New York White Collar Crime Policy in 2013: Too Late to Enter the 21st Century?

Cyrus R. Vance, Jr.
District Attorney, New York County
May 20, 2013

Thanks to John Savarese for that generous introduction and thank you to the White Collar Crime Committee for inviting me to speak here today.

After nearly three and a half years as District Attorney, I have had the opportunity to work on every variety of issue in the criminal justice system, from reduction of violent crime, to intelligence-based prosecution, to sentencing and discovery reform.

But it won't surprise you to know that I have spent a great deal of my time ensuring that the Manhattan DA's Office's continues its leadership role in the battle against white collar crime.

Our state, after all, has a long and distinguished history of investigating and prosecuting fraud and corruption. More than a decade before the enactment of the Securities and Exchange Act of 1934, for example, New York passed the Martin Act to attack securities fraud schemes. In the 1930s, Manhattan District Attorney Thomas E. Dewey both prosecuted New York Stock Exchange President Richard Whitney for what was then a massive embezzlement, and conducted the bribery investigation that ultimately led to the federal indictment and incarceration of the Chief Judge of the U.S. Court of Appeals for the Second Circuit. More recently, former District Attorney Robert M. Morgenthau was famous for his enthusiastic attacks on fraud of all kinds, at places like BCCI and Tyco, to name just a couple.

We continue to devote enormous time and attention to white-collar cases. And I believe we do it well. But although we have the expertise, desire, and independence to investigate and prosecute white collar crime, we are, to put it bluntly, fighting with 1970s era tools.

While technologically, commercially, and even in government, the world around us has adjusted to change and modernized, in the area of white-collar enforcement in the State of New York, we are still using the laws recommended by the Bartlett Commission in 1965, with a few updates that were made in the 1970s and 1980s. With the exception of the 2008 changes in our criminal tax laws, the last major modernization occurred in 1986, more than a quarter century ago.

Contrast this with what policymakers in the federal government have done. In the late 1980s, for example, defense procurement fraud scandals led to enhancements in the United States Sentencing Guidelines. A year or two later, the savings and loan scandal led the Sentencing Commission to add enhancements for frauds that "substantially jeopardized the soundness" of financial institutions.

In the late 1990s, the Guidelines were lambasted as too lenient on more serious frauds, and perhaps too harsh for less serious ones. The Commission embarked on a five-year study, and in 2001, the government modified the guidelines to increase sentences for financial crimes at the high end, and decrease them for cases at the low end.

These amendments came just before major financial scandals broke, including at Enron, Tyco, and WorldCom. Again, Congress responded by enacting the Sarbanes-Oxley Act, which in addition to establishing standards for public company boards and public accounting firms, also made a significant contribution to criminal law. From creating the new crime of securities fraud, to streamlining obstruction of justice laws, to increasing penalties for mail and wire fraud, Congress responded relatively quickly and effectively to these financial scandals.

And it did so again a few years ago with the Dodd-Frank Act, which led the Sentencing Commission once again to amend the guidelines to account for nuances in various types of fraud cases, including, notably, insider trading.

Now, I'm not suggesting that Congress's actions are always what we need. Congress is perfectly capable of going too far. As many people in this room know well, the Sarbanes-Oxley Act also contained a series of directives to the Sentencing Commission to make fraud in the area of public company accounting more serious. The unfortunate result was that for most major accounting frauds involving such companies, officers or directors found guilty of intentionally cooking the books, or just helping in the kitchen, were looking at the portion of the sentencing table that said "life."

But one thing that's clear is that history shows that the federal approach to white collar crime is continually evolving and constantly attuned to the state of the business world.

So what about New York State, the financial capital of the country, if not the world? Essentially, silence. Yes, from time to time someone does something, but it always leaves us wanting.

In 1976, we enacted the crime of Scheme to Defraud, said to have been patterned after federal mail and wire fraud. It was a misdemeanor.

In 1986, we made Scheme to Defraud a felony if a few more hoops are jumped through. But it's the same, lowest-class felony whether the criminal causes loss in the amount of $2,000 or $2 billion.

In 1986, we entered the electronic age and added some computer crimes to the mix, but have pretty much left them where they were more than a quarter century ago. That's when the IBM PC was the hot item of the day, and the World Wide Web was still seven years away.

Recently, recognizing the need for modernization, some of us in the District Attorneys Association of the State of New York thought that it was important to convene a Task Force of thoughtful lawyers to study the issue from top to bottom, not thinking politics but thinking substance, to come up with a set of recommendations that could be considered by the Legislature in its 2014 session next January. In October of last year, in my capacity as president of the DA's Association, I formally appointed the members of the New York State White Collar Crime Task Force.

