cover their tracks, locating them can be challenging. The physical tools used to investigate and prosecute these cases require specialized expertise, are expensive, and are not always readily available.[249]

Seeking to make cybercrime enforcement more effective, the Task Force solicited input from experts in law enforcement to instruct as to the latest trends in cybercrime and identity theft, and to comment on the barriers to enforcement.[250] The Task Force also heard from those in the private sector, ranging from financial institutions to legal practitioners.[251] The common theme was the pervasive nature of the crime and the need to have the ability to charge higher-level offenses for more serious criminal acts. As such, the Task Force explored ways to strengthen and update our existing laws, while examining methods to capture the varied nature of the crimes.

We propose below (1) amending the Penal Law to treat intentional computer attacks more seriously; (2) modifying current Identity Theft laws to treat more serious identity thefts more seriously and to protect vulnerable victims of identity theft, including making Identity

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[247] *See* People v. Ivanov, Ind. No. 02719/2011 (Sup. Ct. N.Y. Co. 2011); Beth Kormanik, *3 Accused of Theft Using a Device at A.T.M.'s*, N.Y. TIMES, Nov. 16, 2011, at A26, *available at* www.nytimes.com/2011/11/17/nyregion/chase-atm-fraud-case-indictment-is-unsealed.html; *see also* United States v. Gonzalez, 08-CR-10223 (D. Mass 2009). Gonzalez was a computer hacker who stole credit card and debit card data from more than 130 million customers from some of the largest retailers in the United States including TJ Maxx, BJ's Wholesale Club, and Barnes and Noble. He was sentenced to 20 years in prison on March 25, 2010. *See* James Verini, *The Great Cyberheist*, N.Y. TIMES SUNDAY MAGAZINE, November 14, 2010, at MM44, *available at* www.nytimes.com/2010/11/14/magazine/14Hacker-t.html.

[248] *See, e.g.*, *Open Hearing: Cyber Threats and Ongoing Efforts to Protect the Nation before the H. Permanent Select Comm. on Intelligence,* 112th Cong. (2011) (statement of Rep. Mike Rogers), *available at* intelligence.house.gov/sites/intelligence.house.gov/files/documents/100411CyberHearingRogers.pdf; MANDIANT, APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS 27-31 (2013), *available at* intelreport.mandiant.com/Mandiant_APT1_Report.pdf.

[249] Adam Palmer, *Prosecutor View of Cybercrime*, NORTON CYBERCRIME FRONTLINE BLOG (June 22, 2011), community.norton.com/t5/Cybercrime-Frontline-Blog/Prosecutor-View-of-Cybercrime/ba-p/478794.

[250] The Task Force heard from officials from the United States Secret Service, the New York City Police Department, the Manhattan District Attorney's Office, the Queens County District Attorney's Office, the United States Attorney's Office for the Eastern District of New York and the Monroe County District Attorney's Office.

[251] The Task Force was advised by JP Morgan Chase Bank, American Express, Joseph DeMarco, Esq., and attorneys from Baker, Hostetler, LLP.

Theft a predicate act for the crime of Enterprise Corruption; and (3) strengthening the law that currently prohibits Unlawful Possession of a Skimmer Device.

A. Computer Intrusion Laws

Computer intrusions are an increasingly widespread and serious problem that impact the corporations, government entities, and individuals who are so critical to the prosperity and safety of New York State.[252] The intrusions can often give rise to national security concerns: the news is rife with reports of state-sponsored hacking for espionage of government information or corporate secrets.[253] Malicious hackers invade computer networks by exploiting vulnerabilities in a system, introducing malware, or the old-fashioned way: finding an insider at the target institution.[254] Once inside, in the best-case scenario, they obliterate the owner's privacy. They can also destroy, manipulate or alter data, thereby causing individuals or companies financial loss, the inability to conduct business, or the loss of data.

1. Change the Definition of Computer Material

Virtually all hacking offenses constitute an unauthorized computer intrusion, unauthorized alteration of computer information, or both. The former may be charged as the Class E felony of Computer Trespass, but only if the defendant intended to commit, attempted to commit, or furthered the commission of another felony, or if the defendant was thereby able to access computer *material*, which is a term of art.[255] The latter, Computer Tampering, requires not only an unauthorized intrusion, but also the alteration or destruction of a computer *program* or computer *data*, also terms of art,[256] and is in any event only a Class A misdemeanor.[257] Computer Tampering can be charged at higher levels when, among

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[252] *See, e.g.*, David E. Sanger and Nicole Perlroth, *Cyberattacks Against U.S. Corporations Are on the Rise*, N.Y. TIMES (May 23, 2013), www.nytimes.com/2013/05/13/us/cyberattacks-on-rise-against-us-corporations.html?pagewanted=all&_r=0; *Cyber Criminals Continue to Use Spear-Phishing attacks to Compromise Computer Networks*, INTERNET CRIME COMPLAINT CENTER (June 25, 2013), www.ic3.gov/media/2013/130625.aspx.

[253] MANDIANT, APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS 27-31 (2013), *available at* intelreport.mandiant.com/Mandiant_APT1_Report.pdf.

[254] People v. Yin, Ind. No. 01764/2011 (Sup. Ct. N.Y. Co. 2011); Chloe Albanesius, *Fired Gucci Employee Indicted for Hacking Company's Computer Network*, PCMAG.COM, (Apr. 6, 2011), www.pcmag.com/article2/0,2817,2383172,00.asp.

[255] PENAL LAW § 156.10. A person is guilty of computer trespass when he or she knowingly uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and: (1) he or she does so with an intent to commit or attempt to commit or further the commission of any felony; or (2) he or she thereby knowingly gains access to computer material.

[256] PENAL LAW §§ 156.00(2), (3).

[257] "A person is guilty of computer tampering in the fourth degree when he or she uses, causes to be used, or accesses a computer, computer service, or computer network without authorization and he or she intentionally alters in any manner or destroys computer data or a computer program of another person." PENAL LAW § 156.20. The penalty increases to an E felony when the aggregate damages exceed $1,000, when the defendant has certain prior convictions, or if he intentionally destroyed or altered computer material. PENAL LAW § 156.25. In order to increase to a D felony or C felony, the aggregate damage must exceed $3,000 or $50,000, respectively. PENAL LAW §§ 156.26, 156.27.

other things, the tampering causes damage exceeding $1,000 (E felony), $3,000 (D felony), or $50,000 (C felony).[258] Altering or destroying computer *material* also constitutes E-felony Computer Tampering.

The definition of "computer material" is restricted to medical records, government records, or data that provides a *competitive advantage* to the individual accessing it without permission.[259] This restrictive definition leaves out all manner of malicious hacking that is not related to trade secrets or other competitive advantages, thereby relegating intentional hacking of private citizens to a misdemeanor. Examples include those who without authorization access private emails of another; hack into webcams for sexual gratification or for spying on unwitting victims; and those who access a school database to take the disciplinary records of children.[260] Under the current definition of "computer material," these crimes would be limited to Class A misdemeanors.[261]

For those reasons, the Task Force proposes that the definition of "computer material" in Penal Law § 156.00(5)(c) be broadened to allow both Computer Trespass and Computer Tampering to be treated with the seriousness they deserve in non-commercial situations.[262] Proposed statutory text appears in Appendix E.

2. Gradate Computer Tampering

Inevitably, when an intrusion occurs, particularly in commercial enterprises, loss amounts, including just to mitigate the damage caused, can quickly rise well above $50,000.[263] Although the crime of Computer Tampering gradates to higher-level felonies when the aggregate damage increases, it is capped at a Class C felony.[264] To compare, Grand

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[258] PENAL LAW §§ 156.20, 156.25, 156.26, 156.27, 156.29.

[259] PENAL LAW § 156.00(5). Specifically, § 156.00(5)(c) states that computer material is property, and that it is any computer data or program which "is not and is not intended to be available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his, her or their consent and which accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof."

[260] *See, e.g.*, Andrew Silke, *Webcams Taken Over By Hackers, Charity Warns*, BBC NEWS (June 20, 2013), www.bbc.co.uk/news/uk-22967622; *Teen Hacker Says Webcam Spying is a 'Laugh'*, BBC NEWS (June 20, 2013), www.bbc.co.uk/news/technology-22986009 (demonstrating how a simple Google search returns numerous videos and "how to" articles explaining how to hack another person's webcam); Fred Attewill, *Hacking Pupil Posted Records on Facebook*, METRO (May 14, 2012), metro.co.uk/2012/05/14/hacking-pupil-lewis-blessed-posted-records-on-facebook-431642/.

[261] Consider also a situation where a bank teller decides to exceed her authority by stealing the personal identifying information of a victim from a bank's network. Absent a corresponding felony, this would be charged as a misdemeanor.

[262] PENAL LAW §§ 156.10, 156.25(3).

[263] *See, e.g.*, *Three Charged in Connection with 'Gozi' Trojan*, KREBSON SECURITY (Jan. 23, 2013), krebsonsecurity.com/2013/01/three-men-charged-in-connection-with-gozi-trojan/; *Concerning Federal Response to Internet Denial of Service Attacks: Hearing Before the H. Subcomm. on Crime and the S. Subcomm. on Judicial Oversight,* 106th Cong. (2000) (statement of Eric H. Holder, Jr., Deputy Att'y Gen.), *available at* www.justice.gov/archive/dag/testimony/holder22900.htm.

[264] PENAL LAW § 156.27.

Larceny gradates up to a Class B felony for thefts in excess of $1 million.[265] Consequently, a defendant who causes $50,000 worth of damage faces the same charge and potential prison sentence as one who causes $5 million worth of damage, an amount that is not unheard of in the modern world.

The Task Force proposes that, consistent with the current Grand Larceny gradation scheme and our proposed gradation of Scheme to Defraud,[266] a new Class B felony, for Computer Tampering that causes loss of $1 million or more, be created. The new crime would include the elements of the fourth degree offense and require proof that a person cause damage in excess of $1 million. At a time when computer intrusions become more common – and more costly – every day, common sense dictates that causing large amounts of computer damage should be treated as seriously as stealing equivalent amounts of money.

Under our proposal, the lower-level offenses of Computer Tampering, currently codified in Penal Law Sections 156.20-157.28, would be reclassified as a fifth-degree offense (Class A misdemeanor), fourth-degree offense (Class E felony), third-degree offense (Class D felony) and second-degree offense (Class C felony), respectively. Proposed statutory text appears in Appendix E.

B. Identity Theft

New York's Identity Theft statutes, which date back to 2002,[267] are split into three degrees – from a Class A misdemeanor to a Class D felony.[268] They were passed to "aid law enforcement in combating one of the fastest growing financial crimes."[269] The basic crime, Identity Theft in the Third Degree, is violated when a person:

> Knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:
>
> 1. Obtains goods, money, property or services or uses credit in the name of such other person or causes financial loss to such person or to another person or persons; or
> 2. Commits a Class A misdemeanor or higher level crime.[270]

The two higher levels – a Class E felony and a Class D felony – are violated principally if the defendant additionally wrongfully obtains more than $500 or more than $2,000, respective-

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[265] PENAL LAW § 155.42 (Grand Larceny in the First Degree).
[266] *See* Section IV(B), *supra*.
[267] *See, e.g.,* NEW YORK LEGISLATIVE SERVICE, NEW YORK STATE LEGISLATIVE ANNUAL ("NYS LEGISLATIVE ANNUAL") 355-356 (2002); PENAL LAW §§ 190.77-190.84.
[268] PENAL LAW §§ 190.78, 190.79, 190.80.
[269] NYS LEGISLATIVE ANNUAL at 355.
[270] PENAL LAW § 190.78.

ly.[271] There is no provision for gradating the crime according to the number of identities assumed.

The Identity Theft law suffers from other weaknesses that detract from its effectiveness. Because it goes no higher than a Class D felony, the statute does not differentiate between a defendant who uses the identity of one victim to steal more than $2,000 and one who assumes the identities of 250 victims to steal more than $500,000. This leads to an incongruous result: prosecutors cannot bring charges that adequately reflect the breadth and severity of the crime committed or the relative impact on the victims. Moreover, because loss amounts from multiple victims cannot be aggregated, prosecutors typically cannot charge the defendant who obtains more than $500,000 with Class C-felony-level Grand Larceny, despite the individual's unjust enrichment by that amount.[272]

The years since this law's 2002 passage underscore the need to strengthen it. In 2004, the Internet Crime Complaint Center (IC3) reported that credit card fraud and check fraud accounted for approximately 5% of all complaints from New York State that year.[273] By 2010, identity theft and check fraud accounted for 25% of all complaints from New York State.[274] Similarly, the Bureau of Justice Statistics reported that in 2004, a year after the Legislature enacted the current law, approximately 3.1% of all households in the United States reported some incident of Identity Theft. By 2010, that number rose to approximately 7% of all households.[275]

1. Gradate Identity Theft

To combat this epidemic, the Task Force proposes amending the Identity Theft statutes to create crimes ranging from a Class A misdemeanor to a Class B felony, with thresholds triggered by the dollar amount wrongfully obtained *or* the number of identities assumed. These proposed amendments are necessary to address the realities of criminal activity perpetrated by identity thieves. And, significantly, they are consistent with New York's tradition of treating more serious harms more seriously.

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[271] PENAL LAW §§ 190.79, 190.80.

[272] It is well established that if a larceny is committed pursuant to a single intent and common plan, successive takings from the same victim may be aggregated to a single count of Grand Larceny. *See, e.g.,* People v. Cox, 286 N.Y. 137, 143 (1941); People v. Daghita, 301 N.Y. 223, 225-26 (1950); People v. Luono, 58 A.D.2d 896, 896-97 (2d Dept. 1977). However, if the larcenies are from different victims, the total loss from multiple larcenies may only be aggregated into a single count of Grand Larceny if all of the larcenies occur at the same time and place pursuant to a common scheme or plan. *See* People v. Berger, 97 A.D.2d 482, 483-84 (2d Dept. 1983).

[273] NEW YORK'S IC3 2004 INTERNET FRAUD CRIME REPORT, INTERNET CRIME COMPLAINT CENTER, www.ic3.gov/media/annualreport/2004/New%20York%202004%20Report.pdf.

[274] NEW YORK'S IC3 2010 INTERNET FRAUD CRIME REPORT, INTERNET CRIME COMPLAINT CENTER, www.ic3.gov/media/annualreport/2010/New%20York%202010%20Report.pdf.

[275] BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, IDENTITY THEFT REPORTED BY HOUSEHOLDS, 2005-2010 4 (2011), *available at* www.bjs.gov/index.cfm?ty=pbdetail&iid=2207.

Under the Task Force's proposal, the current crimes of Identity Theft, which would remain a Class A misdemeanor, Class E felony, and Class D felony, would be reclassified as fifth, fourth, and third-degree offenses, respectively. The amended D felony would be violated not only by causing loss in excess of $2,000, but also by assuming the identities of 10 or more people. The Task Force further proposes a new offense: a Class C felony, Identity Theft in the Second Degree, that would include the elements of the third-degree offense, but also require proof that a person obtained property or caused financial loss in excess of $25,000 or assumed the identities of 25 or more people. The new first-degree offense, a Class B felony, would include the elements of the third-degree offense but would also require proof that a person obtained property or caused financial loss in excess of $500,000 or assumed the identities of 100 or more people. The language of the proposal is set forth in Appendix E.[276]

The Task Force believes that the gradated statutes would provide New York the ability to combat this pervasive crime, and go far to prevent the victimization of its citizens. The dollar threshold amounts and the number of identities compromised serve as meaningful guideposts by which to measure relative culpability and the nature of the criminal activity.

2. Expand Aggravated Identity Theft

In 2008, the Legislature created Aggravated Identity Theft, a Class D felony.[277] This crime focuses on identity thieves who knowingly target members of the armed forces serving overseas. It protects our nation's service men and women when they are most vulnerable. The Task Force recommends that this valuable statute be split into two crimes: the existing statute would become Aggravated Identity Theft in the First Degree, and a new Aggravated Identity Theft in the Second Degree would be added as a Class E felony.

The proposed Class E felony is aimed at protecting other vulnerable groups, namely, the elderly,[278] the incompetent and the physically disabled.[279] These at-risk people are frequently targeted by cyber criminals because they may not be as technologically savvy as the average consumer, and therefore may not learn that they have been victimized for a considerable period of time. Notably, the Federal Trade Commission reports that in 2012, 19% of all Identity Theft complaints were filed by people 60 and over.[280] The proposed statutory text appears in Appendix E.

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[276] As explained in Section IV, below, the Task Force recommends expanding Larceny to cover the theft of personal identifying information, computer data and computer programs. It follows that criminal *possession* of those items could be charged as Criminal Possession of Stolen Property, PENAL LAW §§ 164.45 *et seq.*, rendering superfluous the crime of Unlawful Possession of Personal Identification Information, PENAL LAW §§ 190.83, 190.82, 190.81.

