WHITE COLLAR CRIME

Robert J. Anello & Miriam L. Glaser***

INTRODUCTION

A mention of New York City, the seat of the Second Circuit, invariably evokes thoughts of finance. The home of Wall Street and the World Trade Center, Manhattan is also home to many of the country's major banks, hedge funds, and stock exchanges; the Securities & Exchange Commission has a branch office in New York, as do the Federal Reserve Bank, the Commodity Futures Trading Commission, and the Antitrust Division of the Department of Justice. Even the Court of International Trade is located in Manhattan. Unsurprisingly then, New York City has also played host to some of the most important white collar criminal prosecutions in the nation. As the federal appellate court with jurisdiction over this financial center, the Second Circuit has ruled on many critical issues related to white collar crime. Distinctive in its understanding of business practice, its readiness to identify and oppose legislative encroachment into the realm of the judiciary, and in the high value it places upon legal history and stare decisis, the Second Circuit's sophisticated jurisprudence has influenced courts nationwide.

This Article will address six different areas of white collar law and procedure: (1) fraud, (2) the Racketeer Influenced & Corrupt Organizations Act (RICO), (3) conspiracy, (4) public corruption, (5) white collar practice, and (6) sentencing. Many of the cases profiled in this Article have driven legal and cultural developments far beyond the federal courts, including the cases of Leona Helmsley, one of New York's most prominent real estate moguls; the "Mafia Commission," a take-down of the bosses of the Five Families of La Cosa Nostra; and Abscam, a massive sting operation created by the federal government to expose corrupt officials. Of course, the cases

* Robert J. Anello is a principal of Morvillo Abramowitz Grand Iason & Anello P.C. He is President Emeritus of the Federal Bar Council and a Fellow of the American College of Trial Lawyers, the American Bar Foundation, and the New York State Bar Foundation. He has litigated in the federal and state courts for more than thirty years, focusing his practice primarily on white collar criminal defense, regulatory enforcement matters, complex civil litigation, internal investigations and reviews, representation of professionals before ethics and licensing boards, and appeals.

** Miriam L. Glaser is an associate at Morvillo Abramowitz Grand Iason & Anello P.C. She has served as law clerk to the Honorable John Gleeson, formerly of the United States District Court for the Eastern District of New York, and to the Honorable José A. Cabranes of the United States Court of Appeals for the Second Circuit. She has litigated in federal courts including the Southern and Eastern Districts of New York, the Second Circuit, and the Securities and Exchange Commission. She focuses her practice on white collar criminal defense, regulatory enforcement matters, complex civil litigation, and appeals.

and doctrines discussed can only scratch the surface of the vast wealth of jurisprudence and leadership that the Second Circuit has provided in the arena of white collar crime. Even more fascinating material therefore awaits the interested and industrious reader in his or her own research.

I. FRAUD

Any survey of white collar criminal jurisprudence must start with the jurisprudence and statutory evolution of fraud. Although today fraud is viewed as part of the heartland of white collar crime, until relatively recently fraud was rarely deemed a crime at all. Although a federal criminal fraud statute had existed in some form since this nation's founding, it was rarely used. Its use was particularly uncommon against "private fraud"—fraud between two private parties—rather than fraud against the public at large.[1] Such fraud generally was seen, at worst, as the basis for a civil suit by the defrauded party.

In the early twentieth century, amid a general expansion of federal criminal law, prosecutors realized the powerful nature of criminal fraud. Accordingly, the Second Circuit, as the appellate court at America's financial heart, began to more frequently encounter and rule on the meaning and reach of the federal fraud statutes. As the courts' and the government's understanding of criminal fraud evolved, the Second Circuit reviewed many of the most significant fraud prosecutions. Today, the Second Circuit is perceived as one of the nation's leaders in its jurisprudential and statutory development of the crime of fraud.

A. The Development of Fraud Doctrines

Ninety years ago, in *Bentel v. United States*,[2] the Second Circuit reviewed an early modern-era criminal securities fraud conviction in which the defendant was convicted of defrauding others into purchasing shares in a nonexistent company. The court observed that a "stock swindle" was what would have been considered at common law to be a private fraud and engaged in an extensive historical analysis of the evolution of fraud enforcement from a theory of "caveat emptor," in which the victim of fraud generally was considered to be at fault and could recover at most money damages, to a crime that risked criminal punishment.[3] The court recited certain elements of civil private fraud—including the statement of a falsehood with a guilty knowledge (known as "scienter") of its falsity—and held that those elements apply with equal force when "a civil responsibility becomes by statute a criminal offense."[4]

Today, criminal fraud jurisprudence has grown sophisticated and multifaceted. Broadly worded statutes render individuals and corporations subject to federal criminal liability for nearly any type of fraud, so long as

1. *See* Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 736–37 (1999).
2. 13 F.2d 327 (2d Cir. 1926).
3. *See id.* at 329.
4. *Id.*

some instrumentality of interstate commerce is employed in the course of the crime. Such fraud need not be overtly "public"—even those cases that do not involve fraud on the public at large are considered serious enough to merit federal enforcement. There also have been a variety of developments in enforcement: several highly specialized criminal fraud statutes now exist, specifically targeting conduct affecting financial institutions,[5] the government,[6] the securities industry,[7] and more. Other fraud statutes, including the general mail and wire fraud statutes, which are the focus of this subchapter, broadly penalize schemes "to defraud" or to "obtain[] money or property by means of false or fraudulent pretenses, representations, or promises."[8]

With the growth of fraud enforcement, one of the most critical recurring issues has been the nature of "property." The Second Circuit has analyzed extensively whether particular types of property or other rights, whether tangible or intangible, can be the subject of criminal fraud charges. In *United States v. Schwartz*,[9] the defendant and others were prosecuted for an elaborate scheme to sell American arms and munitions to individuals in countries such as Poland, Argentina, Iraq, Mexico, and the Soviet Union. Among other charges, prosecutors alleged that the defendant had violated the wire fraud statute by fraudulently obtaining an export license.[10]

On appeal, the Second Circuit was presented with the question of whether an export license issued by the federal government can constitute "property" in the hands of the government, as that term was construed by the Supreme Court in *McNally v. United States*.[11] The Second Circuit joined several other courts of appeals in determining that an unissued license, such as the one at issue in *Schwartz*, was not property within the meaning of the federal fraud statutes, and therefore the obtaining of such a license by fraud does not rise to the level of mail or wire fraud.[12] The court accordingly overturned the conviction under the wire fraud statute.[13]

That same year, the Second Circuit decided *United States v. Helmsley*,[14] which upheld the conviction of prominent New York City landowner Leona Helmsley on charges of mail fraud arising out of a tax evasion scheme. Both loved and reviled by the media that dubbed her "Queen of Mean," Helmsley had once famously declared to a housemaid that "only the little

5. *See, e.g.*, 18 U.S.C. § 1344 (2012).

6. *See, e.g.*, *id.* § 371 (conspiracy to defraud the government); *id.* § 1347 (health care fraud).

7. *Id.* § 1348. These types of fraud are discussed in Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225 (2016).

8. 18 U.S.C. §§ 1341, 1343.

9. 924 F.2d 410 (2d Cir. 1991).

10. *See id.* at 413.

11. 483 U.S. 350, 350 (1987).

12. *See Schwartz*, 924 F.2d at 416–18.

13. The Second Circuit's view of the law was borne out nine years later by the Supreme Court's ruling in *Cleveland v. United States*, 531 U.S. 12 (2000), which held that an unissued license did not qualify as property within the meaning of the mail fraud statute.

14. 941 F.2d 71 (2d Cir. 1991).

people pay taxes."[15] Upon her conviction for defrauding the State of New York out of $1.7 million in taxes, Helmsley argued to the court that her conviction should be overturned because the government had not proved that she, in fact, owed any money to the state.[16] Observing that the mail fraud statute "punishes the *scheme*, not its success,"[17] the court rejected Helmsley's argument and held that a scheme to deprive the state of income taxes was cognizable under the mail fraud statute, even if the state was not, in fact, deprived of property because no taxes were actually owed.[18]

More recently, the Second Circuit addressed a similar issue in *Fountain v. United States*.[19] Fountain, a retired Northern New York-area police officer turned illegal cigarette importer, was arrested for evading both United States and Canadian taxes and charged with conspiracy to launder the proceeds of a wire fraud scheme.[20] Specifically, the government argued that the taxes he failed to pay on the cigarettes constituted property owed to the government and that Fountain had illegally deprived the government of that property.[21]

On appeal, Fountain argued that the Supreme Court in *Cleveland v. United States*[22] had determined that an unissued license did not constitute property subject to the federal fraud statutes and that unpaid taxes should be treated in a similar manner.[23] In addressing Fountain's argument, the court reviewed extensively its own body of case law, as well as that of other courts of appeals, with regard to tangible and intangible property.[24] Citing, among other cases, the *Helmsley* opinion, the court held that, although taxes owed to the government are "intangible" and have not yet been collected, they are nevertheless "property" for the purpose of the mail and wire fraud statutes.[25] The court thereby affirmed the ongoing viability of the mail and wire fraud statutes as tools by which the government may prosecute tax crimes.

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15. Sewell Chan, *Remembering Leona Helmsley*, N.Y. TIMES: CITY ROOM (Aug. 20, 2007, 4:25 PM), http://cityroom.blogs.nytimes.com/2007/08/20/leona-helmsley-is-dead-at-87/?_r=0 [https://perma.cc/U2HB-S9CS].

16. The government's proof had focused on Helmsley's tax debt to the federal government, but the government relied on Helmsley's New York State tax returns as proof that her tax evasion had also been directed at the state. *See Helmsley*, 941 F.2d at 93.

17. *Id.* at 94 (emphasis added).

18. *See id.* at 94–95.

19. 357 F.3d 250 (2d Cir. 2004).

20. *See id.* at 252–54.

21. *See id.* at 252.

22. 531 U.S. 12 (2000).

23. *Fountain*, 357 F.3d at 255.

24. The posture of the *Fountain* case on appeal was unusual: because Fountain had pleaded guilty, he had not appealed his conviction but brought this case as a petition for habeas corpus arising out of an intervening change in the law. *See id.* at 252–54. The Second Circuit therefore evaluated his claim under the rarely used actual innocence standard. *See id.* at 254–55.

25. *Id.* at 257–60.

B. Honest Services Fraud

As the scope of fraud liability has expanded in the modern era, the mail and wire fraud statutes have become a key tool for the government. Violations of those statutes are charged in a significant number of white collar prosecutions, often serving as a "catch-all" charge where no other federal statute seems to fit, or as a back-up charge to ensure that the defendant is convicted of at least some form of criminal offense.

Courts have interpreted the mail and wire fraud statutes[26] to penalize frauds that deprived the government, a company, or even the electorate (in the case of a public official) of "intangible" property: specifically, a right or entitlement. Although, as discussed above, the entire concept of "intangible" property has been subject to heavy scrutiny by the courts, perhaps the most hotly contested form of intangible property is the right to the "honest services," or loyalty, of an employee or public official.[27] The issue of whether the deprivation of such "honest services" can constitute mail or wire fraud has been the subject of appellate court rulings, Supreme Court decisions, and congressional action.