The Task Force is unique, in that for the first time in the history of the DA's Association, it has formed a consultative body that is not made up exclusively of District Attorneys or Assistant District Attorneys. To the contrary, I broadened the membership to make sure that it reflected the views of lawyers outside law enforcement.

To that end, only about half of our members are currently state prosecutors. The other half are lawyers in private practice, including some in this room, academics, one current federal prosecutor, and a retired Judge of the New York Court of Appeals, Al Rosenblatt. The Task Force is co-chaired by Erie County DA Frank Sedita and my Chief Assistant, Dan Alonso. It includes three other elected District Attorneys – Bill Fitzpatrick of Onondaga County, Sandra Doorley of Monroe County, and Jim Murphy of Saratoga County – and a number of ADAs from around the state.

This morning, I'd like to discuss with you some of the proposals that we anticipate making this coming July that we believe will bring our white collar laws criminal laws up-to-date. Our goal will be to give prosecutors tools to fight the broad range of white collar crime we see in every county of the state, not just what we see in Manhattan.

As you know, and for better or worse, when the public considers white-collar crime enforcement, it understandably thinks of Wall Street because that's what the media covers extensively. The press loves a good story of a fallen giant, whether that's a hedge fund trader convicted of insider trading, a public-company CEO convicted of falsifying the financial statements of his company in order to prop up its stock, or a pharmaceutical executive convicted of health care fraud.

And make no mistake, these are important cases. My office is proud of its significant financial fraud matters, which include in the last couple of years the indictment of a federally-chartered bank for systematically committing mortgage fraud against Fannie Mae and the conviction of the CEO of a public company in Ohio for looting $100 million, to name a couple.

Or many of you may be familiar with some of the cases colloquially referred to as "stripping" cases. In these cases, European banks stripped references to Iran, Syria and other sanctioned countries from electronic banking messages so that U.S. banks' filters would not be tripped. Lloyds Bank, Credit Suisse, Barclay's, ING, HSBC and Standard Chartered banks entered into deferred prosecution agreements, based on investigations we conducted jointly with our federal partners, in amounts totaling more than $2 billion, with half of the monies returned to the city and state of New York.

But attention to those cases, and the high-profile cases brought by our federal colleagues, should not obscure the myriad white-collar crimes prosecuted every day, from Brooklyn to Buffalo, that don't attract the attention of the international financial press but are equally important to the People of the State of New York, who are either victims or potential victims of these scams.

I'm talking about retail mortgage fraud in Suffolk County, where brokers conspire to falsify paperwork with borrowers, thereby defrauding lenders – and by extension putting taxpayers

on the hook. And I'm talking about the dozen or so lawyers that my office has charged in separate cases in the last 18 months for theft of client funds and related crimes.

I'm also talking about the aging population of Erie County, and the problems with fraud against the elderly by caretakers, relatives, or unscrupulous marketers.

Or what about the immigrants of northern Manhattan or Chinatown, desperate to get their papers, and preyed upon by those falsely claiming quick fixes, or special access?

And I haven't even mentioned identity theft, theft from small businesses and non-profit organizations, and construction fraud. These are the crimes that our state prosecutors deal with every day. They are not always the stuff of public imagination, but these are the economic crimes that affect New Yorkers. Ensuring we are protecting our residents from victimization by them is crucially important to our economy and to all of us.

So when we started the Task Force, we pledged not to focus only on what kinds of cases that might capture the headlines, but rather what the actual wisdom of those who have dedicated their careers to this work – public and private lawyers – tells us is important to protect New Yorkers.

When the Task Force began its work, the group decided on a few ground rules. For one, it is not a political project; any ideas the Task Force is considering are being judged on their own merits, and not based on how likely or unlikely they are to garner support in the Legislature. We will make our recommendations first; the politics will come later.

Also, the Task Force opted not to examine white-collar sentencing in New York, preferring to leave that to the existing New York State Sentencing Commission, appointed by Chief Judge Lippman in 2010, and which I Co-Chair with Judge Barry Kamins. That is not to say that sentencing is not an important backdrop; it's crucial. For example, proposals for new or differently-ordered crimes will necessarily involve an incidental discussion of sentencing implications.

So the Task Force has decided to focus on five, critical areas, each with a subcommittee examining it. Those areas are Fraud, Cybercrime and Identity Theft, Tax and Money Laundering, Procedure, and Corruption. The Fraud subcommittee, additionally, has an Elder Fraud Working Group. Let me give you an overview and some examples from these areas.

The Fraud and Cybercrime portion of this project is by far the most wide-ranging.