[277] L.2008, c.226, eff. Nov. 4, 2008; PENAL LAW § 190.80-a.

[278] The proposal would use the definition of "Vulnerable Elderly Person" from PENAL LAW § 260.31(3).

[279] As defined in PENAL LAW § 260.31(4).

[280] CONSUMER SENTINEL NETWORK, FEDERAL TRADE COMMISSION, DATA BOOK FOR JANUARY – DECEMBER 2012 14 (2013), *available at* ftc.gov/sentinel/reports/sentinel-annual-reports/sentinel-cy2012.pdf.

3. Include Identity Theft in the Organized Crime Control Act

In 1986, the New York State Organized Crime Control Act (OCCA) was enacted, providing an increased penalty for patterns of criminal activity conducted in connection with a structured criminal enterprise.[281] The statute, which is New York's version of the federal Racketeer Influenced Corrupt Organizations Act (RICO),[282] is predicated in part on a defendant's commission of three or more "criminal acts" within a five-year period.[283] The list of qualifying crimes is limited to those listed in Penal Law § 460.10, which does not include Identity Theft. Its absence seems incongruous in light of the inclusion of similar economic crimes, including Residential Mortgage Fraud, Grand Larceny, and Money Laundering.[284]

The purpose of OCCA is to focus on criminal groups whose "sophistication and organization make them more effective at their criminal purposes … [and] to address the particular and cumulative harm posed by persons who band together in complex criminal organizations."[285] Organized identity theft rings abound, and their sophistication, structure and criminal methods certainly bring them within the ambit of what OCCA was intended to address.[286] Indeed, as more traditional organized crime recedes, cybercrime and identity theft have become, in some ways, the new face of organized crime.[287] Law enforcement professionals have even noted in recent years that career drug offenders and violent criminals have been migrating to these crimes, because of the economic benefits and the potential for lower prison sentences.[288]

The Task Force therefore recommends adding Identity Theft to the enumerated list of predicate OCCA offenses in Penal Law § 460.10. Proposed statutory text is in Appendix E.

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[281] *See* PENAL LAW §§ 460.00 *et seq.*
[282] 18 U.S.C. §§ 1961 *et seq.*
[283] PENAL LAW § 460.10
[284] *Id.*
[285] People v. Besser, 96 N.Y.2d 136, 142 (N.Y. 2001).
[286] *See, e.g.*, People v. Jacas, et al., Ind. Nos. 5151/2011, 5156/2011, and 42/2012 (Sup. Ct. N.Y. Co. 2011-2012) (where the predicate used for OCCA was Grand Larceny, even though the conduct of the enterprise was to steal personal identifying information in order to commit fraud through the use of forged credit cards in high-end retail stores). In a massive 111-defendant identity theft prosecution, the Queens County District Attorney's Office was not able to charge identity theft in their 5 separate enterprise corruption indictments. Instead, 5 distinct identity theft indictments were voted to make certain the identity theft conduct was properly covered. Matthew J. Schwartz, *111 Arrested in Identity Theft Probe*, INFORMATIONWEEK SECURITY (Oct. 10, 2011), www.informationweek.com/security/attacks/111-arrested-in-identity-theft-probe/231900438.
[287] Kenneth Corbin, *FBI Underboss Says Cyber Criminals the New Mafia*, ESECURITYPLANET.COM (March 23, 2010), www.esecurityplanet.com/trends/article.php/3872326/FBI-Underboss-Says-Cyber-Criminals-the-New-Mafia.htm.
[288] *See* Richard Posner, *Deterring Identity Theft*, THE POSNER-BECKER BLOG (September 17, 2006), www.becker-posner-blog.com/2006/09/deterring-identity-theft--posner.html.

C. Criminal Possession of a Skimmer Device

Skimming devices, or small electronic devices capable of capturing the personal identifying information of unsuspecting people, are the "bread and butter" of sophisticated criminals engaged in identity theft, forgery, and related cybercrimes. In 2010, the Wall Street Journal reported that ATM skimming alone caused nearly $1 *billion* dollars in loss annually.[289] In 2011, the Justice Department announced the indictment of two brothers from Bulgaria who stole more than $1 million dollars through the use of forged debit cards created from the data skimmed at ATM machines located throughout New York City.[290] That same year, three individuals were indicted in New York for compromising the bank accounts of approximately 1,500 people in five months through ATM skimming devices.[291] Also in 2011, Enterprise Corruption charges were announced against 29 members and associates of a criminal enterprise based in New York City, whose members included waiters who skimmed credit card information from more than 250 unsuspecting customers at high-end restaurants.[292] In each of these cases, skimming devices were critical to the execution of the crimes.

Possessing such devices with the intent that they be used in identity theft crimes has been unlawful since 2008. The basic crime is Unlawful Possession of a Skimmer Device in the Second Degree, which is a Class A misdemeanor.[293] The only available escalation is a recidivist provision: Unlawful Possession of a Skimmer Device in the First Degree, a Class E felony, applies where the defendant was previously convicted for a variety of designated offenses relating to Identity Theft and Grand Larceny.[294] Although these laws are well-intentioned, they did not add to existing law, because the possession of skimming devices

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[289] *See e.g.*, Jennifer Waters, *ATM Skimming: How to Spot, Avoid*, WALL STREET JOURNAL (October 10, 2010), online.wsj.com/article/SB10001424052748704442404575542652417958106.html; Sean Gardiner, *$217,000 Skimmed From ATMs*, WALL ST. J. (June 9, 2010), online.wsj.com/article/SB10001424052748703302604575295082741170878.html (noting that between the end of April and May 2010, $217,000 was stolen through forged debit cards created from debit card data skimmed from ATM machines in banks on Long Island).

[290] *Taking a Trip to the ATM? Beware of 'Skimmers'*, FEDERAL BUREAU OF INVESTIGATION (July 14, 2011), www.fbi.gov/news/stories/2011/july/atm_071411.

[291] *See* People v. Ivanov, Ind. No. 02719/2011 (Sup. Ct. N.Y. Co. 2011); Beth Kormanik, *3 Accused of Theft Using a Device at A.T.M.'s,* N.Y. TIMES, Nov. 16, 2011, at A26, *available at* www.nytimes.com/2011/11/17/nyregion/chase-atm-fraud-case-indictment-is-unsealed.html.

[292] *See* People v. Fernandez et al., Ind. Nos. 5151/2011, 5156/2011, and 42/2012 (Sup. Ct. N.Y. Co. 2011-2012); *see also* Noah Rosenberg, *28 Indicted in Theft of Steakhouse Patrons' Credit Card Data*, N.Y. TIMES, Nov. 18, 2011, at A17, *available at* www.nytimes.com/2011/11/19/nyregion/28-indicted-in-theft-of-credit-card-data-at-steakhouses.html.

[293] L.2008, c.279, § 9, eff. Nov. 1, 2008; PENAL LAW § 190.85.

[294] *Id.*; *see also* PENAL LAW § 190.86 (predicate offenses are Identity Theft in the first, second and third degrees, as defined in Penal Law §§ 190.78, 190.79, 190.80; Unlawful Possession of Personal Identification Information in the first, second and third degrees, as defined in PENAL LAW §§ 190.81-190.83; Unlawful Possession of a Skimmer Device in the first and second degrees, as defined in Penal Law §§ 190.85 and 190.86; Grand Larceny in the first, second, third and fourth degrees, as defined in Penal Law §§ 155.30 *et seq.*)

has been routinely charged as Criminal Possession of Forgery Devices, a Class D felony.[295] The skimming device laws, therefore, lack teeth.

For that reason, the Task Force proposes to upgrade Unlawful Possession of a Skimming Device in the Second Degree from a Class A misdemeanor to a Class D felony, and Unlawful Possession of a Skimming Device in the First Degree to a Class C felony. Additionally, we propose that Forgery, Criminal Possession of a Forged Instrument, and Criminal Possession of Forgery Devices be added as predicate offenses to elevate the basic crime to a Class C felony.[296] These offenses are often intertwined with identity theft and skimming offenses. Finally, the Task Force recommends changing the title of the statutes from "Unlawful Possession" to "Criminal Possession" to highlight the seriousness of the offense. Proposed statutory text appears in Appendix E.

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[295] PENAL LAW § 170.40.

[296] PENAL LAW § 170.10 (Forgery in the Second Degree); PENAL LAW § 170.15 (Forgery in the First degree); PENAL LAW § 170.25 (Criminal Possession of a Forged Instrument in the Second Degree); PENAL LAW § 170.30 (Criminal Possession of a Forged Instrument in the Third Degree); PENAL LAW § 170.40 (Criminal Possession of Forgery Devices); PENAL LAW § 190.85 (Unlawful Possession of a Skimmer Device in the Second Degree); PENAL LAW § 190.86 (Unlawful Possession of a Skimmer Device in the First Degree).

VI. Elder Fraud

Financial elder abuse is a growing problem across the United States. That is especially true in New York State, which has the third-largest older adult population in the country.[297] Due to physical or mental infirmities, the elderly are particularly vulnerable to financial exploitation, especially at the hands of their own caregivers.[298] The elderly are also an attractive target: as a group they hold the largest percentage of the nation's wealth.[299] Combined, these factors have led to staggering rates of financial elder abuse nationwide. According to one study, "the annual financial loss by victims of elder financial abuse is estimated to be at least $2.9 billion, a 12% increase from the $2.6 billion estimated in 2006."[300]

As discussed in Section IV(B), above, the Task Force proposes several substantial amendments to the Scheme to Defraud law, including gradating it according to the amount of money or the number of identities wrongfully taken by the defendant, and expanding it to cover single-victim schemes. Additionally, under the proposal, the crime would be elevated to a Class E felony (from a Class A misdemeanor) where the defendant "intends to obtain and does obtain property or services from at least one vulnerable elderly person."[301] The resulting law would be far more useful against the financial exploitation of elders.[302]

Nonetheless, because of the expanding population of older adults throughout our state, and the increasing frequency of elder abuse, the Task Force concluded that more was needed. Accordingly, it formed an Elder Abuse Working Group, and invited experts in the field of elder abuse prosecutions to join the group. Their work led to the six proposals described below.

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[297] U.S. DEP'T OF HEALTH & HUMAN SERVICES, ADMIN. ON AGING, A PROFILE OF OLDER AMERICANS: 2011 9 (2011), *available at* www.aoa.gov/Aging_Statistics/Profile/2011/docs/2011profile.pdf.

[298] LIFESPAN OF GREATER ROCHESTER ET AL., UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 11 (2011) (finding that in a random sample of 5,777 respondents 60 years or older, 5.2% had been subjected to financial abuse at the hands of family members each year), *available at* www.lifespan-roch.org/documents/UndertheRadar051211.pdf.

[299] RICHARD FRY ET AL., PEW RESEARCH SOCIAL AND DEMOGRAPHIC TRENDS, THE RISING AGE GAP IN ECONOMIC WELL-BEING 2 (2011), *available at* www.pewsocialtrends.org/files/2011/11/WealthReportFINAL.pdf.

[300] METLIFE MATURE MARKET INSTITUTE, THE METLIFE STUDY OF ELDER FINANCIAL ABUSE 2 (2011), *available at* www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf.

[301] *See* Section IV (B), *supra*.

[302] Under current law, a Scheme to Defraud is elevated to a Class E felony where the defendant intends to defraud *more than one* vulnerable elderly person and so obtains property from *more than one* vulnerable elderly person. PENAL LAW § 190.65(1)(c). By contrast, under the Task Force's proposal, the Class E felony would apply where the defendant intends to obtain, and does obtain, property *or services* from a *single* vulnerable elderly person. The proposed language is in Appendix D.

A. Theft from Mentally Disabled Adults

New York's Penal Law was recently amended to target *physical* assaults committed against elderly victims.[303] In contrast with most other states in the country, however, New York has not addressed the *financial* exploitation of impaired adults.[304] The sad fact is that older adults who suffer from age-related cognitive disorders may be unable to understand basic arithmetic, let alone their finances. They may not remember signing checks, wills or deeds, or giving permission or authority to transfer ownership of their bank accounts or real estate. Some can barely communicate.

For those reasons, an elderly victim's mental infirmity can complicate a Larceny prosecution. The Penal Law requires proof that the defendant wrongfully took, obtained or withheld property from an owner – in other words, that the property was taken without consent.[305] A mentally disabled victim, however, cannot give meaningful consent; more saliently, such a victim cannot testify (nor, for that matter, execute a sworn certification) that his property was taken without consent. To prove this element, the prosecution often relies on evidence that at the time of the taking, the victim lacked the mental capacity to consent.

That is precisely what occurred in *People v. Camiola.*[306] There, the defendant stole from his victim, a senile elderly woman, over a two-year period.[307] At trial, the defendant testified that the funds he took were gifts from the victim, who had by then passed away. The trial court permitted the prosecution to introduce evidence of the victim's mental condition at the time of the transfer, deeming it relevant to whether she had the capacity to consent. The First Department affirmed the conviction, explaining:

> The jury was not instructed that the victim's capacity or incapacity was an element of the offense, but only that they could evaluate her capacity under the circumstances of this case in determining whether a trespass had occurred or whether, as defendant contended, he had acted with her knowledge and consent. Although we note the paucity of case law in this State equating a trespass for purposes of larceny with an ostensibly donative victim's inability to consent to the taking, neverthe-

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[303] PENAL LAW §§ 120.05(12) (Assault in the Second Degree); 260.32, 260.34 (Endangering the Welfare of a Vulnerable Elderly Person, or Incompetent or Physically Disabled Person in the Second and First Degrees, respectively).

[304] ROSE MARY BAILLY AND ELIZABETH LOEWY WITH MARGARET A. BOMBA & JAMES J. LYNCH, CIVIC RESEARCH INSTITUTE, FINANCIAL EXPLOITATION OF THE ELDERLY 3-2 (2007) (listing 43 states' penal laws on financial abuses of elderly or infirm victims, which classify victims based upon advanced age, physical disability or mental impairment, relationship between victim and abuser, or a combination of these factors).

[305] PENAL LAW § 155.05(1).

[306] 225 A.D.2d 380 (1st Dept. 1996), *app. denied* 88 N.Y.2d 877 (1996).

[307] *Id.* at 380.

> less, these factors are properly considered in the context of a traditional understanding of the larceny statute.[308]

The "paucity of case law" has seeded confusion in Larceny cases with mentally disabled victims. Basic questions have been left unanswered: Is evidence of the victim's disability admissible? If so, what is the appropriate jury instruction? The Task Force suggests that this confusion be ameliorated by codifying the holding of *Camiola* to make it applicable statewide. This amendment to the Larceny law would clarify that one cannot obtain valid consent from an owner who the defendant knew or had reason to know is incapable of understanding the nature of the transaction. The proposed language would be a new subsection (2) to section 155.10 of the Penal Law, and would state:

> It is no defense to a prosecution for larceny that the defendant obtained consent to take, withhold, or obtain property, where such consent was obtained from a person who the defendant knew or had reason to know was mentally disabled.

This proposal is analogous to, and consistent with, existing law regarding sex offenses. Article 130 of the Penal Law similarly provides that the mental disability of a victim makes that person legally incapable of consent.[309] The Task Force's proposal is derived from the definition of "mentally disabled" in the sex offenses article.[310] The full proposal is set out in Appendix F.

B. Access to Medical Records

An elderly victim's medical records may be required to prove the existence of a mental disability that demonstrates the incapacity to consent, and are certainly crucial evidence in that regard. The experience of Task Force members in seeking to obtain these records is that in some parts of New York State, health care providers produce medical records in response to subpoenas *duces tecum* issued by grand juries. In others, however, providers refuse to comply with subpoenas on the ground that doing so would violate the physician-patient privilege codified in CPLR 4504.[311] Although victims in other types of cases routinely waive their privilege so that prosecutors can obtain crucial medical records, in the case of a mentally-impaired victim, that may be impossible.[312] That victim, of course, cannot consent to waiving her medical privilege any more than she can consent to having her property taken. As a result, law enforcement efforts against elder fraud have suffered.

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[308] *Id.* at 380-81.

[309] PENAL LAW § 130.05(3)(b).

[310] PENAL LAW § 130.00(5) ("'Mentally disabled' means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct").

[311] *See, e.g.*, Matter of a Grand Jury Subpoena Duces Tecum Served on Peconic Bay Medical Center Dated May 18, 2009 (Sup. Ct. Suffolk Co., Grand Jury No. 0901954) (Kahn, J.) (denying Suffolk County District Attorney's Office application for an order compelling compliance with a subpoena *duces tecum* based on state "physician-patient confidentiality") (on file with the Task Force).