The most prominent, and arguably the most influential, action by the federal courts on the issue of honest services was the case of *McNally v. United States*.[28] In *McNally*, the Supreme Court addressed decades of jurisprudence and "judge-made law"[29] when it decided whether the mail and wire fraud statutes penalized "schemes to defraud citizens of their intangible rights to honest and impartial government."[30] In a major reversal against the government, the Court held that the "intangible right" to honest services was too "ambiguous" to give rise to criminal fraud liability.[31]

McNally, however, was not the last word on the subject. Just months before the Supreme Court issued its *McNally* decision, the Second Circuit decided *United States v. Carpenter*,[32] which addressed the conviction of *Wall Street Journal* reporter R. Foster Winans for leaking the contents of his upcoming "Heard on the Street" rumors columns.[33] Winans's conviction for insider trading and mail and wire fraud sent tremors throughout Wall Street, as it demonstrated that the spread of mere rumors could give rise to criminal liability. In addition to its immediate effect on Wall Street, however, *Carpenter* had a longer-term effect on the

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26. *See* 18 U.S.C. §§ 1341, 1343 (2012).

27. *See, e.g.*, United States v. Brasco, 516 F.2d 816 (2d Cir. 1975) (per curiam); United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975).

28. 483 U.S. 350 (1987).

29. As the Second Circuit explained in *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), "[t]he doctrine of 'honest services' was originally judge-made law." *Id.* at 101.

30. *McNally*, 483 U.S. at 355.

31. *Id.* at 360.

32. 791 F.2d 1024 (2d Cir. 1986).

33. In *Carpenter*, the Second Circuit upheld a mail and wire fraud conviction premised upon a Wall Street Journal columnist's misappropriation of intangible "property" consisting of "material nonpublic information in the form of the [*Wall Street Journal*'s] forthcoming publication schedule." *Id.* at 1026. The substantive issues addressed in the *Carpenter* decision are discussed in Seymour, *supra* note 7, at 249.

development of "intangible rights" jurisprudence: granting certiorari from the Second Circuit's opinion, the Supreme Court used *Carpenter* to clarify that, although the intangible right of *honest services* was too ambiguous to give rise to fraud liability, "*McNally* did not limit the scope of [mail fraud] to tangible as distinguished from intangible property rights," as a more general matter.[34] Therefore, the *Wall Street Journal*'s intangible right to privacy in its own confidential information was still the type of intangible property that could support a conviction for mail or wire fraud.[35]

A year after the Supreme Court's decisions in *McNally* and *Carpenter*, Congress responded by codifying the honest services doctrine in a separate provision of the United States Code. In 18 U.S.C. § 1346, Congress declared that "[f]or the purposes of [mail and wire fraud], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[36] Congress did not define the term "honest services," however, which left the responsibility to the courts to clarify the statute's scope.[37]

Nearly fifteen years after Congress enacted § 1346, the Second Circuit was asked again to determine the scope of criminal liability under a theory of honest services fraud. The court addressed the issue in *United States v. Handakas*,[38] a case involving the conviction of a contractor who, in the course of providing services to the New York School Construction Authority (SCA), underpaid his employees and embezzled the extra money for himself.[39] Handakas was convicted of mail fraud for his failure to render honest services to the SCA, because his conduct deprived the SCA of the "right to determine how its contracts would be fulfilled."[40]

On appeal, the Second Circuit extensively surveyed the state of the law with regard to honest services fraud,[41] and considered whether the statute provided sufficient notice to Handakas that his conduct was prohibited.[42] The court determined that the statute had not done so and that § 1346 was void for vagueness as applied to the facts of the case.[43] By reversing Handakas's conviction for mail fraud,[44] the divided panel of the Second Circuit continued the long-running feud between the federal courts and

34. Carpenter v. United States, 484 U.S. 19, 25 (1987).
35. *Id.*
36. 18 U.S.C. § 1346 (2012).
37. *See* United States v. Milovanovic, 678 F.3d 713, 720–21 (9th Cir. 2012) (noting that the scope of § 1346 remained uncertain, leading to questions as to whether the statute was unconstitutionally vague and citing the Second Circuit's answer to that question in *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003) (en banc)).
38. 286 F.3d 92 (2d Cir. 2002).
39. *See id.* at 96–97.
40. *Id.* at 100.
41. *Id.* at 103.
42. *See id.* at 101.
43. The court indicated that, had it been writing on a clean slate, it would have wholly overturned § 1346 as void for vagueness; however, because the statute had been upheld in an earlier opinion of the Second Circuit, *United States v. Sancho*, 157 F.3d 918, 921 (2d Cir. 1998) (per curiam), the court was constrained to invalidate the statute solely on the facts presented by Handakas's case. *See Handakas*, 286 F.3d at 105–06.
44. *Handakas*, 286 F.3d at 112.

Congress, and raised fresh doubts about the viability of the honest services fraud theory.

Just one year later, however, *Handakas* was overruled by the Second Circuit sitting en banc in *United States v. Rybicki*.[45] In *Rybicki*, personal injury attorneys Thomas Rybicki and Fredric Grae conspired to bribe insurance claim adjusters for favorable outcomes for their clients.[46] Not only did the adjusters accept the payments in defiance of their employers' prohibition against such payments, but the adjusters also (unsurprisingly) failed to notify their employers that they had been offered bribes.[47] Rybicki and Grae were thereafter convicted of defrauding client insurance companies out of, among other things, the honest services of their claims adjusters.[48]

On appeal, Rybicki and Grae argued to the Second Circuit that the honest services fraud statute, § 1346, was void for vagueness and thereby unconstitutional.[49] After losing their appeal,[50] Rybicki and Grae requested and received a rehearing by the full Second Circuit, sitting en banc. The en banc court upheld the fraud convictions, holding that § 1346 was intended to be broad and its breadth did not render the statute void for vagueness.[51]

Other appellate courts disagreed with the Second Circuit's interpretation of § 1346,[52] which resulted in a circuit split that the Supreme Court resolved in its 2010 decision in *Skilling v. United States*.[53] *Skilling*, which limited the applicability of honest services fraud to instances of bribery and kickbacks,[54] has now settled the issue of the breadth of § 1346—at least temporarily. In truth, however, the tortured history of honest services fraud suggests that its story is by no means over. And, given that same history, it seems likely that a significant part of that next chapter will likewise be written by the Second Circuit.

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45. 354 F.3d 124 (2d Cir. 2003) (en banc).
46. *See id.* at 127.
47. *See id.*
48. *See id.* at 128.
49. United States v. Rybicki, 287 F.3d 257, 263 (2d Cir. 2002).
50. *See id.* at 266–67.
51. *Rybicki*, 354 F.3d at 144.
52. *See, e.g.*, United States v. McGeehan, 584 F.3d 560, 571 n.10 (3d Cir. 2009) (discussing and analyzing circuit split between the Second Circuit and, among others, the Sixth Circuit); United States v. Brown, 459 F.3d 509, 519–20 (5th Cir. 2006) (following *Rybicki*).
53. 561 U.S. 358 (2010). *Skilling* addressed the appeal of a twenty-five-year sentence imposed on a former Enron executive for his role in that company's collapse. *See id.* at 368–77. Skilling had been convicted of defrauding Enron out of his honest services as a result of his alleged financial mismanagement and insider trading. *See id.* at 375. The Supreme Court determined, among other things, that self-dealing by an executive did not deprive his company of his honest services in a manner cognizable by the mail and wire fraud statutes. *See id.* at 413.
54. *Id.* at 409.

II. RICO AND ORGANIZED CRIME

As the nation's capital of business and industry, as well as a significant maritime port of entry, New York historically has been the site of significant organized crime and racketeering activity. The Second Circuit has therefore earned a prominent place in the interpretation of the various federal statutes put in place to address such crimes. One such statute is RICO,[55] which sets forth harsh penalties for criminal actions committed using an enterprise.[56] RICO also functions to extend the statute of limitations on so-called "racketeering" crimes, allowing governmental action to sweep up criminal activity such as bribes, money laundering, and other conduct that occurred well outside of the otherwise-applicable statute of limitations, so long as a single act of racketeering occurred within the limitations period.[57] The culmination of President Nixon's major organized crime control initiative in the late 1960s, RICO originally was enacted with the intent to reach the organized crime that was so prevalent in major cities such as New York and Chicago.[58] However, the statute is such a powerful tool that it has been used (often quite controversially) to reach organized criminal activity—including gangs and corrupt unions—as well as business activities that some argue are far beyond the statute's purview.[59]

A. Mafia Prosecutions

The first major Mafia prosecution in New York, *United States v. Salerno*,[60] ("the *Mafia Commission* case") came before the Second Circuit at a time when organized crime was rampant in New York and mobsters went about their business with seeming impunity. The Mafia was romanticized by movies such as *The Godfather*,[61] and prosecutors seemed largely unable—or at times unwilling—to take on the difficult work of eradicating New York's organized crime families. The Mafia's impact was felt not only in the realm of illegal drug importation (particularly heroin and cocaine), but also in the realm of legitimate business, where La Cosa Nostra's loan sharking and protection rackets were ubiquitous.[62]

Salerno was the first of several blows that many hoped would begin the process of dismantling New York's Mafia. The case involved the successful prosecution of the bosses of all five of New York's La Cosa Nostra families on several charges, including extortion, cocaine

55. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (2012).

56. RICO defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity" through which a pattern of racketeering is conducted. *Id.* § 1961.

57. *See* G. Robert Blakey, *Time-Bars: RICO—Criminal and Civil—Federal and State*, 88 NOTRE DAME L. REV. 1581, 1643–50 (2013).

58. *See id.* at 1594–95.

59. *See infra* Part II.B.

60. 794 F.2d 64 (2d Cir. 1986).

61. THE GODFATHER (Paramount Pictures 1972).

62. *See* Blakey, *supra* note 57, at 1594–95.

importation, loan sharking, and murder,[63] and was described by then-U.S. Attorney Rudolph Giuliani as a building block in his effort to "wipe out the five families."[64] Evidence at the *Salerno* trial showed just how organized the Mafia could be: the "Mafia Commission," from which the case took its nickname, was the appellation given to a semi-official group of leaders from each of the Five Families of La Cosa Nostra—leaders who were the defendants in the *Mafia Commission* case—which some likened to a "board of directors" or a "ruling council" for the mob.[65]

Appeals from the convictions in *Salerno* presented several knotty issues to the Second Circuit, including arguments that the convictions suffered from various infirmities such as a lack of evidence and that they were barred by the statute of limitations. The case also generated an appeal to the Supreme Court on the issue of Salerno's pretrial detention.[66]

Perhaps the most prominent RICO decision in white collar jurisprudence was the Second Circuit's en banc opinion in the related case of *United States v. Indelicato*,[67] which addressed the definition of the key RICO term "pattern of racketeering activity."[68] Indelicato, a "soldier"[69] in the Bonanno family, argued that his murder of several members of rival families in a single "hit" could not be considered a "pattern of racketeering activity," as the murders were all part of one "criminal transaction."[70] Sitting en banc, the court reviewed extensively its own and other courts of appeals' jurisprudence on the definition of the term "pattern," observing that the decision in *United States v. Ianniello*,[71] which held that two *unrelated* criminal acts could form a "pattern," was an outlier among the courts of appeals.[72] The court accordingly overruled its prior *Ianniello* decision and held that two *related* criminal acts could together constitute a "pattern" within the meaning of the RICO statute.[73] However, its decision also further deepened a separate circuit split by holding that such offenses could still be deemed two distinct acts even if committed virtually simultaneously.[74] In so doing, the court promulgated what has become

63. *Salerno*, 794 F.2d at 66–67.

