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The Triangle Shirtwaist Fire and The Merrill Lynch Analyst Ratings Scandal: Legislative and Prosecutorial Responses to Corporate Malfeasance

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NOTE

THE TRIANGLE SHIRTWAIST FIRE AND THE MERRILL LYNCH ANALYST RATINGS SCANDAL: LEGISLATIVE AND PROSECUTORIAL RESPONSES TO CORPORATE MALFEASANCE

I. INTRODUCTION

The New York City of 1911 was very much the same as the New York City of 2001. Both boasted new economies churning out wealth for the nation on a massive scale. Both were mostly unregulated playgrounds filled with sharp dealing and corner cutting, and both systems were unsustainable.¹ Both eras were marked by scandal: the Triangle Shirtwaist Fire of 1911 and the Merrill Lynch analyst rating scandal of 2001. The fire and the analyst scandals were both major events in New York City's and the nation's histories, and these scandals put a face on growing economic threat to millions of Americans.

Transcending traditional governmental roles, New York State Assembly Majority Leader Al Smith and New York State Attorney General Eliot Spitzer attempted unique solutions within New York State in response to the problems that caused each tragedy. This Note will examine the different methods each used and evaluate the relative effectiveness of each method.

While Al Smith responded to the Triangle Fire with a series of legislative reforms, Spitzer pursued corporate malfeasance with ad hoc investments and media campaigns. Both solutions successfully prevented future malfeasance in the short term, yet the long term effects of a legislative solution provide a base for future reform and set a baseline of acceptable behavior. Investigations and widely publicized settlements may pillory the corporate bad actors, but they also seem to have few lasting effects and are deeply tied to the future office holders' decisions on how to use the assets of their office.

As New York State Assembly Majority Leader, Al Smith used the specially created Factory Investigating Commission as a tool to pass more than thirty-two new laws governing worker safety, most of which were signed into law.² All modern worker safety laws are built upon this

1. See DAVID VON DREHLE, TRIANGLE: THE FIRE THAT CHANGED AMERICA 13 (2003) (citing the massive growth in New York City around the turn of the century).

2. See ROBERT A. SLAYTON, EMPIRE STATESMAN: THE RISE AND REDEMPTION OF AL SMITH 98 (2001).

legislative base.³ In fact, Franklin Roosevelt once said of the New Deal: “Practically all the things we’ve done in the federal government are like things Al Smith did.”⁴ Smith is also praised today by opponents of federal power for using New York State as a laboratory of democracy to pass laws that, once they demonstrated their effectiveness, were passed by the federal government.⁵

Eliot Spitzer has used the Attorney General’s office to pursue corporate reforms, but he has chosen to use the prosecutorial tools of his office, specifically the far ranging Martin Act,⁶ to publicize corporate criminality, rather than trying to twin that with an attempt to affect systemic reform through codification.⁷ The Martin Act was meant to fight fraud, and it allowed Spitzer to “subpoena witnesses, compel their attendance, examine them under oath . . . and require the production of any books or papers . . . deem[ed] relevant or material . . .” to his investigations.⁸ The law does not require the attorney general to impose a judicial sanction or even to charge the subjects of these inquiries with a crime.⁹ Spitzer used the power given to him under the Martin Act to compel disclosure of Merrill Lynch’s internal e-mails, which he then disclosed to the press.¹⁰ This tactic led to a public shaming of Merrill Lynch, as the e-mails disclosed that Merrill Lynch analysts and star technology analyst Henry Blodget were publicly touting stocks they privately derided.¹¹

Al Smith used the publicity from his investigations to become the first Catholic Governor of New York State and later the first Catholic major party candidate for President.¹² Eliot Spitzer has also parlayed the publicity from his investigations into his election as Governor of New York State, and his national reputation raises the possibility that he too may run for

3. *Id.* (dust jacket).