[312] *See* CPLR § 4504(a) (providing for the waiver of the privilege).

As the Court of Appeals has recognized, "the purpose of the privilege is to protect the patient, not to shield the criminal."[313] For that reason, it is plainly in the public interest to allow courts to order the production of the records of mentally-impaired victims. Because the privilege is a creature of statute, such change can only come from the Legislature.[314] The Task Force therefore recommends amending CPLR 4504 to allow a prosecutor to obtain medical records with a subpoena, endorsed by the court, based upon a showing that the patient suffers from a mental disability (as defined in the Larceny proposal described above), and that the patient has been the victim of a crime.[315] Proposed language is set forth in Appendix F.

C. Conditional Examinations of Elderly Victims

Many elderly adults live isolated existences, interacting only with their home health aide or other caregiver. Consequently, in the typical elder fraud case, the victim is the sole witness to the defendant's crimes. Months, or even years, may pass between the outset of an investigation and trial. Even if an elderly victim is healthy and cogent at the beginning of the process, he or she may become incapacitated or pass away prior to trial, rendering the case impossible to prove.

A recent prosecution illustrates this unfortunate phenomenon. An elderly man in his 90s was the victim of a theft by his long-time home aide. Although the victim was in good health when the complaint was brought to the District Attorney's Office, he passed away shortly after the investigation began. The case was prosecuted, but only because the defendant had confessed to the police.[316]

Elder abuse prosecutions should not depend on the chance that the defendant makes a statement to the police. Nor, for that matter, should defendants be permitted to "run the clock" by delaying the trial until their elderly victims become incapacitated or pass away, as has been known to happen.

The law already contains a solution to this problem: the conditional examination. Article 660 of the Criminal Procedure Law provides that a criminal court may "order that a witness or prospective witness . . . be examined conditionally under oath."[317] That testimony may be received into evidence at a later hearing or trial. Under current law, however, wit-

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[313] Matter of Grand Jury Proceedings (Doe), 56 N.Y.2d 348, 352-53 (1982).
[314] Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 134 (1983).
[315] This proposal would not run afoul of the Health Insurance Portability and Accountability Act ("HIPAA"), 42 U.S.C. § 300gg, 29 U.S.C §§ 1181 *et seq.*, and 42 U.S.C. §§ 1320d *et seq*. The HIPAA privacy rule makes exceptions for judicial and administrative proceedings, 45 C.F.R. § 164.512(e)(1), and law enforcement purposes, 45 C.F.R. § 164.512(f)(1). *See also* United States v. Wilk, 572 F. 3d 1229, 1236 (11th Cir. 2009) (HIPAA "authorized the disclosure of confidential medical records for law enforcement purposes, or in the course of a judicial proceeding, in response to a court order or grand jury subpoena").
[316] People v. Tabara Koroma, Ind. No. 04991/2006 (Sup. Ct. N.Y. Co. 2006).
[317] CPL § 660.10.

nesses of advanced age are eligible for conditional examinations only if they suffer from demonstrable physical illness or incapacity when the application for the examination is made.[318] The unfortunate result is that in some cases, victims who are not suffering from such conditions – but are nevertheless elderly – become totally incapacitated or pass away without a conditional examination having been performed.

For that reason, the Task Force recommends that CPL Article 660 be amended to permit prosecutors and defense counsel to seek the conditional examination of witnesses 75 years of age or older, whether or not they suffer from demonstrable illness or incapacity.[319] Unlike current law, this amendment would help the victim of advanced age who appears to be in good health when the defendant is arrested but incapacitated (or has passed away) by the time trial begins. Proposed language is set forth in Appendix F.

D. Caregivers in the Grand Jury

As prosecutors and defense attorneys know, testifying before the grand jury can be a stressful experience for a crime victim. That is even more so for elderly witnesses, who often suffer from physical, mental or emotional impairment. These vulnerable individuals are frequently afraid to testify against the defendant, fearing that an abusive home health aide might seek retribution, or an abusive family member might place the victim in a nursing home. Moreover, many of these victims have physical limitations that make testifying difficult and, on occasion, embarrassing. To calm these concerns, the Assistant District Attorney often wears two hats in the grand jury: prosecutor and temporary caregiver.

What does this mean? While introducing evidence, the prosecutor must also lend physical or emotional support to the older witness. Stories studied by the Elder Abuse Working Group are legion: a prosecutor who elicited evidence while wiping drool from the chin of a Parkinson's sufferer; another who introduced documents into evidence while turning the pages for a wheelchair-bound victim; another who had to stop testimony so that a victim's hearing aid could be reinserted into his ear. Despite these and other prosecutors' best efforts, vulnerable elderly witnesses often remain overwhelmed with anxiety, or suffer physical indignities before an audience of 23 grand jurors. And as a practical matter, the presentation of evidence may be slowed considerably.

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[318] CPL § 660.20(2)(b).

[319] Fixing a threshold age is inevitably somewhat arbitrary. However, data from the Centers for Disease Control indicates that the average American's life expectancy is 78.7 years. CENTERS FOR DISEASE CONTROL AND PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2012 2 (2012), *available at* www.cdc.gov/nchs/data/hus/hus12.pdf. Additionally, a 2002 study found that roughly one in seven Americans over the age of 70 has dementia, suggesting that approximately 3.4 million individuals in this age group have Alzheimer's Disease. B.L. Plassman et al., *Prevalence of Dementia in the United States: the Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMIOLOGY 125, 125 (2007), *available at* www.ncbi.nlm.nih.gov/pmc/articles/PMC2705925/pdf/ned0029-0125.pdf. Based on these data, the Task Force believes that drawing the line for conditional examinations at 75 years of age is reasonable.

The Criminal Procedure Law currently permits a social worker, rape crisis counselor, psychologist or other professional to accompany a child witness into the grand jury.[320] Such individuals are prohibited from providing witnesses with answers, must take an oath to maintain the secrecy of the proceeding, and may only fulfill their function with the consent of the prosecutor. The Task Force recommends that a similar provision be added for vulnerable elderly witnesses. Under the proposal, which is set forth in Appendix F, an "informal caregiver" or "professional social worker" could accompany a "vulnerable elderly person" into the grand jury with the prosecutor's consent.

A few points bear mention. First, members of the Task Force noted that not all elderly victims have social workers or other professional counselors. For that reason, the proposal applies to the "informal caregiver," who might be a trusted family member or neighbor. Second, the proposal would use the current definition of "vulnerable elderly person" from the Penal Law.[321] Lastly, as in the child witness context, the prosecutor would serve as gatekeeper, to prevent wrongdoers or their agents from piercing the secrecy of the grand jury.

Although cases involving older victims certainly differ from child abuse prosecutions, it is a simple fact that many elderly witnesses suffer from age-related physical and mental infirmities that warrant the addition of a caregiver in the grand jury. Both prosecutors and vulnerable elderly witnesses would be better served by a caregiver who is permitted to assist the older grand jury witness in a limited fashion.

E. Larceny by False Promise

Elderly people are frequently the victims of home improvement scams throughout New York State. In the typical scheme, a dishonest contactor persuades his victim to make a full upfront payment; after performing a minimal amount of the promised work, he absconds with the victim's money.

Ambiguity in New York State Law has made it difficult to prosecute these scams. In *People v. Churchill*,[322] the defendant, a home improvement contractor, entered into contracts with four different homeowners for a variety of projects, and was paid for substantially more work than he ultimately performed. He was convicted of Larceny on a false promise theory, which requires a unique burden of proof in New York law: "exclu[sion] to a moral certainty [of] every hypothesis except that of the defendant's intention or belief that the promise would not be performed."[323] In *Churchill*, the Court of Appeals reversed the conviction and dismissed the indictment, holding that from the evidence adduced at trial, it was "impossible

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[320] CPL § 190.25(3)(h).

[321] PENAL LAW § 260.31 ("'Vulnerable elderly person' means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.").

[322] 47 N.Y.2d 151 (1979).

[323] PENAL LAW § 155.05(2)(d).

to conclude that the proof excludes to a moral certainty every hypothesis except guilty intent."[324]

Although *Churchill* appears simply to be a case where the evidence was insufficient to sustain the charge, it has thrown a wrench into home improvement scam prosecutions in some parts of the state. In one case, the Appellate Division reversed a conviction for Larceny by false promise because the "defendant took significant steps" to fulfill his promises.[325] In another, the Appellate Division reversed a contractor's conviction for Larceny by false promise despite the fact that he had "received deposits to build" two pole structures and "never built them or refunded the down payments."[326]

The Court of Appeals' seminal decision in *People v. Norman*, decided 16 years after *Churchill*, spelled out the legal standard applicable to Larceny by false pretense and Larceny by false promise cases, holding that for purposes of legal sufficiency, false promise cases should be held to no greater or lesser standard than any other Larceny case.[327] Pointedly, and contrary to the standard of review applied in *Churchill*, the *Norman* Court held that "Penal Law § 155.05(2)(d)'s 'moral certainty' standard is not an appropriate criterion for measuring the sufficiency of the People's proof."[328] Unfortunately, although *Norman* distinguished *Churchill* on its facts, the Court neither overruled *Churchill* nor clarified that partial performance of a promise, by itself, does not defeat an otherwise legally-sufficient Larceny charge.[329]

To eliminate the ambiguity in case law since *Churchill*, the Task Force proposes amending Penal Law § 155.05(2)(d) to specify explicitly that in a prosecution for Larceny by false promise, "partial performance of such promise does not, by itself, preclude a reasona-

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[324] 47 N.Y.2d at 159.

[325] People v. Smith, 161 A.D.2d 1160, 1161 (4th Dept. 1990).

[326] People v. Rogers, 192 A.D.2d 1092 (4th Dept. 1993). The *Rogers* court held that the People failed to satisfy the "moral certainty" standard based on the evidence that the

> defendant had previously constructed pole structures in New York and that he had a materials account at 84 Lumber where the deposits were placed. Additionally, when defendant was contacted by Mr. Horton regarding his failure to commence construction, defendant told him that he was having problems retaining employees with employees' thefts and that he was having difficulties and delays on other jobs. That testimony was consistent with the testimony of defendant and his wife. Three of the contractees also testified that, when they entered into the contract, defendant indicated that he was seeking multiple contracts to obtain a substantial price reduction on materials. Moreover, there is no evidence that defendant used the deposits for his personal debts, that he made himself unavailable to the complainants, that he absconded to another State or that he had engaged in similar transactions involving a common scheme without a business purpose.

Id. at 1092-93 (internal citations omitted).

[327] 85 N.Y.2d 609, 620-21 (1995).

[328] *Id.* at 620.

[329] *Id.* at 623-24.

ble jury from making such finding from all the facts and circumstances."[330] This language would not alter the "moral certainty" standard generally applicable to such prosecutions, nor change the standard of review.[331] It would, however, clarify present law and assist in combating a common fraud committed against elderly New Yorkers.

F. Other Proposals

The Task Force believes that the above proposals, in addition to our proposed revamping of Scheme to Defraud, discussed in Section IV(B), would greatly assist the efforts of prosecutors around the state to protect the elderly from the scourge of financial exploitation. In addition to the proposals in this section, which are the product of the work of the Elder Abuse Working Group, the Task Force makes one additional recommendation with respect to protecting the elderly. As part of its report on Cybercrime and Identity Theft, the Task Force proposes to create the crime of Aggravated Identity Theft in the Second Degree, a Class E felony, which would apply to defendants who committed Identity Theft in the Fifth Degree, a Class A misdemeanor, knowing that his or her victim was a vulnerable elderly person. This recommendation is described in Section V(B)(2), above.

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[330] The full text of the proposal is set forth in Appendix F.
[331] PENAL LAW § 155.05(2)(d).

VII. Anti-Corruption

Over the past several years, New York has seen an astonishing number of its elected officials implicated in serious corruption scandals.[332] Last year, the State Integrity Investigation, a partnership of the Center for Public Integrity, Global Integrity and Public Radio International, gave the New York State government a grade of "D" for its corruptibility.[333] According to a state-by-state analysis of the laws and practices that deter corruption and promote accountability, New York scored 65% and ranked 37th among the 50 states.[334] The existence, or even the perception, of corruption and lack of accountability in government has far-reaching effects, including depleting our public coffers, wreaking havoc on public confidence, and weakening the civic spirit of our communities.

Unfortunately – some might say heartbreakingly – this phenomenon is not new. Our state suffers from the perennial human problem of short memory. In the words of Dean John Feerick, Chair of the former New York State Commission on Government Integrity, appointed in 1987 by Governor Mario Cuomo and Mayor Edward Koch:

> Tragically, the citizens of New York State witnessed during the 1980s the degradation of public service by the wrongdoing of public servants and party leaders. It would be a mistake to label such malfeasance as unique to our times, and it must be acknowledged that most officials are hard working and honest. But the recent spectacle of public figures in the prisoners' dock inspires sober reflection on what behavior we as citizens will accept and what we can do to alter the state of affairs. When public officials violate the public trust, much more is at stake than the breaking of the law, for such violations strike at the very foundations of government.[335]

The same could be said about New York in the 2010s: public service has been degraded by wrongdoing, most officials are honest, corruption strikes at the heart of government, the sight of high officials being led away in handcuffs is deeply demoralizing. What was old is new again.[336]

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[332] Thomas Kaplan, *For Albany, Yet Another Corruption Case*, N.Y. TIMES (Apr. 2, 2013), www.nytimes.com/2013/04/03/nyregion/with-senator-smiths-arrest-yet-another-corruption-case-for-albany.html.

[333] Ctr. for Pub. Integrity, Global Integrity & Pub. Radio Int'l, *New York Corruption Risk Report Card*, STATE INTEGRITY INVESTIGATION, www.stateintegrity.org/new_york.

[334] *Id.*; *see also New York's Troubled Politicians: The Fall of the Harlem Clubhouse*, THE ECONOMIST, May 4, 2010, www.economist.com/node/15608375 ("'Dysfunctional Albany' . . . is frequently cited as the nation's worst state government – a title for which there is intense competition.").

[335] John D. Feerick, *Reflections on Chairing the New York State Commission on Government Integrity*, 18 FORDHAM URBAN L. J. 157, 170 (1990).

[336] A 1987 article reported, among other things, that "[h]alf a dozen district attorneys said local officials they believe to be corrupt have gone unprosecuted because New York laws make it too difficult – more difficult

New York must face up to this serious problem by strengthening its anti-corruption statutes. With that goal in mind, the Task Force canvassed the law enforcement community for ideas for penal reform. In particular, it sought input from experts experienced in corruption investigations, including a number of state and federal prosecutors, as well as senior investigative staff within the Office of the State Comptroller.[337] The Task Force also looked to the recommendations within the report of the New York State Bar Association Task Force on Government Ethics in January 2011.[338]

Our proposals are set forth below.[339]

A. Bribery

1. Public Sector

In an effort to address one aspect of what will inevitably be a multi-pronged solution, the Task Force examined New York's law governing the bribery of public officials.[340] Currently, the statutes governing the bribery of public officials unnecessarily heighten the burden for prosecuting such conduct. Following the decision of the New York Court of Appeals in *People* v. *Bac Tran*,[341] courts have made clear that bribery requires a mutual agreement between the bribe-giver and public official, or at least a unilateral belief by the bribe-giver that the bribe will in fact influence the public official.[342] By comparison, New York's other bribery laws, as well as the bribery laws of the vast majority of other states, merely require that the bribe-giver "intend[s] to influence" the bribe-receiver. Given the crucial importance

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than in most other states – to bring corruption cases." Jeffrey Schmalz, *New York Officials Shifting Blame in Efforts to Combat Corruption*, N.Y. TIMES, Aug. 19, 1987.

[337] Among these were James Liander, Bureau Chief of the Integrity Bureau in the Queens County District Attorney's Office; Daniel Spector, Deputy Chief of the Public Integrity Section of the U.S. Attorney's Office for the Eastern District of New York; and Daniel Cort, Chief of the Public Integrity Unit at the New York County District Attorney's Office. The Task Force is grateful for their input.

[338] NEW YORK STATE BAR ASS'N, TASK FORCE ON GOV'T ETHICS (2011), *available at* www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=46069.

[339] On April 9, 2013, in the wake of a series of federal corruption charges, Governor Cuomo announced a proposal for a new anti-corruption legislative package, the Public Trust Act, which would create a new class of public corruption crimes. *See* Press Release, Governor Andrew M. Cuomo (Apr. 9, 2013), *available at* www.governor.ny.gov/press/04092013New-Class-of-Public-Corruption-Crimes. The District Attorney's Association – with the unanimous approval of all 62 District Attorneys – supported the Governor's proposals. However, the legislation did not pass by the end of the last legislative session. A copy of the District Attorneys' letter of support is included in Appendix B. The Task Force believes that the five proposals set forth in this report are consistent with the spirit, and in some cases the letter, of the laws proposed in the Public Trust Act.