64. Richard Stengel, *The Passionate Prosecutor*, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,143096,00.html [https://perma.cc/6DRJ-UMDS].

65. *Id.*

66. *See* United States v. Salerno, 481 U.S. 739 (1987). Although the *Salerno* bail opinion is beyond the purview of this article, we note simply that the appeal was unsuccessful for Salerno.

67. 865 F.2d 1370 (2d Cir. 1989).

68. *Id.* at 1371.

69. A soldier is a lower-level member of a Mafia family.

70. *Indelicato*, 865 F.2d at 1372.

71. 808 F.2d 184 (2d Cir. 1986).

72. *See Indelicato*, 865 F.2d at 1382.

73. *See id.* at 1381–84. Five months after *Indelicato*, the Supreme Court agreed with the Second Circuit, and in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 235 (1989), it overruled the Eighth Circuit's interpretation of a RICO pattern to require proof of multiple schemes.

74. *See Indelicato*, 865 F.2d at 1383.

known as the "relatedness and continuity" test for distinguishing RICO crimes, which has been adopted by several other courts of appeals.[75]

After years of appeals such as the ones described above, the *Mafia Commission* convictions were in large part upheld, and the Mafia Commission itself effectively decapitated.[76] These convictions, and the Second Circuit's affirmance thereof, constituted the first significant blow to La Cosa Nostra in New York.

The *Mafia Commission* case was followed in short order by the arrest and trial of Filippo Casamento and several dozen other Mafia figures, which came to be known as the "*Pizza Connection*" case as a result of the mobsters' use of various New York City pizza parlors as a front for their illegal operations.[77] The defendants were accused of shipping over $1.5 billion in heroin to the United States from Mafia connections in Sicily.[78] After an extraordinary seventeen-month trial that saw several defendants testify in their own defense (with apparently deleterious effects[79]), cost the government millions of dollars to conduct, and remains the longest criminal trial ever conducted in the Southern District of New York,[80] the defendants were convicted of crimes, including murder, money laundering, and extortion.[81] The *Pizza Connection* case thereby served as the second significant blow to the New York Mafia in as many years.

The appeal from the *Pizza Connection* case came before the Second Circuit while some of the *Mafia Commission* appeals were still pending. Casamento and his codefendants asserted that errors regarding the introduction of evidence, pretrial publicity, and the nature of the RICO "enterprise" had infected their trial.[82] Perhaps most notably, several more minor defendants also argued that evidence of the conduct of other defendants had prejudiced their defenses and that their cases should have been severed from the defendants who played larger roles in the offenses.[83] The court analyzed the minor defendants' defense strategies and determined

75. *See e.g.*, United States v. Eufrasio, 935 F.2d 553, 565–66 (3d Cir. 1991) (following *Indelicato*); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991) (same); United States v. Anguilo, 897 F.2d 1169, 1180 (1st Cir. 1990) (citing to *Indelicato* for the proposition that "[i]t is the relationship between the acts and the affairs of the enterprise that renders [defendant's] conduct a pattern of racketeering activity under RICO").

76. United States v. Salerno, 868 F.2d 524, 543 (2d Cir. 1989) (affirming conviction); *see also* Arnold H. Lubasch, *U.S. Jury Convicts Eight as Members of Mob Commission*, N.Y. TIMES (Nov. 20, 1986), http://www.nytimes.com/1986/11/20/nyregion/us-jury-convicts-eight-as-members-of-mob-commission.html?pagewanted=all [https://perma.cc/SV37-VPVH].

77. *See generally* United States v. Casamento, 887 F.2d 1141 (2d Cir. 1989).

78. *See id.* at 1148–49.

79. *See id.* at 1153.

80. *See* Frank J. Prial, *U.S. Seeks Long Terms This Week for 16 in 'Pizza Connection' Case*, N.Y. TIMES (June 21, 1987), http://www.nytimes.com/1987/06/21/nyregion/us-seeks-long-terms-this-week-for-16-in-pizza-connection-case.html [https://perma.cc/849W-YNGT]; Jeffrey Toobin, *Post-Pizza*, NEW YORKER (Nov. 30, 2009), http://www.newyorker.com/magazine/2009/11/30/post-pizza [https://perma.cc/DL65-BEFK].

81. *See Casamento*, 887 F.2d at 1191–95.

82. *Id.* at 1149, 1154.

83. *See id.* at 1153.

that they were not inconsistent with those of the more prominent defendants and therefore held that the minor defendants had not suffered a cognizable prejudice from being tried alongside their Mafia superiors.[84] Rejecting the defendants' remaining contentions in a long, thoroughly reasoned opinion, the court substantially upheld the defendants' convictions.[85] The *Pizza Connection* case was later profiled in a report to Congress[86] that became the primary impetus behind the legislature's passage of the Money Laundering Control Act of 1986.[87]

Less than a year after the resolution of the Casamento's and Salerno's appeals, John Gotti, the boss of the Gambino crime family, was arrested and charged with murder, conspiracy, and other RICO crimes.[88] Gotti had acquired the moniker of "the Teflon Don" by managing, until that point, to avoid a significant criminal conviction.[89] His successful tactics included inducing at least one mistrial through jury tampering.[90] But this last arrest and six-week trial, highlighted by raucous, profanity-laden wiretaps, cooperator testimony from Salvatore "the Bull" Gravano, and the disqualification of Gotti's attorney, Bruce Cutler, on the ground that he was "house counsel" to the Gambino family, led to Gotti's conviction—by a sequestered and anonymous jury—and ultimately a life sentence.[91] John Gotti died in prison in 2002.[92]

The conviction of John Gotti was upheld by the Second Circuit in *United States v. Locascio*.[93] Among other claims, Gotti argued that the district court had erred in disqualifying his counsel, that the joinder of several defendants' cases into a single trial had caused prejudicial spillover against Gotti himself, and that there were various problems with evidentiary rulings made by the trial judge.[94] In yet another lengthy and well-reasoned opinion, the Second Circuit upheld substantially all of Gotti's convictions.[95] Among other significant issues addressed in the Gotti appeal, the court took the opportunity to strengthen its jurisprudence on joinder of multiple defendants into a single indictment, holding that so long as the trial judge was careful to instruct the jury with regard to how evidence was to be

84. *See id.*
85. *See id.* at 1191.
86. PRESIDENT'S COMM'N ON ORGANIZED CRIME, INTERIM REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (Oct. 1984), https://www.ncjrs.gov/pdffiles1/Digitization/166517NCJRS.pdf [https://perma.cc/QGP5-EFZY].
87. *See* United States v. Santos, 553 U.S. 507, 539–40 (2008) (Alito, J., dissenting) (discussing impact of *Casamento* on the development of money laundering law).
88. United States v. Gotti, 753 F. Supp. 443 (E.D.N.Y. 1990).
89. Selwyn Raab, *John Gotti Is Dead at 61; Ex-Mafia Boss Courted Limelight*, N.Y. TIMES (June 10, 2002), http://www.nytimes.com/2002/06/10/national/10CND-GOTTI.html?pagewanted=all [https://perma.cc/B643-3AVT].
90. *Id.*
91. *Id.*
92. *Id.*
93. 6 F.3d 924 (2d Cir. 1993).
94. *See id.* at 930–31.
95. *See id.* at 950–51.

considered, the trial of multiple defendants of varying levels of involvement and culpability was perfectly constitutional.[96]

B. Other Uses of the RICO Act

Although the RICO Act was created to combat organized crime, its expansive nature has enabled prosecutors to use it against illegal activity in many other organizational contexts. The Second Circuit has upheld use of the RICO Act in prosecutions of gangs,[97] unions,[98] kidnappers,[99] and even in prosecutions of corruption within New York City agencies.[100] Most relevantly for our purposes, RICO has been used extensively to combat business corruption.[101] The sheer power of the RICO statute, coupled with businesses' and businessmen's natural reluctance to engage in protracted criminal litigation, means that fewer cases make it to the appellate stage.[102] Nevertheless, the Second Circuit has had the opportunity to lead in this area as well.

One of the most prominent instances of a business prosecution using the RICO Act is the Wedtech scandal of the late 1980s.[103] Wedtech, a South Bronx sheet metal fabricating firm that had recently become a publicly traded company, wished to enter into contracts with the government

96. *See id.* at 947.

97. *See, e.g.*, United States v. Diaz, 176 F.3d 52 (2d Cir. 1999) (prosecution of the Latin Kings gang).

98. *See, e.g.*, United States v. Zichettello, 208 F.3d 72 (2d Cir. 2000) (prosecution of corrupt officials in the New York City Transit Police Benevolent Association); United States v. Butler, 954 F.2d 114 (2d Cir. 1992) (prosecution of the president of Local 200, General Service Employees International Union); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980) (prosecution of the president of Local 1814 of the International Longshoremen's Association).

99. *See, e.g.*, United States v. Aulicino, 44 F.3d 1102 (2d Cir. 1995) (prosecution of a ring of drug dealers who regularly kidnapped and tortured other drug dealers).

100. *See, e.g.*, United States v. Alkins, 925 F.2d 541 (2d Cir. 1991) (prosecution of employees of the Queens office of the New York Department of Motor Vehicles); United States v. Friedman, 854 F.2d 535 (2d Cir. 1988) (prosecution of employees of New York City's Traffic Violations Bureau).

101. *See, e.g.*, United States v. Eisen, 974 F.2d 246, 251 (2d Cir. 1992) (RICO prosecution of a law firm in connection with personal injury trials tainted by mail fraud and witness bribery); United States v. Porcelli, 865 F.2d 1352, 1355 (2d Cir. 1989) (RICO prosecution of tax fraud stemming from defendant's ownership of a chain of retail gasoline stations); United States v. Teitler, 802 F.2d 606, 609 (2d Cir. 1986) (RICO prosecution of a law firm that defrauded New York's no-fault automobile insurance companies); United States v. Mazzei, 700 F.2d 85, 87 (2d Cir. 1983) (RICO prosecution involving a "point-shaving scheme" at Boston College, which was the subject of an exposé in Sports Illustrated).

102. For example, one of the most famous RICO prosecutions of a legitimate-seeming business was that of Michael Milken and the brokerage firm where he worked, Drexel Burnham Lambert. In 1989 Milken was indicted on ninety-eight counts of racketeering and fraud, and just over a year later he pleaded guilty. Although the Milken fraud sent shockwaves through the business world, in the end the guilty plea meant that it was never appealed, and therefore the Second Circuit had no opportunity to pass on the legality of Milken's conduct. *See Drexel Burnham Lambert's Legacy: Stars of the Junkyard*, ECONOMIST (Oct. 21, 2010), http://www.economist.com/node/17306419 [https://perma.cc/KP55-JER5].