To understand the issues, one needs to look at how state fraud enforcement is handled today. The basic crime is larceny, committed by false pretenses, false promise, or by trick. Larceny can be punished as high as a class B felony, with a maximum penalty for stealing over a million dollars of 8 1/3 to 25 years, but its elements are exacting and defined so arbitrarily that many big time frauds don't qualify.

For first degree larceny, the entire million must actually be obtained, from one victim, who must have relied on a particular false representation in parting with the money. Intended loss

is insufficient, and if the lie is found to be a false promise rather than a false representation, a unique burden of proof is imposed on the prosecution: proof to a moral certainty.

Because of this exacting regime, New York's Scheme to Defraud law was enacted in 1976 and amended in 1986, to get at ongoing schemes to defraud others. Although it eliminates some of the larceny problems – for example, it allows aggregation of loss amounts across victims – it is much more restrictive than the federal fraud laws on which it is purportedly patterned. As I said, and most significantly, it is at most a class E felony, no matter how much money over $1,000 is obtained due to fraud, with penalties that are unconscionably low for frauds of any significance.

And, for reasons explainable only as political compromise, a scheme to defraud only one victim, no matter how much money is involved, is not captured.

The Task Force aims to fix this, by allowing for punishment of single-victim schemes, and by proposing gradations for Scheme to Defraud. It seems like a basic concept – which is, incidentally, a fundamental principle of the federal guidelines – that the law should contain property thresholds that punish the perpetrators of more serious schemes more seriously. It's time to do that here.

In reviewing our fraud laws, the Task Force is mindful of two trends that will inform its Legislative recommendations. The first is that although New York has not undertaken any systematic review of its anti-fraud laws until now, it has occasionally enacted what we have been calling "boutique" fraud laws aimed at specific subject areas. Typically, these laws slightly relax the larceny elements for crimes committed in certain contexts, but are so narrowly defined as to be essentially toothless.

For example, the crime of Residential Mortgage Fraud was enacted in 2008 during the financial crisis. It has been used, through 2011 (the last year data is available), a grand total of 35 times in only four counties, 26 of them in Suffolk County. Life Settlement Fraud, also enacted in 2008, has never been used. These are political winners, but they don't address the bigger substantive problem.

While there is nothing outwardly harmful about these laws, they lead us into a false complacency – "We've solved the problem, just look at this law." That masks an inability or an unwillingness to get back to first principles and fix the fraud law, which after all was a crime at common law and deserves our keen attention.

The other trend noted by the Fraud committee is that our current larceny law is nearly helpless in dealing with theft of intangible property, such as computer source code. Financial institutions spend vast amounts of money in the research and development of sophisticated software and other computer programs, which they use not only to secure an edge in the competitive marketplace, but also to run their businesses effectively. Savvy criminals have proven able to steal this type of valuable data through computer intrusions such as hacking, viruses, and phishing schemes. Disgruntled employees have also stolen it the old-fashioned way, through outright theft.

Although the "theft" of such property involves making an unauthorized copy, New York's larceny statutes require that a victim be "deprived" of the actual property – a physical impossibility when the property is computer code. As a result, thefts of valuable computer data cannot be punished as larcenies, relegating courts and prosecutors to laws relating to computer tampering or unauthorized copying of data. The penalties for violating such laws, some of which are misdemeanors, have far less deterrent value. The Task Force is eagerly tackling this issue and poised to recommend the elimination of these archaic distinctions that ignore the realities of valuable, intangible property in the 21st century.

We will also be making recommendations in criminal procedure that affect white-collar crime enforcement. In modern white-collar crime, New York's bedrock guarantee of an indictment by a Grand Jury absent hearsay evidence comes at great cost to New York taxpayers, particularly in white-collar prosecutions, which often require the introduction of voluminous business records. Currently, limited business records from financial institutions, telephone companies, and internet service providers are admissible to a Grand Jury pursuant to a business records affidavit from a records custodian.

All other business records, whether from a social media company like Facebook or Twitter, an email provider like Yahoo! or Google, or a non-financial institution, require a live witness to authenticate them.

The problem is magnified as crime has gone global, because the required records are frequently kept outside the county where the Grand Jury is located, often in California or even abroad. Although New York's prosecutors strongly believe in the indictment requirement, we believe that the requirement to present a foundation witness at the Grand Jury stage for these records is antiquated. In fact, Assistants throughout the state are forced to spend many hours on the phone with representatives of these companies trying to assure them that yes, it can possibly be true that New York law requires them to fly across the country to tell 23 people that these emails really came from Yahoo's servers.