[340] PENAL LAW § 200.00.

[341] 80 N.Y.2d 170 (1992).

[342] *Id.* at 176-177.

of restoring confidence and faith in our government and its representatives,[343] the Task Force believes that the New York Legislature should amend the *mens rea* element of the public-servant bribery statutes to require only an intent to influence. Separately, the Task Force also recommends amending the statute to ensure that the broader "intent to influence" language is not read to criminalize legitimate campaign contributions, and lowering the dollar threshold associated with public servant bribery in the second degree from $10,000 to $5,000.

Each of New York's public-servant bribery statutes states that "[a] person is guilty of bribery . . . when he confers, or offers or agrees to confer, any benefit upon a public servant *upon an agreement or understanding* that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced."[344] On the one hand, the "agreement or understanding" formulation appears to be a deliberate shift away from the statutes' predecessors, all of which used the phrase "with intent to influence" or otherwise focused on the mental state of the bribe-giver.[345] On the other hand, the Bartlett Commission specifically stated that it intended to make "no major substantive changes" to the former public-servant bribery statutes but rather "by a largely formal restatement, to simplify and clarify."[346] What is clear is that by including the word "offers" in the bribery law, the Legislature intended to criminalize bribe offers as seriously as completed bribes.

Before the 1965 Penal Law, courts had construed the "agreement or understanding" statutory phrase to be "tantamount to 'with the intent.'"[347] Almost three decades after the 1965 revision, the New York Court of Appeals held that the phrase "agreement or understanding" means more than "intent to influence."[348] In *Bac Tran,* a municipal fire safety inspector told the defendant, a fire safety director of two hotels, that a new violation would be reported. The defendant then put $310 into the shirt pocket of the inspector, who immediately removed the money and said that he could not accept it and the violation would still be reported. The defendant responded by telling the inspector to keep the money "even if [he] wrote a violation" and "do whatever [he] had to do, but keep [the money]."[349] In holding that the prosecution's evidence was legally insufficient to sustain the charge of bribery, the court stated: "[I]f a benefit is offered with only the hope that a public servant would be influenced thereby, then the crime of bribe giving is not committed."[350] In other words, "[a]

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[343] "Voters tell pollsters that integrity is the most important quality they look for in public officials. It's even more important than candidates' opinions on the issues." Ctr. for Pub. Integrity *et al.*, *supra* note 333, www.stateintegrity.org/about.

[344] PENAL LAW §§ 200.00 *et seq.*

[345] *See* former PENAL LAW §§ 371, 378, 465, 1233, 1822.

[346] N.Y. STATE COMM'N ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED NEW YORK PENAL LAW 371 (1964).

[347] People v. Kathan, 136 A.D. 303, 307 (2d Dept. 1910) (with respect to the former Penal Law Section 2440 (bribing a witness), finding that "[t]he words 'upon any understanding or agreement' . . . are tantamount to 'with the intent'").

[348] *Bac Tran*, 80 N.Y.2d at 176-77.

[349] *Id.* at 173.

[350] *Id.* at 177.

mere 'hope' and a statutory 'understanding', in common parlance and in criminal jurisprudence, are miles apart."[351]

As pointed out by the dissent in *Bac Tran*, the import of the decision is that "bribery of a public official [will] hinge upon the *mens rea* of the bribe-receiver, not the bribe-giver."[352] In the words of the dissent: "The gist of the crime of bribery is the wrong done to the people by the corruption in the public service. . . . It is the *effort* to bypass the orderly processes of government to secure an impermissible advantage that is criminal."[353] Perhaps for that reason, in analogous statutes the "agreement or understanding" formulation has generally been reserved for statutes targeting bribe *receiving*, not bribe-giving.[354]

Notably, too, the statutory language requiring an "agreement or understanding" for bribe giving – *i.e.*, "something qualitatively and quantitatively higher than the long-standing, simple 'intent to influence'"[355] – is out of sync both with laws in other states and with other New York bribery laws. The public-servant bribery statutes of 48 other states use the "intent to influence" language to describe the requisite *mens rea* of the bribe-giver.[356] And in New York, every other bribery statute, including commercial bribery, sports bribery and labor official bribery, uses the "intent to influence" formulation.[357] Finally, the federal bribery statute relies on the intent of the bribe-giver, penalizing "[w]hoever . . . corruptly gives, offers or promises anything of value to any public official . . . *with intent to influence* any official act" (emphasis added).[358]

As a consequence of New York's statutory formulation, those who bribe public officials are *less* likely to be prosecuted than those who bribe athletes, businesspeople or labor officials. To be sure, an offer could, if other elements are met, be punished as an attempt to commit a bribery crime.[359] But that crime, with its lower penalties,[360] is hardly the tool that New York needs in its battle against public corruption. The reality is that white-collar crimi-

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[351] *Id.*
[352] *Id.* at 180-81 (Simons, J., dissenting).
[353] *Id.* at 181 n.16.
[354] For example, a sports official is guilty of receiving a bribe in New York when "he solicits, accepts or agrees to accept any benefit from another person *upon agreement or understanding* that he will perform his duties improperly" (emphasis added). PENAL LAW § 180.45(2); *see also* PENAL LAW §§ 180.05, 180.25, 200.10 ("agreement or understanding" formulation used in the context of commercial bribe receiving, bribe receiving by a labor official and public-servant bribe receiving, respectively).
[355] *Bac Tran*, 80 N.Y.2d at 176.
[356] Only Delaware, Iowa and the District of Columbia use the "agreement or understanding" language found in the New York public-servant bribery statute. D.C. CODE § 22-712; DEL. CODE ANN. tit. 11, § 1201; IOWA CODE ANN. § 722.1.
[357] For example, a person is guilty of bribing a labor official in New York "when, *with intent to influence* a labor official in respect to any of his acts, decisions or duties as such labor official, he confers, or offers or agrees to confer, any benefit upon him" (emphasis added). PENAL LAW § 180.15; *see also* PENAL LAW §§ 180.00 (commercial bribing), 180.40 (sports bribing).
[358] 18 U.S.C. § 201(b)(1)(A).
[359] *Bac Tran*, 80 N.Y.2d at 178 (1992); People v. Sanoguet, 157 Misc.2d 771, 780 (Sup. Ct. Bronx Co. 1993).
[360] PENAL LAW § 110.05. *See also* People v. Gordon, 125 A.D.2d 257, 258 (1st Dept. 1986).

nals are not particularly cowed by the prospect of prosecution for a Class E felony, and the non-incarceratory sentences that those crimes invariably draw.[361]

As set forth in Appendix G, the Task Force proposes that the Legislature amend the *mens rea* element of the public-servant bribery statute so that it requires proof of an intent to influence on the part of the bribe-giver, rather than proof of an agreement or understanding. Such an amendment would harmonize the statute with New York's other bribery statutes and with the bribery statutes of 48 other states. The amendment would go a long way toward restoring public confidence in government and in the accountability of its representatives.

To ensure a reasonable interpretation and application of the revised language, the Task Force proposes further amending the statute to clarify that campaign contributions would require an agreement or understanding. While prosecutorial and judicial discretion likely serve as adequate safeguards against such an application of the broader "intent to influence" language, a strict reading of the statute would not foreclose such a result. Indeed, a campaign contribution, under current law, constitutes a "benefit," as defined by the Penal Law,[362] and might well be made "with the intent to influence [a] public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant." Thus, as set forth in Appendix G, the Task Force proposes that if the alleged benefit is a campaign contribution, the prosecution is required to prove, as under current law, an "agreement or understanding" between the contributor and the public servant that the contribution will in fact influence the official.[363]

Finally, Bribery in the Second Degree, a Class C felony, currently involves a bribe "valued in excess of ten thousand dollars."[364] If the bribe is valued at ten thousand dollars or less, the applicable charge is public servant bribery in the third degree, a Class D felony.[365] To set a more appropriate threshold for the crime of public servant bribery in the second degree, the Task Force proposes that the Legislature lower the dollar amount from $10,000 to $5,000. A parallel change would be made to Bribe Receiving in the Second Degree.[366] These proposed amendments are also set forth in Appendix G.

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[361] Although this proposal does not directly affect the criminal liability of the bribe accepting public servant, it would serve as an important prosecutorial tool by providing an enhanced incentive for bribe givers to cooperate against the public officials they have bribed.

[362] "'Benefit' means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary." PENAL LAW § 10.00.

[363] This proposal is consistent with analogous federal law as interpreted by the Supreme Court. In *McCormick v. United States,* 500 U.S. 257 (1991), a state legislator was convicted of extorting payments, which he claimed were campaign contributions, "under color of official right" in violation of the Hobbs Act, 18 U.S.C. 1951(a). The Court reversed the conviction, holding that in the case of campaign contributions (though not in other cases), the Hobbs Act requires that "the payments [be] made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 273. In the case of New York bribery, the Task Force recommends that this be explicitly legislated rather than left to court interpretation.

[364] PENAL LAW § 200.03.

[365] PENAL LAW § 200.00.

[366] PENAL LAW § 200.11.

2. Private Sector

Bribery in the private sector – commercial bribery – is also devastating to the public interest. Commercial bribery is a crime under the laws of most states, including New York.[367] Like its public sector analogue, commercial bribery traditionally involves kickback schemes whereby payments are made to agents to secure the business of their principals or employers, thereby edging out competitors.[368] Recognizing business corruption as a serious problem, the Task Force reviewed New York's Commercial Bribing and Commercial Bribe Receiving Statutes, found at Penal Law sections 180.00 through 180.08. It concluded that existing New York law is ineffective because, as written, it allows a wide swath of corrupt conduct to evade criminal punishment.

One problem stands out as the most significant. To charge felony-level commercial bribery or bribe receiving, the offered amount must be more than $1,000 and must cause "economic harm" in excess of $250 to the employer or principal. The Task Force believes that the economic harm component poses a serious impediment to prosecutions of serious commercial bribery and, therefore, recommends that it be eliminated from Commercial Bribery in the First Degree and Commercial Bribe Receiving in the First Degree. The $1,000 threshold for a felony bribe is more than adequate as a limiting principle, and recognizes that the harm done by bribery is the purchase of loyalty, not the economic result.[369]

The economic harm component is a relatively new addition to the law of commercial bribery. It was added to New York State's Commercial Bribery statute in 1983 because legislators were concerned that the costs associated with commercial bribes were being passed on to the consumer, not borne by the employer.[370] At first blush, this approach, and specifically the added element of economic harm, might have incentivized employers to (1) better police their employees' conduct, and (2) take care that the cost of bribes were not passed on to customers if they wanted their disloyal, bribe-receiving employees punished at the felony level.

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[367] PENAL LAW §§ 180.00, 180.03, 180.05, 180.08. Thirty-five states have laws prohibiting commercial bribery, and in seventeen it is punishable as a felony. ALA. CODE § 13A-11-120; ALASKA STAT. §§ 11.46.660, 11.46.670; ARIZ. REV. STAT. § 13-2605; CAL. PENAL CODE § 641.3; COLO. REV. STAT. § 18-5-401; CONN. GEN. STAT. §§ 53A-160, 53A-161; DEL. CODE ANN. tit. 11, §§ 881, 882; FLA. STAT. §§ 838.15, 838.16; HAW. REV. STAT. § 708-880; 720 ILL. COMP. STAT. 5 / §§ 29A-1, 29A-2, 29A-3; IOWA CODE § 722.2; KAN. STAT. ANN. § 21-4405; KY. REV. STAT. ANN. §§ 518.020, 518.030; LA. REV. STAT. ANN. § 73; ME. REV. STAT. tit 17-A, § 904; MICH. COMP. LAWS § 750.125; MINN. STAT. § 609.86; MISS. CODE ANN. § 97-9-10; MO. REV. STAT. § 570.150; NEB. REV. STAT. § 28-613; NEV. REV. STAT. § 207.295; N.H. REV. STAT. ANN. § 638:7; N.J. STAT. ANN. § 2C:21-10; N.C. GEN. STAT. § 14-353; N.D. CENT. CODE § 12.1-12-08; 18 PA. CONS. STAT. ANN. § 4108; R.I. GEN. LAWS § 7-15-1; S.C. CODE ANN. § 16-17-540; S.D. CODIFIED LAWS §§ 22-43-1, 22-43-2; TEX. PENAL CODE ANN. § 32.43; UTAH CODE ANN. § 76-6-509; VA. CODE ANN. § 18.2-444; WASH. REV. CODE § 9A.68.060; WIS. STAT. § 943.85.

[368] *See* BLACK'S LAW DICTIONARY 187 (7th ed. 1999); *see, e.g.*, People v. Agha Hasan Abedi, 156 Misc.2d 904, 907 (Sup. Ct. N.Y. Co. 1993); Matter of Ingber, 239 A.D.2d 58, 59-60 (1st Dept. 1998); People v. Reynolds, 174 Misc.2d 812, 815 (Sup. Ct. N.Y. Co. 1997).

[369] Misdemeanor commercial bribery and bribe receiving, which require neither a threshold value nor any economic harm, would not be affected by this proposal. *See* PENAL LAW §§ 180.00, 180.05.

[370] People v. Wolf, 98 N.Y.2d 105, 109-10 (2002).

Unfortunately, the amendment's goal of affording greater protection to consumers was not ultimately achieved.

The economic harm requirement of sections 180.03 and 180.08 has made it all but impossible to prosecute commercial bribery and commercial bribe receiving at the felony level.[371] Unlike crimes of theft or fraudulent deprivation of property, commercial bribery causes qualitative but not necessarily quantitative harm: the breach of trust between employer and employee; the corrupt influence that secures a contract or service; and the disadvantage to businesses that operate with integrity. It is the *risk* of tangible harm arising from a corrupt relationship that laws against commercial bribery should seek to protect rather than *actual* harm. Virtually all states with commercial bribery laws have recognized this truism: of the 35 such states, only Arizona requires something similar to economic harm.[372]

New York's sister states realize that economic harm is beside the point, not only because corruption is about loss of trust rather than loss of money, but also because the value of corrupt influence is difficult to quantify and prove. Many New York investigations have stalled because of the disconnect between a commercial bribe paid (and acted on) and a concrete monetary loss to an employer. If, for example, a company is awarded a contract in exchange for a $100,000 kickback to the contracting agent, the employer whose agent took the bribe in exchange for awarding the contract may have suffered no pecuniary loss, assuming the work was performed according to the contract and the contract amount was within a commercially reasonable range. Likewise, if the operator of a hoist at a construction site takes a $1,500 bribe to give priority to one subcontractor's men or materials, his employer may well not have been economically harmed, notwithstanding the employee's undeniably serious act of corruption.

Instead, the employers in such cases are harmed in non-economic ways – they may suffer reputational losses or missed opportunities for future bids, the kind that are difficult to value and prove in straightforward economic terms. The reality is that the likeliest scenario in which proof of economic harm *does* exist is when the prosecutor can prove that an invoice or a contract is actually inflated. But those cases, of course, also typically make out the crime of Larceny by embezzlement or by false pretense – crimes for which the E felony threshold is met in any event when the amount obtained exceeds $1,000.[373] We thus have a statute that is useful only if an invoice is inflated by an amount between $251 and $1,000. In any event, a law that makes the payment or receipt of a million-dollar commercial bribe, in the absence of an inflated invoice, a Class A misdemeanor is tantamount to no law at all.

Bribery is extremely hard to prove in any case. It often requires long-term investigations, electronic eavesdropping, records obtained by search warrant, and cooperating wit-

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[371] *Id.* at 111-12 (because economic harm is a separate element of commercial bribery, evidence independent of the kickback amount was required to prove that element). *Wolf* arose out of a larger prosecution of attorneys, middlemen, and insurance adjusters who colluded to settle negligence cases in exchange for kickbacks.
[372] ARIZ. REV. STAT. ANN. § 13-2605.
[373] PENAL LAW § 155.30.

nesses. Simply put, such techniques are either not available or do not justify the resources necessary where the highest-level prosecution is for a Class A misdemeanor. The actual economic harm – if any – suffered by the bribe receiver's employer is not a reliable measure of the seriousness of the briber-giver's or the bribe-receiver's criminal conduct.

For these reasons, prosecutors throughout New York State report that felony commercial bribery cases are rarely prosecutable. Statewide arrest data, reflected in Figure 1, make that clear. In the ten-year period since 2002, felony prosecutions for commercial bribery have dropped more than 60% as compared to the ten-year period before 2002.[374] In the last several years, the numbers are even starker: between 2009 and the middle of 2012, a grand total of two individuals were arrested for felony commercial bribery in the entire state, and four for commercial bribe receiving. 2010 represents a low point: not a single person in New York was arrested for a felony-level commercial bribery crime.