103. *See* United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990).

pursuant to the Small Business Administration's "[s]ection 8(a)" program, which permitted minority-owned businesses (such as Wedtech) to bid on government contracts outside of the normal competitive bidding process.[104] Then-Congressman Mario Biaggi was also a partner at a small firm, Biaggi & Ehrlich, which was retained in 1978 by Wedtech to engage in lobbying efforts on its behalf.[105] Over the course of time, Wedtech paid substantial amounts of money to Biaggi & Ehrlich, including at least one $50,000 payment that was later alleged to have been a bribe paid to induce Biaggi to use his influence on behalf of Wedtech.[106] Biaggi indeed did exercise substantial influence on Wedtech's behalf by, among other things, corresponding (through a contact) with then-White House Chief of Staff Edwin Meese and (allegedly) threatening at least one local government official with the withdrawal of Biaggi's political support if the official did not vote in favor of a Wedtech project.[107]

In 1987, Biaggi, his son Richard Biaggi, Ehrlich, Stanley Simon (the former Bronx Borough President), Peter Neglia (the former New York Regional Administrator for the Small Business Administration), and several Wedtech officers and employees were arrested and charged with various crimes, including bribery, extortion, tax evasion, perjury, and obstruction of justice; most of these offenses were also charged as racketeering acts for the purpose of the RICO Act.[108] They were convicted at trial on the testimony of, among others, several cooperating witnesses who were former Wedtech employees.[109] The defendants appealed their convictions to the Second Circuit.

On appeal, the Second Circuit primarily focused on the sufficiency of the evidence with regard to the substantive offenses that formed the basis for the RICO convictions, rather than on issues specific to the RICO Act. However, the court took the opportunity to express its frustration with the government for its "frequent preference to charge a RICO violation whenever evidence indicates two eligible offenses."[110] Writing that "RICO was not enacted as an automatic sentence enhancement device," the court made exquisitely clear its unwillingness to uphold a RICO conviction in which the "pattern" of illegality is purely the result of a charging decision by the government.[111] To that end, the court cited *Indelicato* and reiterated that "the 'pattern' element guards against permitting RICO to be used against sporadic criminal activity."[112] Indeed, the court declared, "[i]f the commission of an offense and its false denial could establish a 'pattern,'

104. *Id.* at 670.
105. *Id.* Although Biaggi resigned his partnership in the law firm in 1979 as a result of his status as a congressman, he continued to receive a share of the profits pursuant to a buy-out agreement until 1989. *Id.*
106. *Id.* at 671.
107. *Id.* at 670.
108. *Id.* at 669.
109. *Id.* at 670.
110. *Id.* at 686.
111. *Id.*
112. *Id.* (citing United States v. Indelicato, 865 F.2d 1370, 1381 (2d Cir. 1989)).

then *every* offense related to a criminal enterprise would be eligible for inclusion in a pattern whenever the offender falsely denied its commission. That is not what Congress intended."[113] Although the court upheld the vast majority of the defendants' convictions, it reversed the individual RICO conviction that inspired the discussion above.[114]

III. CONSPIRACY

The Second Circuit also has played a pivotal role in the development of a national jurisprudence regarding the two primary ways in which an individual may be held liable for the acts of others: conspiracy[115] and aiding-and-abetting liability.[116] The Second Circuit has both expanded and sharpened the scope of these crimes, lending much-needed clarity to a tumultuous area of the law. It also has inspired the Supreme Court to pen one of its most commonly cited opinions on the law of conspiracy: *Kotteakos v. United States*.[117]

A. The Role of Knowledge and Agreement in Conspiracy Liability

In *United States v. Peoni*,[118] the defendant, Joseph Peoni, was arrested and charged with passing counterfeit bills to a Mr. Regno. In addition to his conviction on a charge of possessing counterfeit bills, Peoni was convicted of aiding, abetting, and conspiring with Regno in the further passing of the counterfeit bills to one Dorsey.[119] In prosecuting Peoni for participating in Regno's actions, the government argued that Peoni had to have known that those bills would then be passed to a third party, and that he was therefore liable for Regno's passing of the bills.[120] On appeal, Peoni argued that the mere knowledge that a crime may occur in the future as a result of one's actions is not sufficient to give rise to accessory liability.[121]

In a remarkable and scholarly opinion surveying American and English law as far back as the fourteenth century, the Second Circuit, speaking through Judge Learned Hand, held that, because the crux of the crime of conspiracy is an agreement to commit a crime and *not* the knowledge that a crime will eventually be committed, a conspirator is liable only for the

113. *Id.*
114. *Id.* at 697.
115. A conspiracy is formed when two or more people agree together to commit a crime. In a conspiracy, the crime is complete when the two people agree and take a concrete step toward achieving their illegal goal, rather than when they actually achieve that goal. In other words, the law of conspiracy penalizes the agreement to commit a crime, rather than the crime's actual commission. *See generally* United States v. Peoni, 100 F.2d 401 (2d Cir. 1938).
116. This section focuses primarily on conspiracy.
117. 328 U.S. 750 (1946). For further discussion of *Kotteakos*, see *infra* Part III.B.
118. 100 F.2d 401 (2d Cir. 1938).
119. *Id.* at 401–02.
120. *Id.* at 402.
121. *Id.*

crimes of others to which he agreed.[122] This ruling meant that a conspirator could not be held liable for the criminal conduct of coconspirators that was outside the "common purpose[]" of the conspiracy.[123] Similarly, the court held that in order to be liable for abetting Regno, Peoni must have affirmatively joined in Regno's own crime of passing counterfeit bills.[124] Calling the idea that Peoni had agreed with Regno that Dorsey should receive the bills "absurd," the court reversed Peoni's conviction.[125]

The *Peoni* ruling imposed critical limiting factors on the scope of both conspiracy and aiding-and-abetting liability. The latter has been cited by courts across the country in support of similar rulings[126]—even the Supreme Court has repeatedly treated *Peoni* as black letter law.[127] Indeed, the limiting principles that motivated the *Peoni* ruling still guide decisions of the Second Circuit today.[128]

The Second Circuit took the next step in restricting the scope of conspiracy liability two years later in its opinion in *United States v. Falcone*,[129] where it addressed whether the seller of entirely *licit* goods that eventually were used in the course of a crime could be criminally charged. In *Falcone*, the defendant, a sugar distributor from Utica, was engaged in selling sugar to grocers, who then in turn sold the sugar to operators of illicit alcohol stills throughout New York.[130] The facts made clear that Falcone was aware that the sugar was eventually sold to illegal distilleries but that Falcone did not himself sell the sugar to the distilleries.[131] He was nevertheless convicted of a conspiracy to operate an illicit still.[132]

The Second Circuit took the opportunity presented by Falcone's appeal to further clarify the scope of conspiracy liability. The court surveyed the varying jurisprudence on the matter from its sister courts of appeals and aligned itself with the view of the Fifth Circuit: to be deemed a conspirator,

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122. *Id.* at 403.

123. *Id.* ("Nobody is liable in conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it.").

124. *Id.*

125. *Id.*

126. *See, e.g.*, United States v. Irwin, 149 F.3d 565, 569 (7th Cir. 1998) ("The classic formula for aider and abettor liability is Judge Learned Hand's [opinion in *Peoni*], which . . . has been generally accepted."); United States v. Spanos, 462 F.2d 1012, 1016 (9th Cir. 1972) ("Spanos' case . . . fall[s] within the very narrow field to which *Peoni* directly applies."); Wilson-Bey v. United States, 903 A.2d 818, 831 (D.C. 2006) (observing that every U.S. Court of Appeals, many state courts, and the Supreme Court itself have adopted "*Peoni*'s purpose-based formulation").

127. *See, e.g.*, Rosemond v. United States, 134 S. Ct. 1240, 1253 (2014) (citing *Peoni*'s holding on aiding-and-abetting liability, which used the same logic as its holding on conspiracy liability); Nye & Nissen v. United States, 336 U.S. 613, 619 (1949) (same).

128. *See, e.g.*, United States v. Studley, 47 F.3d 569, 570 (2d Cir. 1995) (prohibiting sentencing judges from holding against conspirators at sentencing the actions of their coconspirators, unless the conspirators not only knew but also agreed to the coconspirators' additional conduct).

129. 109 F.2d 579 (2d Cir. 1940).

130. *Id.* at 580.

131. *See id.*

132. *See id.*

the seller of goods must "make [the illegal venture on] his own, [and] have a stake in its outcome."[133] In other words, the seller must not only know of the illegal purpose of the conspiracy but also must agree to be part of the illegality. The court concluded that Falcone had not made any such agreement. The Second Circuit thereby both pronounced a critical limitation on the crime of conspiracy and added to a growing circuit split.[134]

Like *Peoni*, *Falcone* was written by Judge Learned Hand, who was an avid opponent of the expansion of federal conspiracy law that began as early as the 1920s.[135] Years later, the Supreme Court would acknowledge the strength of Judge Hand's voice in the "unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself," citing this type of "loose practice" in conspiracy prosecutions as a "serious threat to fairness in our administration of justice."[136]

B. The Law of Multiple Conspiracies

Several years after its decision in *Falcone*, the Second Circuit had another opportunity to address the law of conspiracy in a case that would later give rise to one of the most important Supreme Court decisions in our national conspiracy jurisprudence. In *United States v. Lekacos*,[137] the defendants were convicted of a conspiracy to obtain fraudulent loans under the National Housing Act. At trial, the evidence showed that Lekacos and his codefendants were guilty of conspiring with an individual named Brown.[138] However, unbeknownst to Lekacos, Brown had also conspired with several other groups of individuals, and evidence as to those other conspiracies was admitted against Lekacos.[139] On appeal, the Second Circuit reviewed its holdings in *Falcone* and *Peoni* and reiterated that mere knowledge of other criminal conduct by coconspirators is not enough to charge the original conspirator with the other conduct.[140] In this case, Lekacos and his codefendants were similar to "[t]hieves who dispose of their loot to a single receiver," who "do not by that fact alone become

133. *Id.* at 581 (citing Young v. United States, 48 F.2d 26 (5th Cir. 1931)).

134. *Compare id.*, *and Young*, 48 F.2d 26, *with* Pattis v. United States, 17 F.2d 562 (9th Cir. 1927), *and* Simpson v. United States, 11 F.2d 591 (4th Cir. 1926).

135. Indeed, *Falcone* itself was an effective blow struck in Judge Hand's fight: the ongoing circuit split that *Falcone* perpetuated induced the Supreme Court to act on the question of whether mere knowledge of future criminality is sufficient to give rise to liability in conspiracy. Granting certiorari from the *Falcone* opinion, the Court affirmed the decision of the Second Circuit, although on a more narrow ground: the Court determined that one who, "without knowledge" of a conspiracy, provides needed supplies to the conspiracy, is not criminally liable for conspiring. *See* United States v. Falcone, 311 U.S. 205, 207 (1940).

136. Krulewitch v. United States, 336 U.S. 440, 445–50 & n.2 (1949) (Jackson, J., concurring); *see also* Von Moltke v. Gilles, 332 U.S. 708, 727–28 (1948) (referencing Judge Hand's opinion in *Falcone*) (Frankfurter, J., writing separately).

137. 151 F.2d 170 (2d Cir. 1945).

138. *Id.* at 172.