This is not just legal common sense; it is also a crucial fiscal issue. Eliminating the live witness requirement would save millions of dollars each year throughout the state, and would allow many of New York's 62 counties, whose budgets currently restrict them from transporting out-of-state witnesses, to prosecute fraud cases. In other words, current law makes it impossible for a fraud victim in many counties to get justice when the evidence comes from an ISP located out of state.

I think this is unacceptable, and makes New York an outlier rather than a leader. The Task Force will recommend that broader categories of records be exempted from authentication by a live witness, and it will seek to remedy other inefficiencies in New York law, to save taxpayers money and ensure that 21st century crime does not escape punishment because of 1960s procedures.

Although we are also doing great work examining money laundering, tax, and cybercrime, I'd like to spend the few minutes I have left saying a brief word about public corruption, which has been the topic of much discussion lately all around our state. As a law enforcement official, I have nothing but admiration for the U.S. Attorney's Offices and the F.B.I., who have been remarkably successful in this task.

In this area, the Task Force's work is particularly important, because again, there has been a failure over many years to update our state laws that relate to corruption. I, for one, have been calling for various measures since I took office in 2010. Simply put, we need better laws if we want state prosecutors to root out corrupt officials.

Of course, such criminals do occasionally wind up in state court. Attorneys General Schneiderman and Cuomo, in the recent past, successfully prosecuted Senator Shirley Huntley and Comptroller Alan Hevesi. DA Charles J. Hynes of Brooklyn famously sent two crooked Supreme Court Justices to state prison, and did the same to Assembly member Clarence Norman, his Democratic county leader. And my own office, the Manhattan DA's office, in the last decade obtained the incarceration of Assembly member Gloria Davis and Senator Guy Velella.

But these successes, a fraction of those of our federal counterparts, came about in spite of the state system, not because of it. In Albany, there sometimes seems to be a palpable distrust of prosecutors, and one often hears that our suggested reforms are unnecessary.

After all, we are told, one cannot predict the results of putting these tools in state prosecutors' hands – it might lead to investigatory witch hunts that could hurt honest public officials. In any event, the discussion goes, why do we need to do anything at all, when federal authorities have been doing a fine job catching the true crooks?

The short answer to these questions is that reliance on the federal government to safeguard government integrity, although it may be working in the sense that criminals are being exposed, is risky public policy and is inherently in tension with a federal system of sovereign states. To be sure, in terms of corruption enforcement, the U.S. Attorneys and the Attorney General, to say nothing of the FBI, are genuinely interested in rooting out this New York problem. But there is nothing in federal law or politics that decrees that that should always be so. Why, in a government that gives states primacy in police power, would New York cede this area whole-hog to a federal government of limited powers, which might not always be so interested in the problem, or be balanced in its enforcement?

Should New York have better anti-corruption laws? You bet, and to that end I recently stood with Governor Cuomo on behalf of the DA's Association to endorse his proposals. In addition, the Task Force is also looking at various proposals. Let me suggest two of them.

Although New York's public bribery law by its terms is violated when a bribe is merely offered or solicited, it paradoxically also requires an illicit "agreement or understanding" between the bribe giver and the bribe receiver in order for the crime to be complete. This exacting element is not required under New York's other bribery laws, including labor bribery, sports bribery, and commercial bribery, and the laws of most other jurisdictions, which are subject to the less exacting requirement of an "intent to influence" the recipient of the bribe. As it stands, those who bribe public officials are less likely to be prosecuted than those who bribe boxers. The Task Force will recommend that this law be changed to eliminate this loophole, which would make it far more effective.

The second corruption proposal I want to highlight, which was suggested to the Task Force by State Comptroller Tom DiNapoli, would enhance penalties for abuse of the public trust. So, although bribery and other forms of corruption and official misconduct are already crimes, there is currently no additional penalty for an official's abuse of his position to commit other, non-corruption, crimes.

Today, for example, if a Commissioner uses his status to facilitate getting away with a private fraud, say, a class C felony, that defendant would now be punished for a class B felony and be subject to more serious punishment. This would apply only to public servants who commit non-corruption offenses that are significantly facilitated by their position. The enhancement would work much in the way that hate crimes or crimes of terrorism are currently enhanced under our penal law. Abuses of trust should be treated in the same way.

There is obviously no quick fix for the problem of corruption in New York State, and I predict that it will take years to get us to where we want to be in this area. But these and the other proposals, procedural and substantive, that the Task Force intends to roll out, are an excellent beginning.

Our work with the Task Force is not yet done, and I urge anyone with thoughts or suggestions about our work to give us a call. My door is always open to the white-collar defense bar, and I look forward to many discussions going forward. Thank you for having me.