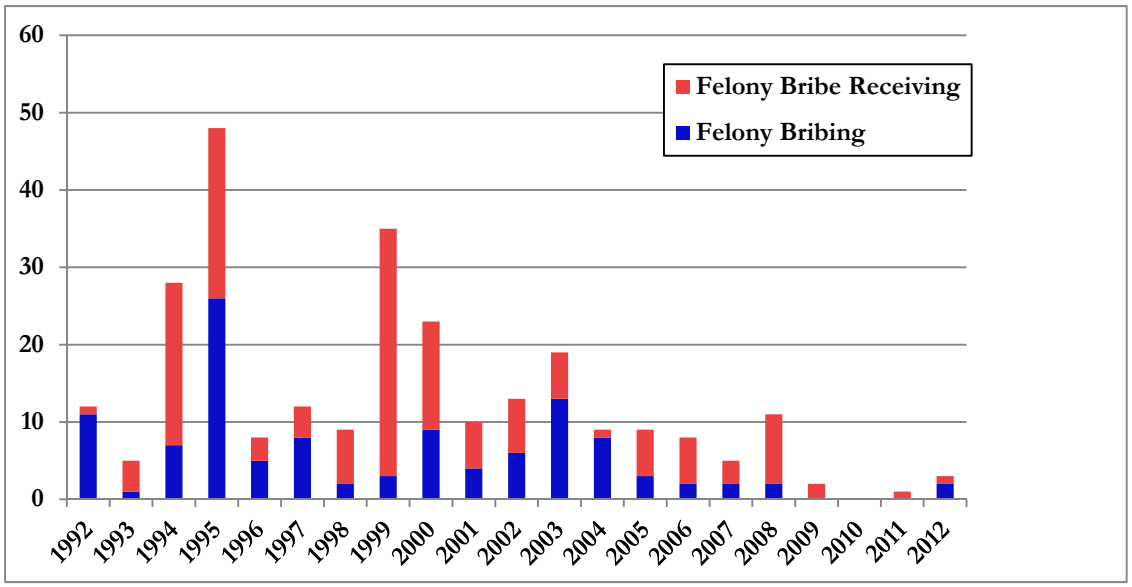

Figure 1

In sum, the 1983 amendment ultimately did nothing to afford greater protection to consumers. Law enforcement's ability to rid our free markets of corrupt side-deals, which disadvantage those businesses that operate with integrity, is essentially where it was before the amendments. For these reasons, the Task Force urges that New York's Commercial Bribery in the First Degree and Commercial Bribe Receiving in the First Degree statutes, codified at Sections 180.03 and 180.08 of the New York Penal Law, be amended to eliminate the requirement of economic harm to the employer.[375] The proposed revision is found at Appendix G.

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[374] These statistics are from the DCJS arrest database, and run through June 2012. New York State Division of Criminal Justice Services, Computerized Criminal History System (on file with the Task Force).

[375] The possibility of adding the term "corruptly" to the statute was also considered so as not to criminalize benefits that might be associated with innocuous and essential social business development efforts. However, after considerable reflection, the Task Force decided that such addition would be redundant, as the statutes already contain a sufficient limiting principle, namely, that the conduct be taken without the consent of the

B. Undisclosed Self-Dealing

Corruption extends beyond bribery. The Task Force believes that New Yorkers have a right to honest public servants and transparent public processes. Accordingly, the Task Force considered the problem of undisclosed self-dealing by public servants – conduct that falls outside the scope of bribery but nonetheless impairs the functioning of good government. It concluded that New York State needs a law that specifically targets public servants who further their own undisclosed economic interests while claiming to act for their constituents or government employer.

The quintessential case of undisclosed self-dealing involves a public official who awards a contract or grant to a company in which he or she holds an undisclosed ownership interest. Assuming the bid is competitive – the contract's economic terms are fair – and the company actually performs the work, the official's constituents have suffered no tangible harm. No bribe changed hands; no kickback was paid. Nevertheless, the process has been corrupted: the official has worked not for the public interest, but for his or her own hidden self-interest. This concealment is "harmful because it masks self-dealing that deprives the public of its right to unbiased decisionmaking."[376] It also "undermines people's faith in their government and destroys the integrity of our democracy."[377]

Federal prosecutions of undisclosed self-dealing were severely limited by the Supreme Court's decision in *Skilling v. United States*.[378] Prior to *Skilling*, federal prosecutors routinely charged undisclosed conflicts of interest as fraudulent deprivations of the public's right to a government official's "honest services," under Title 18, United States Code, § 1346. That definitional section modifies the federal mail and wire fraud laws to make such deprivations actionable as fraud.[379] Under the pre-*Skilling* regime, federal prosecutors took the position that "when a public official makes a decision that would otherwise be legitimate but fails to disclose a pecuniary interest in the matter, the public suffers a loss because it is 'deprived of its right either to disinterested decisionmaking itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act.'"[380]

In *Skilling*, the Supreme Court rejected the government's theory that § 1346 could be read to criminalize undisclosed self-dealing, absent actual bribes or kickbacks. Writing for the majority, Justice Ginsburg admonished that any "enterprise of criminalizing undisclosed self-dealing by a public official or private employee . . . [must] employ standards of sufficient

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employer or principal. Moreover, because the word "corruptly" is nowhere else used in New York's Penal Law, the Task Force believed that its introduction here would lead to unpredictable interpretation and potentially undermine the effort to deter this conduct.

[376] Lisa Kern Griffin, *The Federal Common Law Crime of Corruption*, 89 N.C. L. REV. 1815, 1834 (2011).

[377] *Restoring Key Tools to Combat Fraud and Corruption After the Supreme Court's Skilling Decision: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 44 (2010) (statement of Sen. Russell D. Feingold, Member, S. Comm. on the Judiciary).

[378] 130 S.Ct. 2896 (2010).

[379] 18 U.S.C. §§ 1341, 1343.

[380] Griffin, *supra* note 376, at 1837 (quoting United States v. Sawyer, 85 F.3d 713, 724 (1st Cir. 1996)).

definiteness and specificity to overcome due process concerns."[381] She enumerated questions that a law against undisclosed self-dealing must answer:

> How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.[382]

Skilling left a gap in the federal law. No longer can federal prosecutors charge conduct like that seen in *United States v. Keane*,[383] in which a city alderman bought properties through nominees and voted on matters that favorably affected the properties without disclosing his interest, or in *United States v. O'Malley*,[384] in which an insurance commissioner steered insurance companies to use a law firm in which he had an interest.

The Task Force believes that *Skilling* represents an opportunity for state prosecutors to lead the charge against local-level corruption in New York. Several other states already punish such conduct as felonies.[385] New York prosecutors should be given a similarly powerful tool.

The current Penal Law is plainly insufficient. New York's Scheme to Defraud statute requires the obtaining of tangible property. Defrauding the Government, for example, applies only to public servants who steal property or services from the government. Under current law, undisclosed self-dealing can at best be prosecuted as a failure to provide proper disclosure under Article 4 of the Public Officers Law, which is punishable as a Class A misdemeanor and only applies to state employees.[386] Or, if the interest or transaction is one that must otherwise be disclosed in a filing with a public office, it could be prosecuted as Offering a False Instrument for Filing – which, depending on the circumstances could either be a Class A misdemeanor or a Class E felony[387] – but that law also requires a filing in all circum-

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[381] *Skilling,* 130 S.Ct. at 2933 n.44.
[382] *Id.*
[383] 522 F.2d 534 (7th Cir. 1975).
[384] 707 F.2d 1240 (11th Cir. 1983).
[385] At least 10 states punish conflicts of interest or undisclosed self-dealing as felonies, including Arizona, Arkansas, Indiana, Mississippi, New Jersey, New Mexico, Ohio, Pennsylvania, Utah, and Wisconsin. ARIZ. REV. STAT. § 38-510; ARK. CODE ANN. § 5-52-101; IND. CODE § 35-44-1-3; MISS. CODE ANN. § 97-11-53; N.J. STAT. ANN. § 2C:27-9; N.M. STAT. ANN. §§ 10-16-4, 30-23-6; OHIO REV. CODE ANN. § 2921.42; 65 PA. CONS. STAT. ANN. § 1103; UTAH CODE ANN. §§ 67-16-8, 67-16-10; WIS. STAT. § 946.14.
[386] PUB. OFF. LAW § 73-a. Even that minor penalty is marred by the requirement that prosecution be initiated only after a referral by the Joint Commission on Public Ethics. PUB. OFF. LAW § 73-a(4).
[387] The difference between the felony-level false filing crime and the misdemeanor is that the Class E felony, Offering a False Instrument for Filing in the First Degree, requires that the defendant act "with the intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state." PENAL LAW § 175.35. For purposes of section 175.35, "intent to defraud" does not require pecuniary or financial loss, but simply means seeking to defeat "'legitimate official action and purpose . . . by misrepresentation,

stances. Neither, therefore, is a sufficient deterrent to self-dealing conduct. The state should demonstrate a more serious commitment to ending the abuses of public trust that accompany self-dealing behavior.

The Task Force considered different ways to criminalize undisclosed self-dealing. One proposal would amend the crime of Defrauding the Government by expanding its definition of "intent to defraud" to include undisclosed self-dealing by a public official. This route presents two disadvantages. First, under current law, the crime would be capped at a Class E felony, no matter the size of the hidden benefit obtained by the public servant.[388] Second, the gravamen of Defrauding the Government (in its current form) is a public employee's theft of property or services from the government, for example, through a phony invoice scheme. Inserting the concept of an intangible right could be cumbersome at best; at worst, it could create the statutory ambiguity that drove the Supreme Court to limit the federal honest services law.[389]

In light of these concerns, the Task Force took a different approach. In 2011, the New York State Bar Association's Task Force on Government Ethics issued its report, which included a draft law against Undisclosed Self-Dealing.[390] The Task Force endorses that proposal, with some minor changes. Under the new law, a person would be guilty of Undisclosed Self-Dealing in the Second Degree, a Class D felony, when:

> being a public servant, he or she intentionally engages in conduct or a course of conduct in his or her official capacity in connection with the award of a public contract or public grant or other effort to obtain or retain public business or public funds that is intended to confer an undisclosed benefit on himself, herself or a relative, and thereby obtains or attempts to obtain a benefit for himself, herself or a relative with a value in excess of $3,000. A benefit is disclosed if its existence is made known prior to the alleged wrongful conduct to either (i) the relevant state or local ethics commission or (ii) the official responsible for the public servant's appointment to his or her po-

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chicane or . . . overreaching.'" People v. Kase, 76 A.D. 532, 537 (1st Dept. 1980) (citation omitted), *aff'd on opinion below*, 53 N.Y.2d 989 (1981). Thus, "[w]hoever intentionally files a false statement with a public office or public servant for the purpose of frustrating the State's power to fulfill this responsibility, violates the statute." *Id.*

[388] As described in Section VIII, below, the Task Force proposes that Defrauding the Government be amended and gradated to attack schemes by anyone – not just public servants and party officers – to defraud governmental entities.

[389] *Skilling,* 130 S.Ct. at 2933.

[390] NEW YORK STATE BAR ASS'N, TASK FORCE ON GOVERNMENT ETHICS 51-52 (2011), *available at* www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=46069.

> sition, provided that person is not a participant in the alleged wrongful conduct.[391]

The Task Force also recommends the passage of Undisclosed Self-Dealing in the First Degree, a Class C felony, which would require the same elements for conviction with a $10,000 threshold.[392] The proposed statute would borrow the definition of "relative" from the New York City Conflict of Interest Board: a spouse, domestic partner, child, parent, or sibling of the public servant; a person with whom a public servant has a business or other financial relationship; and each firm in which the public servant has a present or potential interest.[393]

Several aspects of the proposal bear mention. First, it criminalizes self-dealing "conduct or a course of conduct." Prosecutors would therefore be empowered, for the first time in New York, to pursue both isolated acts and repeated incidents of self-dealing involving ongoing corrupt relationships. As with other "scheme" crimes, evidence of conduct that was part of the scheme – even conduct that took place over a course of years, or perhaps occurred in different counties – would be treated as part and parcel of the offense, as it has been for decades in federal prosecutions.[394] This approach would enable the efficient prosecution of the scheme in one county, and would allow a jury to hear the full scope of the illegal scheme.

Second, the proposal's safe harbor disclosure structure imposes an ongoing disclosure obligation, thereby encouraging transparency. It also prevents gamesmanship. The Public Officers Law requires that financial disclosures for state employees be filed annually. Within the course of a year, a public servant could: file her disclosure form; acquire an ownership interest in a company; steer government business to that company; and sell her ownership interest. If the law against undisclosed self-dealing were linked to the requirements of the Public Officers Law or the equivalent local provision, she would commit no crime, despite her corrupt conduct. The safe harbor structure precludes that undesirable result. On the other hand, the required mental state – "intentional" – limits the law's application to those who engage in corrupt transactions. It will, therefore, not ensnare a public servant who unwittingly omits items on her annual financial disclosure forms.

Third, the proposed statute answers the questions laid out by Justice Ginsburg in *Skilling*. It explains how "direct or significant . . . the conflicting financial interest" must be: the interest must be held by the public servant or a "relative," a defined term. It measures the extent to which "the official action [has] to further that interest in order to amount to [a crime]" by setting dollar thresholds. And it identifies "[t]o whom should the disclosure be

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[391] *See* Appendix G.

[392] The Task Force also recommends that section 460.10(1) of the Penal Law be amended to include the new crimes of Undisclosed Self-Dealing as a pattern act for a charge of Enterprise Corruption, and that section 700.05(8)(b) be amended to authorize electronic eavesdropping for the new crimes.

[393] RULES OF THE CITY OF NEW YORK, tit. 53, § 1-01.

[394] *See* 18 U.S.C. §§ 1341, 1343.

made and what information should it convey": it should be made to the relevant state or local ethics commission, and should reveal the economic interest from which the "benefit" will flow. Moreover, the statute clarifies that disclosure must predate the alleged wrongful conduct.

When a similar proposal was made by the State Bar Task Force in 2011, it was not acted on. The Task Force respectfully recommends that this version be enacted into law.

C. Official Misconduct

The Office of the State Comptroller (OSC), Thomas P. DiNapoli, shared a recommendation with the Task Force to enhance the penalties for the existing crime of Official Misconduct. Specifically, the OSC's view was that "the penalties for Official Misconduct, Penal Law Section 195.00, are inadequate to address the types of abuse which the State has encountered," and the OSC recommended "that two new sections be added to [the Official Misconduct section], creating second degree and first degree Official Misconduct offenses, depending on the amount of the benefit conferred as [a] result of the public servant's misconduct."[395] With some variations that relate to the grading of the existing and new proposed offenses, the Task Force adopted the OSC's proposal.

By way of background, the crime of Official Misconduct is currently a single-degree crime – a Class A misdemeanor.[396] It criminalizes a public servant's unauthorized action (or his or her failure to perform an act his or her duty requires) with the intent to obtain a benefit or deprive another person of a benefit.[397] Some hypothetical examples illustrate the current law's shortcomings. If a high-ranking police official voids moving violations and parking tickets issued to her family members, the level of the offense is the same whether the revenue lost to the municipality totals $50 or $5,000. Similarly, if a law enforcement official fails to act on an embezzlement complaint because the alleged perpetrator is the son of a friend, the level of that offense is a Class A misdemeanor, regardless whether that failure to act prevented the victim company from recovering $500 or $5,000 in stolen funds. And, while our Penal Law includes sections for Rewarding Official Misconduct and Receiving a Reward for Official Misconduct,[398] which present a range of E and C felonies, these offenses do not reach situations where there is no reward to the official, that is, when the breach of the official's duty inures only to the benefit of a third party.

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[395] Letter from Nelson R. Sheingold, Counsel for Investigations, Office of the State Comptroller, to Daniel R. Alonso and Frank A. Sedita, III (July 10, 2013). *See* Appendix B.

[396] PENAL LAW § 195.00 provides: "Official Misconduct. A public servant is guilty of official misconduct when, with intent to obtain benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or
2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office."

[397] *Id.*

[398] *See* PENAL LAW §§ 200.20 *et seq.*

The inadequacies of the single-degree offense of Official Misconduct may be addressed by (1) retaining the current offense of Official Misconduct as a Class A misdemeanor but reclassifying it as a third-degree offense; (2) creating a second-degree offense, a Class E felony, which would include the elements of the third-degree offense and require proof that the public servant obtained a benefit or deprived another person of a benefit valued in excess of $1,000; and (3) creating a first-degree offense, a Class D felony, which would also include the elements of the third-degree offense but would require proof that the public servant obtained a benefit or deprived another person of a benefit valued in excess of $3,000.[399] Proposed statutory text appears in Appendix G.