139. *Id.*

140. *Id.* at 172–73.

confederates: they may, but it takes more than knowledge that he is a 'fence' to make them such."[141] Accordingly, the court held that in a case of multiple, separate conspiracies linked by one individual—a so-called "hub and spoke" conspiracy—members of one separate conspiracy cannot be said to have conspired with members of another conspiracy simply by virtue of their link to the individual.[142]

The Second Circuit's view of the law of multiple conspiracies was enshrined by the Supreme Court in *Kotteakos*, which is one of the most frequently cited cases on conspiracy law today. Echoing the underlying opinion in *Lecakos*, the *Kotteakos* Court held that the government's proof "made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment."[143] Deeming the *Lekacos* Court's analogy to thieves sharing the same fence an "apt" comparison, the Supreme Court affirmed the Second Circuit's holding.[144]

In *United States v. McDermott*,[145] the Second Circuit continued to develop the law of multiple conspiracies by overturning the conviction of James McDermott on charges of conspiracy. In a salacious story that delighted the news media, McDermott was charged with conspiring with two individuals—his girlfriend Kathryn Gannon, a "pornographic film star" and alleged prostitute,[146] and another boyfriend of Gannon, Anthony Pomponio, of whose existence McDermott was not aware—to commit insider trading.[147] According to the government, when McDermott would tell Gannon a piece of confidential information, Gannon would then convey the information to Pomponio, who would trade on the information.[148] The government argued that the "unit[y of] purpose" between McDermott and Pomponio—i.e., to provide insider information and to have that information acted upon—tied the two men together in a conspiracy to achieve that purpose, despite the lack of an affirmative agreement (or, indeed, any

141. *Id.* at 173; *see also id.* ("In the case at bar, we assume that Lekacos and Kotteakos and Regenbogen knew that Brown was for the time being acting as a broker for a number of other persons, who were getting loans in fraud of the Act, and who were making false representations to the bank like those which they themselves were making. But that was not enough to make them confederates with the other applicants; it did not give them any interest in the success of any loans but their own; there was no interest, no venture, common to them and anyone else but Brown himself.").

142. *Id.* at 174.

143. United States v. Kotteakos, 328 U.S. 750, 755 (1946).

144. *See id.* at 755–76. In *Lekacos*, the Second Circuit held that the district court's error in admitting evidence of Brown's other conspiracies was not so prejudicial as to require a new trial and accordingly upheld the conviction. United States v. Lekacos, 151 F.2d 170, 173–74 (2d Cir. 1945). The Supreme Court's analysis of the prejudice issue took up the vast majority of its *Kotteakos* opinion, and, with regard to this point alone, the Court reversed the judgment of the Second Circuit. *Kotteakos*, 328 U.S. at 773–74.

145. 245 F.3d 133 (2d Cir. 2001). Robert Anello served as counsel to the appellant in this case.

146. *Id.* at 135–36.

147. *Id.* at 136.

148. *Id.*

contact) between them.[149] McDermott was convicted at trial on both the substantive and the conspiracy counts.[150]

On appeal, McDermott quite naturally argued that, because he had not known that his girlfriend had another boyfriend, he could not possibly have conspired with the boyfriend to commit a crime.[151] The court determined that sufficient evidence supported McDermott's conviction of the substantive crime of insider trading with Gannon, but held as a matter of law that, because McDermott did not know of Pomponio's existence (much less his involvement with Gannon), McDermott could not have entered into a single conspiracy that included both Gannon and Pomponio.[152] The court rejected the government's attempt to "redefine a conspiracy by its purpose, rather than by the agreement of its members to that purpose."[153] "[D]eclin[ing] to hold . . . that a cheating heart must foresee a cheating heart," the court reversed the conspiracy counts,[154] and out of concern that the evidence regarding the conspiracy had tainted McDermott's trial on the substantive insider trading counts, ordered a new trial for McDermott on the substantive counts as well.[155]

C. Specialized Forms of Conspiracy

Notwithstanding its relatively frequent posture of restraining attempted expansions of the law of conspiracy, the Second Circuit also has been a leader in the development of more specialized forms of conspiracy—most prominently, tax-related conspiracies. The *Klein* conspiracy, which originated from a 1957 case of the same name, *United States v. Klein*,[156] is now a ubiquitous term within the federal courts for a conspiracy to prevent the government from investigating a possible tax crime.[157] In *Klein*, the defendant and several others were charged with a massive conspiracy to import whiskey into the United States without paying the required import tax, thereby flouting the United States's then-strict price controls on hard liquor.[158] They allegedly carried out their scheme using at least three illegal means: by creating shell companies in Canada and Cuba that would conduct the actual transactions, by filing falsified tax returns and concealing

149. *Id.* at 137.
150. *Id.* at 135.
151. *Id.* at 137.
152. *Id.* at 138.
153. *Id.* at 137.
154. *Id.* at 138.
155. *Id.* at 140.
156. 247 F.2d 908 (2d Cir. 1957).
157. *See, e.g.*, United States v. Bendshadler, 438 F. App'x 569 (9th Cir. 2011); United States v. Fletcher, 322 F.3d 508 (8th Cir. 2003); United States v. Crim, 451 F. App'x 196 (3d Cir. 2001); United States v. Vogt, 910 F.2d 1184 (4th Cir. 1990); United States v. Adkinson, 158 F.3d 1147 (11th Cir. 1998); United States v. Furkin, 119 F.3d 1276 (7th Cir. 1997); United States v. Goldberg, 105 F.3d 770 (1st Cir. 1997); United States v. Sturman, 951 F.2d 1466 (6th Cir. 1991).
158. *Klein*, 247 F.2d at 911–12.

income, and by lying to IRS investigators by submitting falsified interrogatories when the scheme was uncovered.[159]

Although the district court dismissed the substantive tax evasion charges during the trial, the defendants were tried and convicted of conspiracy against the United States pursuant to the federal conspiracy statute,[160] which forbids conspiracies that "deprive [the government] of property rights through deceptive means."[161] On appeal, the Second Circuit upheld Klein's conviction, holding for the first time that a conspiracy to interfere with or obstruct the government in its enforcement of the tax code constitutes a conspiracy affirmatively to deprive the United States of property rights.[162] Since then, nearly every federal appellate court in the country has adjudicated an appeal from a *Klein* conspiracy conviction and has made special reference to the role of the Second Circuit in developing the doctrine.[163]

Notwithstanding its controversial nature, the *Klein* conspiracy doctrine has never directly been tested in the Supreme Court, and recent decisions of the Second Circuit, most notably *United States v. Coplan*,[164] have cast serious doubt on the continuing viability of the doctrine. Time will tell whether this judge-made crime may constitutionally continue to be prosecuted.

IV. PUBLIC CORRUPTION

Federal prosecutors long have sought to combat public corruption using federal laws against mail and wire fraud, obstruction of justice, and bribery, as well as two broader statutes known as the Hobbs Act[165] and the Travel Act.[166] Because New York's federal prosecutors have been significant leaders in the anticorruption field, the Second Circuit has emerged as a strong voice in such cases as well.

A. The Abscam *Cases*

One of the most prominent and controversial instances of a vast, far-reaching sting operation, which implicated a number of the doctrines described above, was the "*Abscam*" group of prosecutions of the late 1970s and early 1980s.[167] *Abscam* arose out of an extensive and meticulously

159. *Id.*
160. *Id.* at 911.
161. 18 U.S.C. § 371 (2012).
162. *Klein*, 247 F.2d at 916.
163. *See supra* note 157 and accompanying text.
164. 703 F.3d 46 (2d Cir. 2012). The authors' law firm served as trial counsel to Richard Shapiro, one of two appellants whose convictions were overturned by the Second Circuit in *Coplan*.
165. 18 U.S.C. § 1951.
166. *Id.* § 1952.
167. The term "Abscam" is alternately explained as a portmanteau of "Arab scam" or "Abdul scam," the latter being based upon the name of the fictitious Middle Eastern sheikh for whom the undercover investigators purported to work. *See* United States v. Myers, 635 F.2d 932, 934 n.1 (2d Cir. 1980).

planned sting in which FBI agents worked with convicted fraudster Melvin Weinstein to generate a scheme geared toward uncovering corruption within the federal and state governments. Posing as agents for a (nonexistent) Middle Eastern sheikh, Weinstein and FBI Agent Anthony Amoroso (under a pseudonym) met with numerous congressmen and other government officials to induce them to accept bribes or other illegal benefits in exchange for political favors. Although some of the officials refused the bribes, most did not. Those who accepted the bribes—the *Abscam* defendants—were arrested and charged with various offenses, including taking illegal gratuities and bribes, violations of the Travel Act, and conflicts of interest. The *Abscam* prosecutions, although primarily located within the Second Circuit, spanned federal courts from New York City to Washington, D.C.[168]

Over the course of a number of appeals,[169] the *Abscam* defendants raised twin attacks against their convictions: that they were "reluctant" victims of entrapment by the government and that the government had violated their due process rights by taking an "excessive" role in procuring the criminal conduct. The court observed that the burden of disproving entrapment lay upon the government, requiring it to prove to the jury that "the defendants were predisposed . . . to commit offenses of the sort charged and 'awaiting any propitious opportunity.'"[170] The court extensively reviewed the evidence presented by the defendants to determine whether the defendants were reluctant participants or were predisposed to criminal activity. The court found that in most, if not all cases, the defendants' "reluctance" to participate in the scheme was "flat[ly] refute[d]" by the evidence.[171] The court further found that, although the government certainly provided the opportunity for the defendants to commit illegal activities, including the "coaching" of some conspirators in their interaction with the undercover FBI agents by the government's cooperator, sufficient evidence demonstrated the defendants' predisposition toward official misconduct to justify a finding of guilt.[172]

The court also examined the due process issue raised by many of the *Abscam* defendants to determine whether, among other things, the government had acted unconstitutionally by allegedly "creat[ing] the crimes" or using excessive inducements to elicit the defendants' illegal conduct.[173] Unlike in the entrapment analysis, which focused on the conduct of the defendants, the relevant issue in the due process analysis was

168. *See* United States v. Myers, 527 F. Supp. 1206, 1209–10 (E.D.N.Y. 1981).

169. United States v. Williams, 705 F.2d 603 (2d Cir. 1983); United States v. Myers, 692 F.2d 823 (2d Cir. 1982); United States v. Alexandro, 675 F.2d 34 (2d Cir. 1982); *Myers*, 635 F.2d 932; United States v. Murphy, 642 F.2d 699 (2d Cir. 1980) (per curiam). Due to their factual and legal relatedness, this section profiles these appeals together as a unit, but they were each heard and decided separately.

170. *Williams*, 705 F.2d at 613 (quoting United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952)).

171. *Id.* at 613–14.

172. *Id.* at 616; *Myers*, 692 F.2d at 836.

173. *Myers*, 692 F.2d at 836.

whether the government had overstepped its bounds to the point where the convictions were "unfair."[174] In the end, although the court expressed reservations about the government's role in bringing about the illegal activities, the court determined that the undercover agents had done no more than create the opportunity for the defendants to act illegally and that the government had therefore acted within its rights (if only barely) in conducting the sting.[175] Accordingly, and not without some sharp words of caution from the Second Circuit, the *Abscam* defendants' convictions were affirmed.

The Second Circuit's treatment of the Abscam scandal drove a national conversation on the federal government's investigatory tactics, resulting in congressional hearings and revised policies from the Attorney General's Office.[176] It also influenced the decision making of its sister courts of appeals: although the Second Circuit was the first to address the due process issues raised by the *Abscam* defendants, the Third Circuit and the D.C. Circuit addressed other *Abscam* appeals and were similarly troubled by the apparent involvement of the government in creating or inducing the crimes.[177] The Second Circuit's *Abscam* opinions provided a key point of reference for the other courts as they sought to address the government's conduct, and both courts invoked the Second Circuit's decisions in reluctantly validating their courts' *Abscam* prosecutions.[178]

B. Other Official Misconduct

In addition to the issues of due process it addressed in the *Abscam* cases, the Second Circuit has made its mark on the substantive elements of public corruption statutes. In *United States v. Margiotta*,[179] the Second Circuit addressed the definition of extortion for the purposes of the Hobbs Act. In that case, Joseph Margiotta, the chairman of the Republican Committee of Nassau County, negotiated a deal with a local insurance brokerage, the Williams Agency, in which Margiotta would appoint the Agency as the official insurance broker for the County's properties in exchange for the Agency's promise to allow Margiotta to award a portion of its municipal

174. *Id.*

175. *Id.* at 837; *see also Williams*, 705 F.2d at 619–22; United States v. Alexandro, 675 F.2d 34, 39–42 (2d Cir. 1982).

176. The Department of Justice made clear that it had heard and acknowledged the harsh criticism of the Abscam sting received from the Second Circuit, as the Attorney General's Office almost immediately after the early *Abscam* opinions issued revised guidelines governing entrapment by federal prosecutors and their agents. *See, e.g.*, OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON FBI UNDERCOVER OPERATIONS (Jan. 5, 1981), https://www.ncjrs.gov/pdffiles1/Photocopy/74988NCJRS.pdf [https://perma.cc/V8FL-4RQ7]; OFFICE OF THE ATTORNEY GEN., ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS (Dec. 2, 1980).

177. *See infra* note 178 and accompanying text.

178. *See, e.g.*, United States v. Weisz, 718 F.2d 413, 435–37 (D.C. Cir. 1983) (affirming *Abscam* conviction); United States v. Kelly, 707 F.2d 1460, 1470 (D.C. Cir. 1983) (same); United States v. Jannotti, 673 F.2d 578, 609–10 (3d Cir. 1982) (en banc) (reversing district court's acquittal of defendant on due process grounds).

179. 688 F.2d 108 (2d Cir. 1982).

insurance policies to others as political favors.[180] The government alleged that his actions constituted a "wrongful use" of his office "under color of official right,"[181] because Margiotta had used the power of his office to solicit benefits from individuals wishing to do business with his party (and, therefore, with the government).[182] Margiotta was charged with and convicted of extortion in violation of the Hobbs Act.[183]

On appeal, Margiotta argued that he had not caused or threatened any harm to those from whom he requested bribes and that his conduct "was a good faith continuation of a long-standing and widely known political patronage arrangement in New York."[184] He further argued that he was not a public official within the meaning of the Hobbs Act because he had no official government office, and therefore could not be guilty of extortion as a matter of law.[185] In a lengthy and thorough opinion that delved into various "competing visions of political history" and that discussed how "the line between legitimate political patronage and fraud on the public has always been difficult to draw,"[186] the Second Circuit determined that, although Margiotta was not formally a government official, he wielded power over such officials by virtue of his office and that he caused those officials (unknowingly) to "exercise their power in a manner which induced the Williams Agency to make the kickbacks."[187] The court further determined that Margiotta had implied to the Agency that, if it did not cooperate with his scheme, it would be "excluded" from the municipality's insurance business.[188] That conduct, the court held, was more than enough to override Margiotta's argument that he had not threatened the Agency.[189] Over the strong dissent of Judge Ralph Winter, who argued that the court's opinion impermissibly criminalized mere "political disingenuousness,"[190] the court affirmed the conviction.

In *United States v. O'Grady*,[191] the Second Circuit picked up where it had left off in the *Margiotta* opinion. In 1981, Edward O'Grady, a superintendent of the Quality Control Section, Department of New Car Engineering of the New York City Transit Authority (NYCTA), was charged with violating the Hobbs Act by making wrongful use of his office: namely, that he had extorted vendors by accepting from them over forty fully paid trips to resorts, tickets to games at Madison Square Garden,

180. *Id.* at 112.
181. Hobbs Act of 1946, 18 U.S.C. § 1951(b)(2) (2012).
182. *Margiotta*, 688 F.2d at 130.
183. *Id.* at 131.
184. *Id.* at 119.
185. *Id.* at 111.
186. *Id.* at 111, 138.
187. *Id.* at 132.
188. *Id.* at 134–35.
189. *Id.* at 134.
190. *See id.* at 139 (Winter, J., concurring in part and dissenting in part) ("The majority's use of mail fraud as a catch-all prohibition of political disingenuousness expands that legislation beyond any colorable claim of Congressional intent and creates a real danger of prosecutorial abuse for partisan political purposes.").
191. 742 F.2d 682 (2d Cir. 1984) (en banc).

invitations to golf outings, meals, and other benefits, totaling over $34,000.[192] O'Grady's case was different from a standard extortion case, however, because the evidence at trial did not demonstrate that O'Grady had ever *asked* for a benefit—rather, the record demonstrated that the gifts were freely given, that vendors maintained company policies to give such gifts to customers, and that similar gifts were given to other senior NYCTA officials without repercussion.[193] Nevertheless, O'Grady was convicted of extortion.[194]

O'Grady's appeal required the Second Circuit to determine the issue of whether a public official's acceptance of *unsolicited* benefits, albeit with the knowledge that he was being given the benefits because of his public office, constituted extortion within the meaning of the Hobbs Act or whether some degree of duress on the part of the official was required. The Second Circuit held that no duress was required and that the acceptance of unsolicited benefits was not prohibited by the Hobbs Act.[195] Rather, the court held, "[e]xtortion . . . is committed when a public official makes wrongful use of his office to obtain money not due him or his office"—in other words, "there must . . . be proof that the public official did something, under color of his public office, to cause the giving of benefits."[196]

The Second Circuit's *Margiotta* opinion, and the *O'Grady* opinion that built upon it, created a circuit split that led to a decade of controversy—some even within the Second Circuit itself.[197] This controversy eventually attracted the attention of the Supreme Court. Eight years after *O'Grady* was issued, the Second Circuit's opinion was explicitly overruled in *Evans v. United States*,[198] which held that acceptance of benefits under color of official right constituted extortion within the meaning of the Hobbs Act without regard to whether the official had requested or demanded the proffered benefit.[199]

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192. *Id.* at 683–85.

193. *Id.* at 685.

194. *Id.* at 708.

195. *Id.* at 684; *see also id.* at 689 (distinguishing contrary holdings of other courts of appeals).

196. *Id.* at 687.

197. *See, e.g.*, United States v. Margiotta, 688 F.2d 108, 139–44 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part); United States v. Adler, 274 F. Supp. 2d 583, 586 (S.D.N.Y. 2003) (observing that "[t]he *Margiotta* decision . . . has been widely criticized by practically everybody including the writer"). With regard to the circuit split, see, e.g., *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003). Controversy regarding whether any part of *Margiotta* remains good law continues to this day. *See, e.g.*, United States v. Smith, 985 F. Supp. 2d 547, 603 n.21 (S.D.N.Y. 2014) ("In citing to *Margiotta* for the proposition that a party officer may owe a fiduciary duty to his or her party and its followers, the [c]ourt reaches no conclusion as to whether *Margiotta*'s central premise—that a party officer who is not a public official can be prosecuted for honest-services wire fraud based on his or her violation of a fiduciary duty owed to the 'general citizenry' under certain circumstances—remains good law in the Second Circuit.").

198. 504 U.S. 255 (1992).

199. *Id.* at 258 & n.1 (discussing the circuit split and affirming the decretal language of the Eleventh Circuit, which stated that "passive acceptance of a benefit by a public official is sufficient to form the basis of a Hobbs Act violation if the official knows that he is being offered the payment in exchange for a specific requested exercise of his official power. The

The Second Circuit addressed another major public corruption statute, the Travel Act, in the 1988 case of *United States v. Biaggi*.[200] Mario Biaggi, a ten-term congressman for the Bronx and Westchester, was convicted in 1987 on charges relating to his receipt of gifts from individuals seeking to influence federal and New York State politics.[201] Specifically, Biaggi was charged with having accepted several vacations, including a $3,200 getaway at a Florida spa, from a longtime friend and political ally, Meade Esposito, a semiretired leader in the Democratic Party in Brooklyn.[202] Both Biaggi and Esposito argued that the vacation was merely a gift from one friend to another and that Esposito had received no favors in return; however, the government argued that the vacation constituted a bribe, or at the least an illegal gratuity, that Esposito paid to induce Biaggi to use his official position to benefit Esposito's client.[203] Although Biaggi initially was prosecuted for committing fraud against the United States and soliciting bribes, he was acquitted of those charges.[204] He was convicted, however, on charges related to receipt of illegal gratuities, obstruction of justice, and violation of the Travel Act.[205]

Biaggi appealed his conviction and his sentence on the grounds that, among other things, his actions to help Esposito's client were not "official acts" because they were not taken in the course of his official duties as a federal legislator.[206] The Second Circuit rejected his arguments, observing that "the duties of senators and representatives routinely include interceding with various agencies on behalf of their constituents"[207] and that the local public officials who had testified at trial had said it was not unusual for a federal public official to intercede for a constituent on city matters.[208] Accordingly, the Second Circuit held that a congressman's "official acts" include those directed at local, not merely federal, officials.[209]

Finally, no discussion of public corruption jurisprudence in the Second Circuit would be complete without a mention of the court's own brush with

official need not take any specific action to induce the offering of the benefit" (quoting United States v. Evans, 910 F.2d 790, 796 (11th Cir. 1990))).

200. 853 F.2d 89 (2d Cir. 1988).

201. *Id.* at 94.

202. *Id.* at 93.

203. *Id.* at 91–92.

204. *Id.* at 94.

205. *See* United States v. Biaggi, 674 F. Supp. 86 (E.D.N.Y. 1987); United States v. Biaggi, 673 F. Supp. 96 (E.D.N.Y. 1987).

206. *Biaggi*, 853 F.2d at 98.

207. *Id.*

208. *Id.* at 99.

209. *Id.* at 97–98. Biaggi was also convicted around the same time of corruption as part of the Wedtech scandal, which arose out of another set of bribes connected to a construction project in New York City. *See* United States v. Biaggi, 909 F.2d 662 (2d Cir. 1990); *see also supra* Part II.B. Biaggi was released from prison in 1991 as a result of his declining health, although he lived nearly another twenty-five years before his death on June 24, 2015. *See* Robert D. McFadden, *Mario Biaggi, 97, Popular Bronx Congressman Who Went to Prison, Dies*, N.Y. TIMES (June 25, 2015), http://www.nytimes.com/2015/06/26/nyregion/mario-biaggi-10-term-new-york-congressman-who-went-to-prison-dies-at-97.html?_r=0 [https://perma.cc/3T4F-5VWU].

corruption. In 1939, then-Chief Judge Martin Manton, who was once the youngest judge ever to be appointed to the Second Circuit, resigned from the bench after rumors surfaced that he had taken bribes from parties seeking to buy his vote.[210] Evidence later showed that Manton had suffered severe financial reversals during the Great Depression and had resorted to seeking and accepting money from litigants to avoid financial ruin.[211] Manton was tried in the court in which he had once sat as a judge, by a fellow federal judge who was brought in from the District of Maryland for that purpose, and attained the ignominious distinction of becoming the first federal judge convicted of receiving bribes.[212] He served seventeen months of a two-year prison term and died shortly thereafter at the age of sixty-six.[213]

V. SENTENCING

As the nation's financial capital in good times and in bad, New York has played host to some of the most prominent white collar crimes—including the largest Ponzi scheme in history in the collapse of Bernie Madoff's investment empire.[214] For that reason, the Second Circuit's sentencing jurisprudence is both well publicized and influential.