By adding two levels of Official Misconduct, with penalties calibrated to the financial benefit or harm associated with the conduct,[400] our laws will finally recognize and punish serious acts of Official Misconduct as felonies, and perhaps more effectively deter those acts.

D. Abuse of Public Trust Sentencing Enhancement

The OSC provided another recommendation, which the Task Force supports, for a general sentencing enhancement for public servants who intentionally use their positions to facilitate significantly their commission (or concealment) of an offense. This enhancement would apply only when the underlying count of conviction does not capture the abuse of the official's position as an element.

Bribery, bribe receiving, and rewarding official misconduct, as examples, all include the actor's status as a public servant as an element of the offense, and our lawmakers plainly considered the actor's status in grading the seriousness of the offenses and the potential penalties. But unfortunately, wayward public officials have not always confined their misdeeds to the sections of the penal statutes that specifically reference them. So, for example, if a Senator uses her position to embezzle money from a charity, or a police officer uses his position to facilitate a drug transaction, the elements of a Grand Larceny charge or a drug sale charge do not capture each defendant's abuse of position, nor do the potential penalties. The Task Force believes that the facts that cause the additional harm – the public-servant status of the offender and the abuse of his or her official position – should be captured though an appropriate sentencing enhancement.

The OSC previously proposed a bill in January 2013, entitled "Abuse of Public Trust," that would accomplish this goal. The proposed legislation sought to vest the prosecutor with the ability to enhance the potential penalties against a public servant who abuses his or her position by charging the defendant with a distinct offense, Abuse of Public Trust,

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[399] The OSC recommended elevating the current Official Misconduct misdemeanor to a Class E felony as a third-degree offense, creating a second-degree offense as a Class D felony, and a first-degree offense a Class C felony.

[400] The Task Force does not believe that adding a harm/benefit element to the two proposed sections of Official Misconduct will face the same challenges associated with the harm element in the current felony Commercial Bribery statutes discussed above. If there is no readily provable financial harm or benefit related to an act of official misconduct, the offense will simply remain a misdemeanor.

in addition to the substantive Penal Law violations. Upon a conviction for the substantive offense, the level of the underlying substantive offense would be elevated one category for sentencing purposes. The OSC's proposal also included a mandatory fine upon conviction for an offense involving a public official's abuse of his or her position. The Task Force endorses this proposal. The text for the Abuse of Trust Act appears in Appendix G.[401]

[401] The OSC's proposed bill may also be found at: open.nysenate.gov/legislation/api/1.0/html/bill/A3629-2013.

VIII. Tax and Money Laundering

Tax fraud and money laundering crimes have in common their concealment of the nature, source, location, or control of funds, either by misuse of the financial system and legitimate businesses, or through other means. In some cases, they mark the intersection between street crime and white-collar crime. But at their core, they are pure financial crimes, investigated using the same techniques as those used in fraud and corruption cases. In all cases, when criminals who lie, cheat and steal launder their funds or hide their income (legitimate or ill-gotten), honest citizens pay the price.

Thus, when an auto dealer sells an expensive car to an individual known to sell drugs or promote prostitution, he enables the drug dealer and the pimp to continue preying on others. Or, when a public official or corporate officer receives a large kickback in connection with a contract award, the funds might be disguised as sham "consulting fees" from the beneficiary, which enables the transaction to project a legitimate veneer and potentially escape detection. And when otherwise legitimate businesses do not report their cash receipts in order to underpay their tax obligations, the rest of us must pay higher taxes. Through such conduct, wrongdoers of every stripe contaminate the banking system with dirty money and deprive the public coffers of much-needed revenues.

At the same time, the globalization of commerce and the explosion of electronic fund transfer options have made it easier for criminals to, for example, conceal their identities and engage in evasion or money laundering by exploiting tax havens, often through the use of shell companies.[402] Such conduct impairs the transparency of the banking system, within the state and around the world.[403] While the federal government has made significant strides in preventing, detecting and prosecuting money laundering, New York State law enforcement lags behind.

We propose two new statutes designed to improve the detection and prosecution of criminals who engage in illegal activity and of the people and businesses who enable those criminals to enjoy their ill-gotten gains. These additions to our money laundering laws, which were last revised more than a decade ago,[404] are designed to protect the integrity of the New York financial system. Specifically, the Task Force proposes: (1) a statute that criminalizes structuring transactions to evade reporting requirements; and (2) a statute prohibiting mone-

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[402] *See, e.g.*, United States v. Tilga, 824 F. Supp. 2d 1295, 1329 (D.N.M. 2011); United States v. Mendez, 420 Fed. Appx. 933, 938 (11th Cir. 2011).

[403] Cyrus R. Vance, Jr., Keynote Remarks, 13th Annual Florida Int'l Bankers Ass'n Anti-Money Laundering Conference (Feb. 14, 2013), *available at* manhattanda.org/press-release/district-attorney-vance-delivers-keynote-address-calling-banks-help-prevent-financial-; *Engaging Iran, Hearing Before the S. Comm. on Foreign Relations*, 111th Cong. 6-7 (2009) (statement of Robert M. Morgenthau, District Attorney, New York County), *available at* www.gpo.gov/fdsys/pkg/CHRG-111shrg52971/pdf/CHRG-111shrg52971.pdf.

[404] L.2000, c. 489, § 5, eff. Nov. 1, 2000.

tary transactions in criminally-derived property in excess of $20,000. Enactment of these proposals would bring New York's laws closer to federal law and the laws in other states.

The tax laws of New York were overhauled in 2009. As explained more fully below, the Task Force concluded that it would be premature to suggest any significant amendments to those recent enactments. We nonetheless identified four areas that call for improvement: (1) the aggregation provision applicable to tax felonies should be amended to remove the one-year limitation; (2) state law should be amended to allow, in limited circumstances, disclosure of tax returns and other tax information to prosecutors for use in non-tax criminal investigations; (3) the Penal Law should be amended to provide for venue in tax prosecutions based on the effect that the tax violation has on a particular jurisdiction; and (4) the Penal Law should address complex schemes to defraud the government of revenue.

Our proposals for amending the state's money laundering laws are more extensive than our suggestions about the tax laws; so, we address the money laundering proposals first and the tax law proposals second.

A. Money Laundering Proposals

Because criminals of all sorts need their dirty money to appear clean, Congress has passed several laws designed to prevent, detect and prosecute money laundering.[405] Justice Alito has described the purpose of these and similar state laws:

> Money laundering provisions serve two chief ends. First, they provide deterrence by preventing drug traffickers and other criminals who amass large quantities of cash from using these funds "to support a luxurious lifestyle" or otherwise to enjoy the fruits of their crimes. Second, they inhibit the growth of criminal enterprises by preventing the use of dirty money to promote the enterprise's growth.[406]

In many ways, there are no greater goals than these in the investigation of complex crime. Although the current New York money laundering law, enacted in 2000 and codified in Penal Law Article 470,[407] was groundbreaking for its time, the Task Force believes that it is time to go further.

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[405] *See* 18 U.S.C. §§ 1956, 1957.

[406] United States v. Santos, 553 U.S. 507, 535 (2008) (Alito, J., dissenting) (internal citations omitted).

[407] L.2000, c. 489, § 5, eff. Nov. 1, 2000; PENAL LAW §§ 470.05 (Money Laundering in the Fourth Degree), 470.10 (Money Laundering in the Third Degree), 470.15 (Money Laundering in the Second Degree), 470.20 (Money Laundering in the First Degree).

1. Structuring

Enacted by Congress in 1970, the Bank Secrecy Act (BSA) creates, among other things, a duty for institutions to file certain reports with the federal government when they receive cash in excess of $10,000.[408] The key reports are currency transaction reports (CTRs),[409] IRS Form 8300,[410] and currency and monetary instrument reports (CMIRs).[411] The BSA criminalizes the falsification or prevention of filings, and also the structuring of transactions to evade obligations, the latter being the key provision of the BSA that the Task Force examined.[412] The classic example is an individual who deposits $9,000 in three different banks in a single day. Over the last decade, several states have enacted their own structuring statutes.[413] New York has not.

Investigators and prosecutors of white-collar crime frequently encounter individuals and entities making deposits just under the $10,000 reporting threshold in order to avoid having financial institutions file CTRs. This has long been a favored tool of professional money launderers.[414] For example, investigators regularly come across bank accounts into which cash is deposited at banks around the United States, including New York, to make it appear that the deposits are unrelated and under the $10,000 reporting threshold. That type of activity might well indicate that the bank account is being used by a narcotics distributor

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[408] *See* 31 U.S.C. §§ 5311-5314e, 5316-5331, 5332e; 12 U.S.C. §§ 1829b, 1951-1959e; 31 C.F.R. Chapter X; 31 C.F.R. Part 103; 18 U.S.C. §§ 1956-57, 1960.

[409] Currency Transaction Reports, also known as FinCEN Form 104, are meant to "[a]ssess the bank's compliance with statutory and regulatory requirements for the reporting of large currency transactions." FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, CURRENCY TRANSACTION REPORTING OVERVIEW, www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_017.htm.

[410] "The general rule is that you must file Form 8300, Report of Cash Payments over $10,000 Received in a Trade or Business, if your business receives more than $10,000 in cash from one buyer as a result of a single transaction or two or more related transactions. The information provided by Form 8300 provides valuable information to the Internal Revenue Service (IRS) and the Financial Crimes Enforcement Network (FinCEN) in their efforts to combat money laundering." INTERNAL REVENUE SERVICE, FORM 8300 AND REPORTING CASH PAYMENTS OF OVER $10,000, www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Form-8300-and-Reporting-Cash-Payments-of-Over-$10,000.

[411] CMIRs are meant to help FinCEN "[a]ssess the bank's compliance with statutory and regulatory requirements for the reporting of international shipments of currency or monetary instruments." FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL, INTERNATIONAL TRANSPORTATION OF CURRENT OR MONETARY INSTRUMENTS REPORTING OVERVIEW, www.ffiec.gov/bsa_aml_infobase/pages_manual/OLM_035.htm.

[412] 31 U.S.C. § 5324.

[413] Examples of states that criminalize structuring include Arizona, ARIZ. REV. STAT. ANN. § 13-2317(B)(5); Delaware, DEL. CODE ANN. tit. 11, § 951(f); Missouri, MO. ANN. STAT. § 574.105(2)(3); New Jersey, N.J. STAT. ANN. § 2C:21-25(e); and Pennsylvania, 18 PA. CONS. STAT. ANN. § 5111(a)(3).

[414] January 23, 2013 Presentation by Daniel Wager to the White Collar Crime Task Force (Wager Presentation). A copy of the presentation can be found in Appendix B. Mr. Wager is Senior Vice President of Head of Global Enhanced Due Diligence for TD Bank. Prior to joining TD Bank in 2011, Mr. Wager served as a supervisory special agent with the U.S. Department of Homeland Security, Office of Homeland Security Investigations (HSI), including service as the director of the New York High Intensity Financial Crime Area (HIFCA) from 2008 to 2011.

or other cash-based criminal or group, but state prosecutors are powerless to charge this activity.

Structuring is not just about money laundering, but also about tax evasion. State Tax prosecutors have reported to the Task Force that they regularly see structuring activity by individuals who are seeking to evade taxes. For example, if a restaurant accepts only cash but does not want to pay its taxes, it might structure cash deposits so as to avoid the filing of a CTR. Criminals also sometimes purchase postal money orders with cash, then use the money orders to purchase goods or services. Indeed, money orders are sometimes used for large expenses, including mortgage payments.

In a case that illustrates the need for a state structuring law, an individual bundled $100 million in checks belonging to various businesses and cashed them at a commercial check casher.[415] As a result, the currency transaction reports were filed in this individual's name, rather than in the names of the businesses whose checks were cashed, which actually received the money. In this way, the bundler helped conceal revenue received from a wide cross-section of businesses, including retail establishments (florists, food vendors, hardware merchants, and furniture sellers), real-estate and finance professionals, manufacturing businesses, wholesalers, and construction companies. The result was that those businesses were able to evade various business and personal income taxes.[416]

Prosecutors would often be able to show the intent to evade a filing requirement, at least circumstantially through the pattern of structured deposits. But it is usually quite difficult under current law to prove that a defendant who structures transactions also intended to commit an existing penal offense, such as tax fraud or money laundering, sufficient to charge them as an accomplice or co-conspirator. By contrast, under the BSA, structurers may be charged in federal court based only on their structuring activity for the purpose of evading the filing requirements, thereby allowing the Department of Justice to target money launderers and tax evaders without also having the burden to prove an additional crime.[417]

For all these reasons, in 2004, a New York County grand jury investigating commercial check cashers, and the ability of these entities to launder money and facilitate tax fraud, recommended exactly what the Task Force now urges. In the words of the grand jurors:

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[415] REPORT OF THE GRAND JURY OF THE SUPREME COURT, IMPANELED BY THE HON. DANIEL FITZGERALD ON MAY 21, 2003, 13 (2004) (2004 GRAND JURY REPORT) (on file with the Task Force).

[416] *Id.*

[417] United States v. MacPherson, 424 F.3d 183, 193 (2d Cir. 2005) (section 5324 makes no reference to the source of the money or to the defendant's motive; its "singular focus is on the method employed" to evade the filing requirement); *see also* United States v. Funds in Amount of $101,999.78, 2008 WL 4222248, at *3 (N.D. Ill. 2008) (inference from the facts set forth in the complaint – numerous $8,000 cash deposits, the number of accounts used, and the total deposited over 3 years – sufficient to support a reasonable belief claimant was engaged in structuring).

> It came as no surprise to this grand jury that unscrupulous persons can find ways to circumvent the filing requirements. It was explained to us that, with respect to check cashing, these rules can be evaded simply by breaking a currency transaction into multiple transactions, and conducting them at multiple locations or over a series of days, a maneuver known as "structuring." Congress reacted to this in the mid 1980's by enacting laws to prohibit structuring, including both civil and criminal sanctions.[418]

Based on that finding, the grand jury recommended:

> [T]here should be a criminal statute specifically prohibiting the structuring of check cashing transactions to avoid the CTR record keeping requirement. This will greatly advance law enforcement efforts by giving State and Local prosecutors the ability to prosecute the structuring activity engaged in by the intermediaries and their customers as a continuing crime. We also believe that it will provide better protection in tracking the flow of illegal monies, as well as being a means to thwart tax evaders.[419]

In sum, New York's lack of structuring law prevents its prosecutors from charging money launderers and tax evaders, and recovering their ill-gotten gains for the state.[420] And those cases are not necessarily sent to federal court – like in many areas of criminal law, many otherwise-prosecutable cases are declined by federal prosecutors because of threshold amounts, resource issues, or federal prosecution priorities.[421] The cases simply go unaddressed, left on the proverbial table.

The Task Force agreed that New York State should criminalize structuring, but also accepted as a guiding principle that it would not recommend that new reporting requirements be imposed on New York State financial institutions or businesses. (Currently, only check cashers owe such a duty to the Department of Financial Services, under the Banking Law.[422]) For that reason, the structuring law that we propose criminalizes efforts to evade the requirements of the BSA.[423]

Under our proposal, the term "structures" would be defined as follows:

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[418] 2004 GRAND JURY REPORT, *supra* note 415, at 10.
[419] *Id.* at 23.
[420] Wager Presentation, *supra* note 414.
[421] *Id.*
[422] BANKING LAW §§ 360 *et seq*.
[423] *See* Appendix H for the full proposal.

> A person structures a transaction when, with the intent to evade any reporting requirement under the New York State Banking Law or 31 U.S.C. §§ 5311 through 5326, or any regulation prescribed thereunder, he or she conducts or attempts to conduct one or more related transactions in currency, in any amount, with one or more financial institutions, on one or more days. Structuring includes, but is not limited to, the breaking down of a single sum of currency exceeding ten thousand dollars into smaller sums, including sums at or below ten thousand dollars, or the conduct of a transaction, or series of currency transactions, including transactions at or below ten thousand dollars. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution or on any single day in order to constitute structuring.

This language mirrors the definition of structuring under federal law.[424]

Structuring in the Second Degree, a Class E felony, would be defined as follows:

> A person is guilty of structuring when, with the intent to evade any reporting requirement under the New York State Banking Law or 31 U.S.C. §§ 5311 through 5326, or any regulation prescribed thereunder, he or she structures one or more transactions.

Notably, this crime would require proof that the defendant intentionally sought to evade the reporting requirement, which, by definition, includes proof that the defendant knew such requirements exist. It would not, however, require proof that the defendant knew that his conduct was a violation of criminal law. This comports with a long line of federal cases on the issue of *mens rea* for structuring offenses.[425]

The companion offense, Structuring in the First Degree, would be a Class D felony, and would apply when an aggravating factor is established, such as the intent to commit another crime or to aid or conceal the commission of another crime, or when the aggregate

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[424] 31 C.F.R. § 103.