A. Federal Sentencing Guidelines Issues

The Federal Sentencing Guidelines ("the Guidelines") are an elaborate system of sentencing measures by which a judge may calculate the number of "levels" that are attributable to an offender's conduct, apply additional conduct-based categories to enhance or reduce the number of levels attributable to the underlying offense, and then use a table to calculate the range of months of incarceration attributable to the final Guidelines level. When the Guidelines were commissioned by Congress in the Sentencing Reform Act of 1984, they were mandatory; they remained so for over twenty years. In *United States v. Booker*,[215] the Supreme Court invalidated the statute *requiring* district judges to sentence defendants according to the Guidelines, although it did not forbid courts to use the Guidelines as an advisory source.[216] Although as a result of *Booker* their importance may now have somewhat decreased, the Guidelines continue to this day to play an enormous role in federal sentencing, particularly with regard to white collar and drug crimes.

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210. *Ex-Judge Manton of U.S. Bench Here: Head of the Appeals Court Who Served Time for Accepting $186,000 Dies Up-State*, N.Y. TIMES, Nov. 18, 1946, at 21.
211. *Id.*
212. *Id.*
213. *Id.*
214. Madoff pleaded guilty to his conduct and did not appeal his sentence. *See* United States v. Madoff, 826 F. Supp. 2d 699 (S.D.N.Y. 2011).
215. 543 U.S. 220 (2005).
216. *Id.*

Perhaps the most important Guidelines-related sentencing opinion issued by the Second Circuit in the last decade is *United States v. Crosby*,[217] the appeal of a convicted felon found in possession of a firearm and sentenced to a ten-year prison term imposed pursuant to the Guidelines. In *Crosby*, the court had its first opportunity to address the Guidelines' validity after the Supreme Court's *Booker* decision. The court overturned Crosby's sentence on the ground that the district court had treated the Sentencing Guidelines as mandatory, writing that

> [i]n considering [the issue of the lawfulness of Crosby's sentence], we are mindful that this will be the first sentencing appeal decided by our Court since the decision in *Booker*/*Fanfan*. As such, it will likely be of special interest to the district judges of this Circuit as they confront a host of new issues. It would be entirely inappropriate for us even to try to anticipate all of those issues, much less resolve them. Nevertheless, we believe that in the aftermath of a momentous decision like *Booker*/*Fanfan*, which will affect a large number of cases confronting the district judges of this Circuit almost daily, it is appropriate for us to explain the larger framework within which we decide this appeal. We do so in the hope that our explanation will be helpful to bench and bar alike.[218]

The court's hope was borne out: although the *Crosby* decision did not resolve all, or even many, of the issues that arose from the *Booker* decision and its progeny, as a result of the court's careful exposition of pre-*Booker* sentencing law, *Crosby* has become the seminal Second Circuit case applying the *Booker* decision to its own jurisprudence. Although *Crosby* was later overruled in part by the Second Circuit in *United States v. Cavera*,[219] the case nevertheless remains a key part of the structure of post-*Booker* sentencing in the Second Circuit to this day.

One Guidelines case with particular relevance to white collar criminal jurisprudence is *United States v. Milikowsky*.[220] In *Milikowsky*, the defendant, the principal of several small steel-related businesses, was alleged to have conspired with others to fix the prices of new steel drums to be sold in the eastern part of the United States, including the New Haven, Connecticut area where he was arrested.[221] After a three-week jury trial, Milikowsky was convicted of price fixing in violation of the Sherman Act.[222] He argued at sentencing that the court should sentence him leniently because his imprisonment would have a "destructive effect" on his employees at the steel mills.[223] The district judge determined that Milikowsky's situation was one of the rare instances where "the loss of his

217. 397 F.3d 103 (2d Cir. 2005).
218. *Id.* at 106–07.
219. 550 F.3d 180 (2d Cir. 2008) (en banc).
220. 65 F.3d 4 (2d Cir. 1995). *Milikowsky* was decided when application of the Guidelines was still mandatory but continues to be used today.
221. *Id.* at 5–6.
222. *Id.* at 6; *see* 15 U.S.C. § 1 (2012).
223. *Milikowsky*, 65 F.3d at 6.

daily guidance would extraordinarily impact . . . persons who are employed by him."[224] As such, the court sentenced Milikowsky to probation.[225]

On appeal, the Second Circuit had the opportunity to address an issue that has particular relevance to the unique concerns of white collar sentencing: whether a sentencing court may consider the fact that the defendant is critical to the ongoing operation of a business and that his imprisonment would inflict undue hardship upon innocent employees.[226] The court answered this question in the affirmative. Although the court acknowledged that generally the "business effects" of incarcerating a white collar offender should not be considered by sentencing judges, it observed that courts were certainly permitted to grant a downward departure in "appropriate circumstances"—including those where a departure was necessary to "reduce the destructive effects that incarceration of a defendant may have on innocent third parties."[227] Because the court determined that "extraordinary effects on an antitrust offender's employees, 'to a degree[] not adequately taken into consideration by the Sentencing Commission,' warrant a downward departure," the court affirmed Milikowsky's sentence.[228]

B. Modern Trends in White Collar Sentencing: Judicial Independence and Substantive Unreasonableness

Long before the Supreme Court declared the Guidelines unconstitutional, Second Circuit judges and the lawyers who argue before them began to criticize the effect of the Guidelines on federal sentencing.[229] Perhaps as a result of its members' willingness to speak on their concerns regarding the Guidelines, the Second Circuit has played host to ever-growing controversy regarding the rapid inflation of white collar sentences. Today, commentators (including federal judges) regularly raise questions as to whether the Federal Sentencing Guidelines, although nonbinding, nevertheless have such an effect upon sentencing judges that they result in substantively unreasonable sentences—in other words, sentences that so "shock the conscience" as to constitute a manifest injustice and thereby require reversal.[230]

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224. *Id.*
225. *Id.*
226. *See id.*
227. *Id.* at 6–7.
228. *Id.* at 8 (quoting United States v. Rogers, 972 F.2d 489, 492 (2d Cir. 1992)).
229. *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998).
230. *See, e.g.*, Frank Bowman, *Sacrificial Felon: Life Sentences for Marquee White-Collar Criminals Don't Make Sense*, AM. LAW., Jan. 2007, at 63 (noting that the "rules governing high-end federal white-collar sentences are now completely untethered from both criminal law theory and simple common sense"); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6 (2013); *see also A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes*, A.B.A. CRIM. JUST. SEC. (Nov. 10, 2014), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/economic_crimes.authcheckdam.pdf [https://perma.cc/E9TB-H8FY].

Since the economic tumult that began after the "dot com" bubble burst, and as a result of the strict sentencing provisions instituted by Congress in the Sarbanes-Oxley Act of 2002[231] and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,[232] sentences for financial crimes, in the Second Circuit and elsewhere, have increased significantly, and the subject of substantive unreasonableness has become more frequently discussed.[233] Although the Second Circuit has repeatedly reaffirmed in recent times that a sentencing judge's policy disagreement with the Guidelines is a valid basis for imposing a non-Guideline sentence,[234] the court itself has been reluctant to overturn sentences on the ground of substantive unreasonableness.[235] Nevertheless, as the post-financial crisis white collar sentencing regime continues to take shape, and judges' post-*Booker* understanding of the role of the Guidelines in determining federal sentences continues to develop and mature, the court will undoubtedly continue to be the key driver of discussion and jurisprudence in these areas that it has been in so many others.

VI. WHITE COLLAR PRACTICE AND PROCEDURE

Because of its business expertise and relatively sizeable white collar criminal docket, the Second Circuit is a national leader in jurisprudence arising from white collar criminal cases. Foremost in the Second Circuit's groundbreaking jurisprudence are its decisions concerning the application of the attorney-client privilege in highly complex and sophisticated matters. Courts across the country have adopted some of the Second Circuit's most critical rulings on privilege and other matters of white collar practice.

A. The Kovel Letter

In *United States v. Kovel*,[236] the Second Circuit established the "*Kovel* Doctrine," which protects the confidentiality of communications between a lawyer, a client, and an accountant (or other professional) engaged by the lawyer to assist in the representation of the client. Criminal defense practitioners now commonly speak of a "*Kovel* Letter": a letter agreement between an attorney and a professional service provider that ensures that the

231. Pub. L. No. 107-204, 116 Stat. 745.

232. Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (codified at 15 U.S.C. § 78o (2012)).

233. Two prominent examples of such increased sentences are *United States v. Ebbers*, 458 F.3d 110 (2d Cir. 2006), in which the Second Circuit upheld a twenty-five-year sentence for Bernie Ebbers, an executive of fallen telecom giant WorldCom, and *United States v. Rigas*, 583 F.3d 108 (2d Cir. 2009), in which the Second Circuit upheld sentences of twelve and seventeen years respectively for father and son fraudsters John and Timothy Rigas, the former owners and officers of the Adelphia Communications Company. Each defendant appealed his sentence on multiple grounds, including, most relevantly, that the sentence was, as a result of the application of the Guidelines as enhanced by Sarbanes-Oxley, substantively unreasonable. *Rigas*, 583 F.3d at 115. Each defendant was unsuccessful. *Id.* at 126.

234. *See, e.g.*, United States v. Cavera, 550 F.3d 180, 191 (2d Cir. 2008).

235. *See, e.g.*, *Rigas*, 583 F.3d at 122–24 (discussing substantive reasonableness of the *Rigas* and *Ebbers* sentences).

236. 296 F.2d 918 (2d Cir. 1961).

service provider's work will take place within the protection of the attorney-client privilege.[237]

On September 6, 1961, Louis Kovel, an accountant who worked at a law firm and who had performed accounting work on behalf of a firm client, was subpoenaed to testify against the client in the grand jury.[238] At the direction of his law firm employer, Kovel refused to testify, asserting that his work was protected by the attorney-client privilege.[239] The judge overseeing the grand jury ordered Kovel to testify, and he continued to refuse.[240] The judge therefore held Kovel in criminal contempt and sentenced him to one year of imprisonment.[241] Kovel served four days in jail and appealed his conviction.[242]

The Second Circuit, speaking through Judge Friendly, overturned the conviction. Observing that it is undisputed that a translator's work is protected by the attorney-client privilege, the court said, pithily, that "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases."[243] In the same vein, accountants' work, and that of other professionals who similarly address issues that cannot easily be addressed by attorneys, must be given the benefit of the attorney-client privilege. Indeed, the court noted, the complexity of modern white collar criminal cases means that attorneys often *cannot* address fully their clients' concerns without the help of other professionals.[244] The court, therefore, held that the privilege must extend to those professionals who are "indispensable" to an attorney's ability to represent a client, so long as such professionals' work is done for the purpose of providing legal advice to the client.[245]

The *Kovel* decision has been cited by nearly every federal appellate court in the country and adopted in full or in part by many.[246] It has been

237. *See* Jill I. Gross & Ronald W. Filante, *Developing a Law/Business Collaboration Through Pace's Securities Arbitration Clinic*, 11 FORDHAM J. CORP. & FIN. L. 57, 73 (2005).

238. *Kovel*, 296 F.2d at 919.

239. *Id.*

240. *Id.* at 920.

241. *Id.*

242. *Id.*

243. *Id.* at 922.

244. *Id.*

245. *Id.* at 921. The Second Circuit extended its *Kovel* analysis in *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), to situations in which a professional service provider works for a *codefendant's* counsel under a joint defense agreement. On appeal, Schwimmer argued that the government had improperly obtained privileged information from his codefendant's *Kovel*-protected accountant. The Second Circuit agreed with Schwimmer, holding that the doctrine of common interest privilege, which had been developed by other courts of appeals, but had not yet been fully adopted by the Second Circuit, protected Schwimmer's communications with the accountant. *Id.* at 244.

246. *See, e.g.*, *In re* Lindsey, 158 F.3d 1263, 1280–81 (D.C. Cir. 1998) (applying and analyzing *Kovel* doctrine); Grand Jury Proceedings Under Seal v. United States, 947 F.2d 1188, 1190–91 (4th Cir. 1991) (acknowledging *Kovel* doctrine and applying doctrine to medical professionals); United States v. Pipkins, 528 F.2d 559, 562–63 (5th Cir. 1976) (same); United States v. Alvarez, 519 F.2d 1036, 1045–46 (3d Cir. 1975) (same); United States v. Judson, 322 F.2d 460, 462–63 (9th Cir. 1963) (same); *see also* Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 24 & n.20 (1st Cir. 2011) (noting the "pedigree and

extended to cases well outside its original application, including civil cases,[247] and is commonly invoked when "the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client."[248] It is not too much to say that the Second Circuit's *Kovel* decision changed the way modern attorneys practice law. Although the doctrine is not without its limitations, today, thanks to *Kovel*, attorneys nationwide may safely employ professionals of all types to generate and analyze integral parts of their cases, relying upon the attorney-client privilege to protect their communications with those professionals.

B. The Act of Production Privilege

The Second Circuit also has recognized an "act of production" privilege, which extends the Fifth Amendment protection against self-incrimination to situations in which individuals have been directed to turn over documents the mere existence of which, or the individuals' possession of which, would be incriminating. Although the privilege was first developed by the Supreme Court,[249] the Second Circuit adopted the doctrine wholeheartedly in *United States v. Praetorius*[250] and *In re Katz*,[251] both of which determined that the Fifth Amendment protects individuals from a required "testimonial" production of personal records.

In 1979, the Second Circuit addressed the waiver of the privilege against self-incrimination in the context of organizational privilege. In *United States v. O'Henry's Film Works, Inc.*,[252] the court held that a film company's CEO, Henry Pergament, had not waived his Fifth Amendment right against self-incrimination by responding to an IRS subpoena. The subpoena, issued to Pergament in his capacity as president of the company, requested certain receipts and ledgers held by the company; Pergament

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wide acceptance" of *Kovel* and, assuming for the sake of argument, that the doctrine would apply in the First Circuit in "the right case").

247. *See, e.g.*, Scott v. Chipotle Mexican Grill, Inc., 94 F. Supp. 3d 585, 591–92 (S.D.N.Y. 2015); Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 70–71 (S.D.N.Y. 2010); La. Mun. Police Emps. Ret. Sys. v. Sealed Air Corp., 253 F.R.D. 300, 311–12 (D.N.J. 2008).

248. *See, e.g.*, United States v. Ackert, 169 F.3d 136, 139 (2d Cir. 1999).

249. The Supreme Court's jurisprudence on this issue was developed throughout the mid-twentieth century, culminating in its watershed opinion in *Fisher v. United States*, 425 U.S. 391 (1976). Critically, although the Supreme Court initially drove the development of the act of production privilege, a circuit split has arisen around the proper interpretation of the Supreme Court's instructions. As discussed in this section, the Second Circuit has been a consistent voice for strengthening the privilege, and other circuits have looked to the lead of the Second Circuit in developing their own act of production privilege jurisprudence. *See, e.g.*, United States v. Hubbell, 167 F.3d 552, 577–78 (D.C. Cir. 1999) (analyzing and applying the Second Circuit's holding in United States v. Praetorius, 622 F.2d 1054 (2d Cir. 1979)); United States v. Lang, 792 F.2d 1235, 1240–41 (4th Cir. 1986) (adopting the Second Circuit's holding in *In re* Grand Jury Subpoenas Issued to Thirteen Corps., 775 F.2d 43, 46 (2d Cir. 1985)); United States v. Fox, 721 F.2d 32 (2d Cir. 1983).

250. 622 F.2d 1054 (2d Cir. 1979) (following *Fisher*).

251. 623 F.2d 122 (2d Cir. 1980) (following *Fisher*).

252. 598 F.2d 313 (2d Cir. 1979). Although the *O'Henry* opinion was issued before the Second Circuit's first use of the term "act of production privilege" in *Praetorius*, the nascent doctrine clearly can be seen playing a critical role in the court's decision.

responded that neither he nor the film company possessed or controlled the subpoenaed records.[253] The government thereafter took the position that, because Pergament had responded to that question in spite of his right to invoke his Fifth Amendment privilege, he had made a complete waiver his Fifth Amendment privilege.[254] Pergament responded that he had not waived the privilege at all, and he refused to answer further questions.[255]

As the Second Circuit observed on appeal, it is well established that the Fifth Amendment's privilege against self-incrimination does not extend to corporations.[256] Therefore, a corporate agent is under a duty to produce the organization's records even when such records may be incriminating.[257] However, even a corporate agent retains his individual Fifth Amendment privilege, and it is not unreasonable that the production of corporate records would, as it did in this case, create criminal exposure for the corporate agent.[258] Therefore, where a corporate agent is implicated in illegal activity by the company (or vice versa), reliance on the act of production privilege would inevitably bring the corporation's responsibilities into tension with the agent's rights.[259] In balancing that tension, the court observed that it is clear that a corporate agent's personal right against self-incrimination would be waived in a limited manner by his producing, or failing to produce, the subpoenaed corporate records; the question that the court therefore had to address was whether that waiver would be voluntary and, if so, whether the waiver extended beyond the scope of the relevant document production.[260] The court determined that, because the corporate agent's waiver was compelled by the corporation's lack of Fifth Amendment privilege, it was not a voluntary waiver and that a corporate agent answering questions regarding documents in the corporation's possession could not be forced to answer questions on any other matters touching on his individual criminal exposure unless he waived his personal Fifth Amendment right or was immunized.[261] The court thereby provided corporate agents with as much protection as possible without abrogating the law denying Fifth Amendment rights to corporations.

The Second Circuit further strengthened the act of production privilege four years later in *United States v. Fox*.[262] In *Fox*, the defendant was the owner of a sole proprietorship that was subject to an audit by the IRS.[263] When the IRS sought the books and records of the proprietorship, Fox sought to invoke the act of production privilege.[264] The district court held

253. *Id.* at 315 & n.1.
254. *Id.* at 316.
255. *Id.* at 315–16.
256. *Id.* at 316.
257. *Id.*
258. *Id.* at 316–17.
259. *Id.*
260. *Id.* at 318.
261. *Id.*
262. 721 F.2d 32 (2d Cir. 1983).
263. *Id.* at 33–34.
264. *Id.* at 34.

that the act of production privilege protects only those documents that are "purely personal" and that the protection does not reach business records.[265] The court reviewed the records that Fox sought to protect and determined that those records were not "personal" and that, therefore, "producing the summoned documents [would] not constitute compelled testimonial communication under the fifth amendment."[266] The court ordered the documents produced to the government but stayed its order in order to permit Fox to appeal.[267]

Upon reviewing the case, the Second Circuit reversed the district court's order. The court reviewed the history of the act of production privilege and acknowledged that corporations generally do not have a right against self-incrimination.[268] However, the court noted, Fox's corporation was a sole proprietorship and thus "st[ood] on different constitutional grounds."[269] Unlike a corporation, any liability to which the company was exposed would invariably put the owner of a sole proprietorship in the same exposed position—and indeed, in this case, the court observed that it appeared "the government [was] attempting to compensate for its lack of knowledge by requiring Fox to become the primary informant against himself."[270] The court accordingly held that "[b]ecause a sole proprietorship has no legal existence apart from its owner, the compelled disclosure of a sole proprietor's private or business papers implicates his privilege against self-incrimination."[271]

As a final note on the scope of the act of production privilege, it is important to realize that, although the main thrust of its jurisprudence was toward greater coverage by the Fifth Amendment privilege, the Second Circuit also has carefully preserved a long-recognized exception to the privilege by which "required records"—those records created in compliance with a statutory requirement, such as the Bank Secrecy Act—are *not* immune from production.[272] Although the required records exception has been called into question by other courts of appeals, the Second Circuit reaffirmed the exception as recently as three years ago in *In re Grand Jury Subpoena Dated February 2, 2012*.[273]

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265. *Id.*
266. *Id.* at 35 (quoting United States v. Fox, 554 F. Supp. 422, 425 (S.D.N.Y. 1983)).
267. *Id.*
268. *See id.*
269. *Id.* at 36.
270. *Id.* at 37–38.
271. *Id.* at 36. Similarly, in *In re Three Grand Jury Subpoenas Duces Tecum Dated Jan. 29, 1999*, 191 F.3d 173 (2d Cir. 1999), the court addressed whether former employees of an organization may claim the act of production privilege. The court reinforced the robust nature of the privilege by quashing the subpoena, holding that an ex-employee may assert a Fifth Amendment privilege in the face of a grand jury subpoena demanding that he produce documents belonging to his former employer. *Id.* at 183–84. Richard Weinberg, a principal of Morvillo Abramowitz Grand Iason & Anello P.C., represented appellant John Doe II in this case.
272. *See, e.g.*, *In re* Grand Jury Subpoena Dated Feb. 2, 2012, 741 F.3d 339 (2d Cir. 2013); *In re* Two Grand Jury Subpoenae Duces Tecum Dated Aug. 21, 1985, 793 F.2d 69 (2d Cir. 1986).
273. 741 F.3d 339 (2d Cir. 2013).

CONCLUSION

The Second Circuit's contribution to the development of white collar jurisprudence over the past century and a half is immense and broad. The court has issued watershed opinions in nearly every area of white collar law, practice, and procedure. It has guided the national conversation on the nature of white collar criminality and the appropriate punishment for financial crimes. It has created and resolved circuit splits, and its decisions have inspired the Supreme Court to speak on issues that have shaped white collar law and deeply divided the courts of appeals. The Second Circuit's role as the nation's compass, and perhaps its conscience, in white collar criminal matters promises to continue and to grow even greater over the next century and beyond.