[425] *Compare* Ratzlaf v. United States, 510 U.S. 135, 149 (1994) (acknowledging "venerable principle that ignorance of the law is no defense" but interpreting willfulness requirement of federal structuring law to require that the jury "find [the defendant] knew the structuring in which he engaged was unlawful") *with* United States v. MacPherson, 424 F.3d 183, 188-189 (2d Cir. 2005) (explaining that within a year of *Ratzlaf*, "Congress responded by eliminating willfulness as an element necessary to convict a person of structuring in violation of § 5324"; current law requires the jury to find that "a defendant, with knowledge of the reporting requirement imposed by law, structured a currency transaction intend[ing] to deprive the government of information to which it is entitled," but not that he knew his conduct was unlawful) (internal punctuation and citation omitted).

value of the currency exceeds $100,000 in any twelve-month period. Both the first and second degree crimes would serve as predicate crimes for the purpose of the OCCA law,[426] and designated offenses for the purpose of electronic eavesdropping."[427] This would also mirror federal law.[428] The proposed language for both provisions is set forth in Appendix H.

2. Criminal Monetary Transactions

The Task Force heard from experts on the movement of illegal money through New York's stream of commerce.[429] They and members of the Task Force also spoke to a gap in New York law: it is currently legal in New York to engage in large-scale monetary transactions using money that the actor *knows* are the proceeds of crime. Such conduct, by itself, is simply not covered by New York's current money laundering laws, codified in Article 470 of the Penal Law. Having studied the relevant federal statutes closely, the Task Force recommends the adoption of a criminal "money spending" statute to fill this gap.

The federal criminal money spending statute, 18 U.S.C. § 1957 (Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity), focuses on commercial transactions that involve the knowing use of "criminally derived property" in transactions that in fact involve the proceeds of "specified unlawful activity" (SUA).[430] The statute provides that it is a crime to spend or receive money that the defendant knows is the product of criminal activity, as long as it involves SUA, is in an amount greater than $10,000, and involves a monetary transaction by, through, or to a financial institution.[431] SUA refers to a wide variety of criminal activity specified in the federal criminal code, including fraud, drug offenses, BSA violations,[432] and copyright infringement.[433] A defendant convicted of a Section 1957 violation can be sentenced to prison and can also be required to forfeit any property involved in, or traceable to property involved in, such violation.[434]

Most importantly, unlike other federal money laundering statutes, as long as knowledge that the transaction involves criminally-derived property is established, section

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[426] PENAL LAW § 460.10.
[427] CPL § 700.05(8).
[428] Federal structuring and criminal monetary transaction offenses are predicate offenses under OCCA's federal equivalent, the Racketeer Influenced and Corrupt Organizations Act (RICO), and are both subject to eavesdropping under federal law. *See* 18 U.S.C. §§ 1961(1)(D), 2516(1)(g).
[429] Wager Presentation, *supra* note 414; January 23, 2013 Presentation by Special Agent Kevin Tyrrell to the White Collar Crime Task Force (on file with the Task Force). Special Agent Tyrrell is a Section Chief at the United States Department of Homeland Security – Homeland Security Investigations at the National Bulk Cash Smuggling Center in Williston, Vermont.
[430] 18 U.S.C. § 1957. "Criminally derived property" is defined as "any property constituting, or derived from, proceeds obtained from a criminal offense." 18 U.S.C. § 1957(f). "Specified unlawful activity," defined in 18 U.S.C. § 1956(c)(7), includes a wide array of enumerated federal crimes.
[431] 18 U.S.C. §§ 1957(a), 1957(f).
[432] 18 U.S.C. §§ 1956(c)(7)(A), 1961(1).
[433] 18 U.S.C. §§ 1957(b), 1957(h), 3571, and 3559.
[434] 18 U.S.C. §§ 981(a)(1)(A), 982(a)(1)(A).

1957 does not require an additional intent or design to conceal the source of the funds or to promote criminal activity.[435] Broadly put, it encompasses any knowing spending of tainted funds, including to make otherwise legitimate purchases. Congress intended that the statute extend both to those who participated in traditional criminal activity and to merchants and financial institutions that knowingly receive tainted funds in the course of ordinary commercial activity.[436] In that sense, while commonly referred to as a criminal "money spending" statute, it is also a "money receiving" statute. As the House Judiciary Subcommittee on Crime explained in enacting the statute:

> A person who engages in a financial transaction using the proceeds of a designated offense would violate this section if such person knew that the subject of the transaction were the proceeds of any crime. The [House Judiciary Committee's Subcommittee on Crime] is aware that every person who does business with a drug trafficker, or any other criminal, does so at some substantial risk if that person knows that they are being paid with the proceeds of a crime and then uses that money in a financial transaction. . . . The only way we will get at this problem is to let the whole community, the whole population, know they are part of the problem and they could very well be convicted of it if they knowingly take these funds.[437]

The offense is directed, for example, at the real estate agent who arranges for the purchase of a residence knowing that the buyer is using funds derived from prostitution, the investment banker who knowingly accepts gambling proceeds for a client's stock acquisition, the art dealer who knowingly accepts narcotics proceeds as payment for artwork, or the car dealer who knowingly accepts cash obtained by fraud as payment for a luxury vehicle.[438] Under current New York law, this activity is all legal.

The Task Force proposes the new offense of Criminal Monetary Transaction, designed to criminalize the spending or receiving of criminal proceeds by a person who is

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[435] *See* H.R. Rep. No 855, 99th Cong., 2d Sess. 13-14 (1986).

[436] *Id.*

[437] *Id.* at 13.

[438] *See, e.g.*, United States v. Rutgard, 116 F.3d 1270, 1291 (9th Cir. 1997) ("The description of the crime . . . does not speak to the attempt to cleanse dirty money by putting it in a clean form and so disguising it. This statute applies to the most open, above-board transaction."); United States v. Gabriele, 63 F.3d 61, 65 (1st Cir. 1995) ("The crux of the argument is that section 1957 is a rather novel statute, in that it criminalizes conduct by a person once removed from that of the person who generated the criminally derived property. Thus, he argues, the proscribed conduct is not likely to appear unlawful to an ordinary citizen . . . . Section 1957 is but another in a substantial line of federal criminal statutes whose only *mens rea* requirement is knowledge of the prior criminal conduct that tainted the property involved in the proscribed activity"). United States v. Wright, 341 Fed. Appx. 709, 713 (2d Cir. 2009) (drug dealer spent cash on vehicle purchase and monthly payments).

aware that the funds were derived from an illegal source.[439] A person would be guilty of the second-degree offense, a Class E felony, when:

> he or she knowingly engages or attempts to engage in a monetary transaction in property derived from criminal conduct with a value greater than $20,000, and the property is in fact derived from specified criminal conduct.

The first-degree offense, a Class D felony, would apply to transactions of more than $60,000. These threshold amounts are slightly higher than those in the current New York money laundering provisions, reflecting the fact that the new statute does not require additional intent or knowledge regarding the reason for the transactions at issue.[440] As with the structuring proposal described above, the Task Force recommends that Criminal Monetary Transactions in the First and Second Degrees be available predicates for an OCCA charge and wiretap application.[441] As with Structuring, this would mirror federal RICO and eavesdropping law.[442]

The key limiting principle is the defendant's knowledge that the money is illicit – legitimate business people avoid liability if they lack the "aware[ness] . . . that such circumstance exists."[443] New York does not recognize the federal theory of "willful blindness" or "conscious avoidance," and we would not change that. Under section 1957, on the other hand, knowledge "may be demonstrated by showing that the defendant either had actual knowledge or deliberately closed his eyes to what otherwise would have been obvious to him concerning the fact in question."[444] The Task Force's proposal is thus more restrictive than federal law.

Although the proposed statute requires proof that the defendant knew that the money came from criminal conduct, like the federal law (and the current New York money laundering law), it does not require the prosecutor to prove that the defendant knew the money was obtained from *specified* criminal conduct. Moreover, under the proposal, when money that has been obtained from lawful activity is commingled with money obtained from specified criminal conduct, it would not be necessary to prove that the funds used in the transaction were derived exclusively from the specified criminal conduct. This conclusion is consistent with federal case law.[445]

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[439] New York would be a pioneer in enacting this offense on the state level.

[440] PENAL LAW §§ 470.05, 470.10. The Task Force has also provided for minor amendments to other provisions of Article 470 of the Penal Law to make them consistent with this proposed statute. For example, Section 470.25, the provision pertaining to money laundering fines, and Section 470.03, the provision pertaining to aggregation of value, will require new subsections. These are set forth in Appendix H.

[441] PENAL LAW § 460.10; CPL § 700.05(8).

[442] 18 U.S.C. §§ 1961(1)(B), 2516(1)(c).

[443] PENAL LAW § 15.05(2).

[444] United States v. Flores, 454 F.3d 149, 155 (3d Cir. 2006).

[445] *See, e.g.*, United States v. Johnson, 971 F.2d 562, 570 (10th Cir. 1992) ("[T]he portion of § 1957 requiring a showing that the proceeds were in fact 'derived from specified unlawful activity' could not have been intend-

The definition of "financial institution" currently applicable to money laundering in New York would apply to the new crime as well.[446] That definition, like the federal definition, is broad. It encompasses not just banks and credit unions but also most merchants, including car dealerships, jewelers, casinos, stockbrokers, travel agencies, and pawnbrokers.[447]

Similarly, the proposed definition of "monetary transaction" mirrors the federal definition. The one exception to that element of the federal offense is for attorney's fees, excluding "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."[448] New York's right to counsel, of course, is broader than the Sixth Amendment, and can attach even in the investigative stage of a criminal case.[449] For that reason, the Task Force believes that the new statute should exclude all *bona fide* attorneys' fees.

With this law, New York would take a great step forward in deterring financial institutions and merchants from knowingly benefitting from the proceeds of criminal activity, as well as by targeting criminals who seek to enjoy their ill-gotten gains. The full proposal is set forth in Appendix H.

B. Tax Proposals

The 2009 amendments to the Tax Law were designed "to increase civil and criminal penalties for fraud and tax evasion and to improve the Tax Department's ability to identify and pursue non-compliant taxpayers."[450] The amendments, to Article 37 of the Tax Law, created a new crime, Criminal Tax Fraud, committed when a defendant willfully engages in one of eight "tax fraud acts," for example, by failing to file a return,[451] filing a return containing materially false information,[452] or failing to remit taxes collected on behalf of the state.[453] The lowest level crime, Criminal Tax Fraud in the Fifth Degree, is a Class A misdemeanor.[454]

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ed as a requirement that the government prove that no 'untainted' funds were deposited along with the unlawful proceeds. Such an interpretation would allow individuals to avoid prosecution simply by commingling legitimate funds with proceeds of crime. This would defeat the very purpose of the money-laundering statutes.") (internal citations omitted).

[446] PENAL LAW § 470.00(6).

[447] *Id.*; *see* 31 U.S.C. § 5312(a)(2).

[448] 18 U.S.C. § 1957(f)(1).

[449] *See, e.g.*, People v. Hobson, 39 N.Y.2d 479, 483-84 (1976) ("Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer.").

[450] William Comiskey, *Taking Aim at Tax Evaders*, N.Y. ST. B. ASS'N. J., Nov./Dec. 2009, at 11, *available at* www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=33575.

[451] TAX LAW § 1801(a)(1).

[452] TAX LAW § 1801(a)(2).

[453] TAX LAW § 1801(a)(5).

[454] TAX LAW § 1802.

The crime is then gradated up to Criminal Tax Fraud in the First Degree, a Class B felony, based on monetary thresholds triggered by the amount of tax liability evaded.[455]

These new criminal sanctions serve a critical role in the enforcement of the Tax Law by prosecutors and the Tax Department. They not only punish offenders, but also deter potential tax evaders. The Department reported to the Task Force that it has significantly increased the number of criminal investigations opened and referred for prosecution since the enactment of the 2009 amendments. Nonetheless, the overall impact of the new criminal sanctions is unclear from the available data, largely because returns for the 2009 calendar year were not due until April 2010, and tax prosecutions are normally brought several years after the filing date. There is therefore an insufficient basis on which to evaluate the impact of the new law at this time.

For these reasons, the Task Force's only actual proposed amendment to the Tax Law, though important, is rather modest: permit aggregation of tax fraud amounts over multiple years. (The current law's aggregation provision is limited to a single year.) Below is a discussion of the aggregation proposal and the Task Force's three additional tax-related proposals.

1. Aggregation of Tax Loss Across Years

As explained above, the tax offenses in Article 37 of the Tax Law are relatively new, and, for the most part, there is no reason to doubt their adequacy. The Task Force concluded, however, that the inability to aggregate tax loss across tax years artificially downgrades the true impact of a particular tax fraud. The definition of aggregation contained in Section 1807 provides:

> for purposes of this article, the payments due and not paid under a single article of this chapter pursuant to a common scheme or plan or due and not paid, within one year, may be charged in a single count, and the amount of underpaid tax liability incurred, within one year, may be aggregated in a single count.[456]

Limiting aggregation to a single year creates an artificial demarcation line – a tax year – that obscures the key factor in a tax fraud prosecution: how much tax the taxpayer evaded. We propose an amendment to enable the aggregation of the full amount of evaded taxes in a single charge.

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[455] TAX LAW §§ 1803-1806. The thresholds are:

More than $3,000	Class E felony
More than $10,000	Class D felony
More than $50,000	Class C felony
More than $1 million	Class B felony

[456] TAX LAW § 1807.

Consider, for example, a taxpayer who runs a business that takes in a large amount of cash. He decides to intentionally underreport his income on his state income tax returns for three straight years. If his tax due on underreported income was $8,000 one year, $27,000 the next, and $35,000 the following year, under current law he can be charged with one Class E felony and two Class D felonies. But the best measure of his culpability is not how many criminal charges a prosecutor can bring, but rather the *harm* caused by the crime. If aggregation across years were permitted, the $70,000 tax loss would be prosecuted as one count of Criminal Tax Fraud in the Second Degree, a Class C felony. That single charge better approximates his culpability, and is far easier for the public to understand, than the two Class D felonies and one Class E felony that would be charged under current law.

Ironically, in the above hypothetical, the theoretical term of incarceration for the defendant would be *less* under the Task Force's proposal than under current law. The two Class D felonies carry maximum terms of imprisonment of 2⅓ – 7 years, and the Class E felony carries a maximum term of 1⅓ – 4 years.[457] Under current law, because each involves a separate criminal transaction, the sentencing court would have the discretion to sentence the defendant to an indeterminate term in state prison of 6 – 18 years.[458] If, instead, the defendant had been prosecuted for one Class C felony, based on the entire aggregate tax loss pursuant to his common scheme, the sentencing court would be limited to a maximum of 5 – 15 years.[459]

Aggregation across tax years is consistent with federal law. Under section 2T1.1 of the United States Sentencing Guidelines, the base criminal offense level for crimes involving tax fraud is determined by reference to "tax loss," which is defined as "the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed)."[460] In determining tax loss, the Guidelines make clear that "all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."[461]

This anomaly in New York can be rectified simply by removing the words "within one year" from section 1807. The proposed bill is set out in Appendix H.

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[457] PENAL LAW § 70.00(2).
[458] PENAL LAW § 70.25(1).
[459] PENAL LAW § 70.00(2).
[460] U.S. SENTENCING GUIDELINES MANUAL § 2T1.1(c)(1).
[461] U.S. SENTENCING GUIDELINES MANUAL § 2T1.1, Application note 2 (internal citation omitted).

2. Disclosure of Tax Information in Non-Tax Prosecutions

Tax secrecy is closely guarded, as it should be, in New York State. The Tax Law prohibits the Tax Department from disclosing returns or return information except pursuant to a proper judicial order or under certain narrow circumstances permitted by law.[462] That prohibition has been interpreted to include the production of tax returns or tax information pursuant to a grand jury subpoena *duces tecum* in a non-tax investigation.[463] As a consequence, state grand juries generally cannot obtain tax returns or return information in non-tax cases.

Such material can greatly assist in the enforcement of other laws that victimize the public. In an identity theft case, it can help establish a relationship between the defendant and a co-conspirator. In an embezzlement case, it can rebut a common defense – that the stolen monies represent authorized compensation[464] – by showing that the defendant failed to declare the stolen funds as income. The same would hold true for a case in which the defendant is committing public assistance or public benefits fraud by understating his income, which might even include submitting a false tax return as purported proof of that income.[465] The real returns would be crucial evidence of guilt in such cases.

By contrast with New York State law, federal prosecutors *can* obtain returns and return information from the Internal Revenue Service in non-tax cases. The federal Tax Reform Act of 1976 permits the Internal Revenue Service to make disclosures to a prosecutor investigating *any* crime, so long as she obtains a court order upon a proper showing. Federal prosecutors can often obtain state returns and state return information even in a non-tax investigation or proceeding.[466] Certain other states have similar statutes.[467] The Task Force believes that New York prosecutors should be on equal footing with their counterparts; more fundamentally, they should have this critical device in their toolbox.

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[462] *See, e.g.,* TAX LAW §§ 487(1), 514, and 697(e). Moreover, such provisions prohibit the production of a return or return information pursuant to a grand jury subpoena *duces tecum* in connection with non-tax investigations.

[463] Matter of New York State Dept. of Taxation and Fin. v. New York State Dept. of Law, Statewide Organized Crime Task Force, 44 N.Y.2d 575, 578 (1978).

[464] *See, e.g.*, People v. Thomas, Ind. No. 01463/2012 (Sup. Ct. N.Y. Co. 2012) (defendant, a company insider, embezzled funds and argued the monies represented authorized compensation).

[465] *See, e.g.,* People v. Lopez, 97 A.D.3d 853, 853 (3d Dept. 2012), *lv. denied*, 19 N.Y.3d 1027 (2012) (affirming judgment of conviction upon guilty plea to welfare fraud and larceny in "satisfaction of a 19-count indictment and uncharged state tax crimes").

[466] United States v. Hampers, 651 F.2d 19, 23 (1st Cir. 1981) (state nondisclosure statute creates only a "qualified privilege" with respect to state tax returns sought by a federal grand jury). For cases applying the *Hampers* standard, see *In re Grand Jury Subpoena*, 144 F. Supp. 2d 540, 541-42 (W.D. Va. 2001); *In re Grand Jury Empanelled January 21, 1981*, 535 F. Supp. 537, 541-543 (D.N.J. 1982); *In re Grand Jury Subpoena*, 118 F.R.D. 558, 564-65 (D. Vt. 1987); *In re Cruz*, 561 F. Supp. 1042, 1045-46 (D. Ct. 1983); and *United States v. Brown*, at *2-3 2011 WL 208424 (M.D. La. 2011).

[467] N.D. CENT. CODE §§ 57-39.2-23(1)(b)-(d) (sales tax), 57-38-57(1)(b)-(d) (income tax); W. VA. CODE § 11-10-5d(e); *cf.* TENN. CODE § 67-1-1707 ("A return or tax information may be disclosed in response to a subpoena that is duly authorized and properly served under the Federal Rules of Criminal Procedure or the Tennessee Rules of Criminal Procedure.").

Proper safeguards are crucial, and tax secrecy should not be disturbed lightly. To balance the competing concerns, the Task Force proposes that prosecutors be able to obtain returns or return information in non-tax prosecutions by serving the Tax Department with a subpoena *duces tecum* that has been "so-ordered" by a judge of a superior court. That order would be based upon a sworn written application establishing that: (1) there is reasonable cause to believe that a specific criminal act has been committed; (2) there is reasonable cause to believe that the return or return information may be relevant to commission of such act; (3) the return or return information is sought exclusively for use in a criminal investigation or proceeding concerning such investigation; and (4) the information sought cannot reasonably be obtained, under the circumstances, from another source.[468]

Although the authority to seek these records would constitute a useful tool, the Task Force does not believe it would become routine. In response to a request from the Task Force, the Internal Revenue Service estimated that in the most recent fiscal year, federal prosecutors throughout the entire nation obtained approximately 300 to 400 such orders.[469] The applications were evenly split between narcotics-related investigations and other types of cases.

A proposed statute authorizing this procedure is set forth in Appendix H.

3. Particular Effect Jurisdiction

Due to idiosyncrasies in the state's law on county venue, some tax fraud prosecutions cannot be brought in New York City – even if the defendant's conduct had the effect of diminishing or defeating City tax revenue.

By way of background, the Criminal Procedure Law contains a specific venue provision applicable in tax cases. Under it, a tax-related crime "may be prosecuted in any county in which an underlying transaction reflected, reported or required to be reflected or reported, in whole or part, on such return, report, document, declaration, statement, or filing occurred."[470] Alternatively, if a fraudulent return is filed electronically, venue is proper in the county from which the return was sent, as well as the county that received it.[471] These rules, however, do not apply in cases involving the underpayment of New York City taxes.[472] New York City encompasses five counties. If the defendant lives in one county, works in another and electronically files a fraudulent return from outside the state, where is venue proper?

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[468] These are the same requirements that federal prosecutors must satisfy to obtain tax information.
[469] General statistical information provided to the Task Force by the Internal Revenue Service, May 2013 (on file with the Task Force).
[470] CPL § 20.40(4)(m).
[471] CPL § 20.60(1).
[472] *See* Matter of Taub v. Altman, 3 N.Y.3d 30, 33-35 (2004).

For counties outside New York City, "particular effect" venue provides the answer to this question. Also known as "injured forum" or "protective" jurisdiction,[473] it permits a county to assert venue over a defendant whose "conduct had, or was likely to have, a particular effect upon such county or a political subdivision or part thereof, and was performed with intent that it would, or with knowledge that it was likely to, have such particular effect therein," even though none of the criminal conduct occurred in that county.[474] But for New York City, the rule is different: particular effect venue cannot be used for losses that injure the entire City, as opposed to any one county within New York City, unless a concrete and identifiable injury is suffered specifically by a particular county.[475]

The absence of explicit authorization to use particular effect jurisdiction to prosecute tax frauds that affect the entire City of New York has produced some nettlesome results. Take, for example, a Staten Island resident who operates two restaurants, one in Manhattan and one in Yonkers. While vacationing along the Jersey shore, the restaurateur electronically files two false quarterly sales tax returns, one for each restaurant. Under the law as currently written, Westchester County has particular effect venue, but *no* county in New York City has it, even though all five counties were harmed by the defendant's conduct.

To solve this problem, the Task Force suggests an amendment to CPL § 20.40(2)(c) that would enable any of the five counties of New York City to prosecute cases in which New York City is deprived of tax revenue, *e.g.*, withholding tax, sales tax, or personal income tax. The Task Force further proposes that venue be proper in Albany County if the harm involves a deprivation of a state tax. The proposal is to amend section 20.40(2)(c) as follows:

> Such conduct had, or was likely to have, a particular effect upon such county or a political subdivision or part thereof, <u>or on a city of which such county is a part, whether or not such conduct also had effects on other counties or on the State as a whole; provided that, (a) if such conduct had or was likely to have such particular effect upon the State as a whole, then there shall be proper jurisdiction in the county of Albany in addition to any counties particularly affected, and (b) such conduct</u> ~~and~~ was performed with intent that it would, or with knowledge that it was likely to, have such particular effect therein.

Tax fraud cases are increasingly complex, and may involve conduct in multiple counties and returns filed electronically from outside the state. By establishing venue over such

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[473] *See* People v. Fea, 47 N.Y.2d 70, 75-77 (1979).
[474] CPL § 20.40(2)(c).
[475] *Taub*, 3 N.Y.3d at 34-35. This principle also applies in other contexts. *See* People v. Zimmerman, 9 N.Y.3d 421, 429-430 (2007) (No "particular effect" jurisdiction in New York County even though defendant allegedly committed perjury in Ohio while being interviewed there in the course investigation conducted by New York County office of Attorney General's Antitrust Bureau).

cases, this proposal would prevent unnecessary litigation over venue and ensure that the state's new tax law is enforced to the fullest extent possible.

4. Defrauding the Government

Sophisticated criminals often combine traditional tax evasion with other offenses, such as premium insurance fraud. Expanding and strengthening the crime of Defrauding the Government would enable our state to expose the full spectrum of defendants' financial crimes against our government entities. The amended crime that we propose would enable wrongdoers to be charged with related acts that drain public funds in a single, clear count.

A long-term investigation into commercial check cashing establishments illustrates the problem. The investigation uncovered at least 300 businesses, mostly in the construction industry, that cashed hundreds of millions of dollars in checks and used a significant portion of that cash for payroll.[476] By concealing their true payroll, these businesses evaded withholding tax administered by the New York State Department of Taxation and Finance, dodged unemployment insurance tax administered by the New York State Department of Labor, and underpaid the insurance premium owed on the workers' compensation insurance policy, which is often obtained from the New York State Insurance Fund. On these facts, current law requires the prosecution to file many low-grade felony charges under the Workers' Compensation Law or misdemeanors under the Labor Law, as well as violations of the Tax Law, the Penal Law, or the New York City Administrative Code. Even the limited aggregation permitted by the Tax Law is not helpful because some of these taxes are not administered by the Tax Department and, accordingly, cannot be folded into one count of Criminal Tax Fraud.

Similarly, grand juries are not easily able to file a single, all-encompassing charge that reflects evasion of corporate taxes owed to New York State and New York City, or to the theft of collected sales tax. The existing crime of Scheme to Defraud,[477] which the Task Force proposes in Section IV(B) be strengthened in several ways, is commonly aimed at schemes to deprive others of money or property, rather than the expectation of revenue.

To solve these problems, the Task Force proposes amending the crime of Defrauding the Government.[478] In its current form, that crime applies only to public servants or party officers who steal property or services from government agencies. It is capped at a Class E felony, no matter the size and scope of the defendant's fraud.[479] It is, in

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[476] 2004 GRAND JURY REPORT, *supra* note 415, at 17-18. Dozens of similar prosecutions have been brought in recent years. *See, e.g.*, People v. Finkelberg, Ind. No. 01456/2003 (Sup. Ct. N.Y. Co. 2003); People v. Vayner, Ind. No. 01739/2003 (Sup. Ct. N.Y. Co. 2003); People v. Popilevsky, Ind. No. 01740/2003 (Sup. Ct. N.Y. Co. 2003); People v. Vilshteyn, Ind. No. 01901/2003 (Sup. Ct. N.Y. Co. 2003); People v. Chang, Ind. No. 06031/2009 (Sup. Ct. N.Y. Co. 2009); People v. Liang, Ind. No. 02363/2010 (Sup. Ct. N.Y. Co. 2010).
[477] PENAL LAW §§ 190.60, 190.65.
[478] PENAL LAW § 195.20.
[479] PENAL LAW § 195.20.

other words, a boutique statute aimed at a narrow slice of criminal conduct: government insiders stealing from government entities. Much like the other boutique statutes described above, Defrauding the Government is rarely used: between 2007 and 2011, it was charged only 41 times.[480]

The concept, however, is a good one. Fraud against the public fisc should be punished more severely: it victimizes all New Yorkers by taking money that otherwise could be used to fund education or rebuild our infrastructure. But that is true regardless of whether the perpetrator is a government insider or not, and it is true whether the object of the fraud is money already in public coffers, or revenue that is wrongfully withheld. The Task Force therefore recommends deleting the phrase "being a public servant or party officer" from the law. The Task Force also recommends that the new crime, as well as the existing sections of Defrauding the Government, be gradated, up to a Class B felony, based upon the amount of money wrongfully taken from the government.[481] This design is consistent with the Task Force's proposed amendments to Scheme to Defraud, as described in Section IV(B), above.

The basic crime, a Class E felony, would apply to systematic, ongoing courses of conduct aimed at defrauding governmental entities, with a value exceeding $1,000. The remaining thresholds would then be set at $10,000 for the Class D felony, $25,000 for the Class C felony, and $250,000 for the Class B felony. By setting the thresholds at these levels, which are lower for the Class B and C felonies than in the proposed gradation of Scheme to Defraud, the state would send a powerful message that thefts from the public fisc damage all of us.

Additionally, as explained above, the Task Force recommends expanding Defrauding the Government to cover fraud carried out by depriving the government of revenues. This change would permit a scheme to evade various types of taxes to be charged in a single count. By way of example, the fourth-degree crime would read as follows:

> A person is guilty of defrauding the government in the fourth degree when he or she:
>
> (a) engages in a scheme constituting a systematic ongoing course of conduct with intent to:
>
> ***
>
> (iii) defraud the state or a political subdivision of the state or a public authority, public benefit corporation, or municipal cor-

[480] New York State Division of Criminal Justice Services, SCI and Indictment Database (on file with the Task Force).

[481] A similar proposal, though not aimed specifically at revenue, is contained within Governor Cuomo's Public Trust Act. L.2013, Governor's Program Bill No. 3 at 10-29, *available at* www.governor.ny.gov/assets/documents/GPB3-PUBLIC-TRUST-ACT-BILL.pdf.

> poration of the state, or any instrumentality thereof, of one or more forms of revenue, and so evades payment of any tax, insurance premium, contribution, or fee, or any portion thereof, owed to the state or a political subdivision, public authority, public benefit corporation or municipal corporation of the state or any instrumentality thereof, and
>
> ***
>
> (b) the aggregate unpaid tax, premium, contribution, or fee owed exceeds ten thousand dollars.

The crime would be elevated by threshold amounts of unpaid taxes, premium, contributions or fees, set at the levels described above.

IX. Conclusion

Throughout this Report, the Task Force has tried to present an honest assessment of the state of New York's laws and procedures aimed at combating white-collar crime, with an eye toward recommending common-sense improvements. After careful deliberation, we have presented the consensus view of our members. We hope that the District Attorneys Association and the New York legal community find our suggestions helpful, and we look forward to being part of the continuing dialogue.

NEW YORK STATE WHITE COLLAR CRIME TASK FORCE
Members & Staff

Co-Chairs

Frank A. Sedita, III
District Attorney
Erie County

Daniel R. Alonso
Chief Assistant District Attorney
New York County District Attorney's Office

Members

David B. Anders
Wachtell, Lipton, Rosen & Katz

Catherine A. Christian
Assistant District Attorney
and Counsel to the Trial Division
Office of the Special Narcotics Prosecutor

Steven M. Cohen
Zuckerman Spaeder LLP

Thomas J. Curran
Peckar & Abramson, P.C.

Sandra Doorley
District Attorney
Monroe County

Christina B. Dugger
First Assistant U.S. Attorney
U.S. Attorney's Office
Eastern District of New York

William J. Fitzpatrick
District Attorney
Onondaga County

Daniel J. French
French-Alcott, PLLC

Barry Ginsberg
Chief Risk Officer
New York State Department of Taxation
(Chair, Tax and Money Laundering Committee)

Owen Heimer
Marsh & McLennan Companies, Inc.
(Chair, Fraud Committee)

Nancy Hoppock
NYU School of Law
Center for the Administration of Criminal Law
(Chair, Anti-Corruption Committee)

Mitra Hormozi
Zuckerman Spaeder LLP

Andrew C. Hruska
King & Spalding LLP

Lawrence Iason
Morvillo Abramowitz Grand Iason & Anello PC

Adam S. Kaufmann
Lewis Baach PLLC

Andrew Lankler
Lankler, Carragher & Horwitz LLP

NEW YORK STATE WHITE COLLAR CRIME TASK FORCE
Members & Staff

Maureen McCormack
Assistant District Attorney
Suffolk County District Attorney's Office

John W. Moscow
Baker & Hostetler LLP

James A. Murphy
District Attorney
Saratoga County
(Chair, Procedural Reform Committee)

Daniel C. Richman
Columbia Law School

Hon. Albert M. Rosenblatt
NYU School of Law

John M. Ryan
Chief Assistant District Attorney
Queens County District Attorney's Office

Karen Patton Seymour
Sullivan & Cromwell LLP

David M. Szuchman
Executive Assistant District Attorney
New York County District Attorney's Office
(Chair, Cybercrime and Identity Theft Committee)

Thomas D. Thacher, II
Thacher Associates LLC

NEW YORK STATE WHITE COLLAR CRIME TASK FORCE
Members & Staff

Staff

The following lawyers were formally appointed to the Task Force staff at the outset of the Task Force's formation:

Sally Pritchard, *Chief Counsel*

John Doscher, *Counsel*
(Chair, Elder Fraud Working Group)

Christina Skinner, *Counsel*

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Brian Allen
Robert J. DeMarco
Charlotte Fishman
Caitlin J. Halligan
Duncan P. Levin
Elizabeth Loewy
Gilda I. Mariani
Mark Monaghan
Gregory C. Pavlides
J. Christopher Prather
Gabriel M. Nugent
Diane Peress
Edward D. Saslaw
Michael Sachs
Alexander Su
Ann C. Sullivan
Albert J. Teichman
Marshall D. Trager

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Lois Raff
Anthony Girese
Morrie Kleinbart

The Task Force gratefully acknowledges the assistance of John Hughes, a student at Columbia Law School.

NEW YORK STATE WHITE COLLAR CRIME TASK FORCE
Members & Staff

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DISTRICT ATTORNEYS ASSOCIATION
STATE OF NEW YORK