4. *Id.*

5. BROOKE A. MASTERS, SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER 14 (2006). Smith’s legislative program was, as Roosevelt said, the intellectual forbearer of the New Deal. It should be noted, however, that Smith later publicly broke with Roosevelt and claimed that Roosevelt’s reforms went far beyond anything Smith had created while he was Governor and State Assembly Majority Leader in New York State.

6. N.Y. GEN. BUS. LAW art. 23-A, §§ 352 to 359-h (McKinney 2005).

7. *See id.* § 352. *See also* Nicholas Thompson, *The Sword of Spitzer*, LEGAL AFFAIRS MAGAZINE, May/June (2004), at 2; Ben White & Robert O’Harrow, Jr., *Wall Street Probe Puts Prosecutor in Spotlight*, WASH. POST, Apr. 24, 2002, at A1.

8. N.Y. GEN. BUS. LAW § 352.

9. *See id.*

10. CHARLES GASPARINO, BLOOD ON THE STREET: THE SENSATIONAL INSIDE STORY OF HOW WALL STREET ANALYSTS DUPED A GENERATION OF INVESTORS 246 (2005).

11. *Id.* at 246–47.

12. *See* SLAYTON, *supra* note 2, at 299, 321–22. Smith was elected Governor in 1918. After losing his re-election campaign in 1920, as a result of a Republican landslide, he was returned to office in 1922. Smith served as Governor until he ran for President in 1928 and lost to Herbert Hoover.

President someday.¹³ Their differing responses to corporate malfeasance show two possible solutions state actors can employ to check quasi-criminal behavior, and these solutions should be an instructive lesson in government responses to future corporate scandals.

Americans became aware of the massive nature of corporate scandals through the very public failure of WorldCom and Enron. These failures and the ensuing stock market decline sparked the drive for corporate reform.¹⁴ Spitzer's investigations fed the growing din for change, but they were neither the sole precursors nor the main impetus for reform.¹⁵

Focusing on Spitzer's first investigation of Merrill Lynch, it is possible to see how an abuse of the system could have been corrected by state, and later federal, legislation. By not using the momentum gained by the stunning disclosures of stock analysts' practices to support meaningful legislative change, this Note concludes that Eliot Spitzer lost a golden opportunity to either let New York State take the lead in regulating stock analysts or put forth proposals for legislation based on his unique experience and perspective regarding what had gone wrong at Merrill Lynch. By staying silent, Spitzer robbed legislators of the benefit of his experience and made an already difficult job even more impossible.

Part II of this Note examines the traditional roles of Tammany Hall, the political machine that spawned Al Smith, and the traditional roles played by Eliot Spitzer's predecessors as State Attorney General. In addition, this Part also examines New York's factory economy at the turn of the 20th century and its financial markets at the dawn of the 21st. Part III recounts the Triangle Shirtwaist Fire and the legislative path to reform. Part IV tells the story of the Merrill Lynch stock analyst ratings scandal and analyzes the effectiveness of Eliot Spitzer's reforms. Part V explains the criminal justice system's failure to serve a deterrent or retributive role for the corporate actors involved. Part VI examines Spitzer's preference for a prosecutorial or investigative solution and concludes that a legislative solution to corporate malfeasance, along the lines of Al Smith's Factory Investigating Commission, would have served the public far better than Eliot Spitzer's use of the Martin Act.

13. Many national publications have touted a potential Spitzer candidacy for President. Spitzer, for his part, has not claimed national ambitions, but by the same token he has done little to discourage these Presidential speculations. If Spitzer's public comments on running for Governor were any indication, a run for President may well be in the cards. See Raymond Hernandez, *Finding Fraud On Wall St. May Be Step to Higher Post*, N.Y. TIMES, April 29, 2003, at C4.

14. John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor's Perspective*, 76 U. COLO. L. REV. 57 (2005).

15. *Id.* at 57–59 (discussing the scope of the Enron fraud).

II. BEGINNINGS

A. NEW YORK CITY AT THE TURN OF THE 20TH CENTURY

By the dawn of the 20th century, New York City's primary industry was manufacturing.¹⁶ Factories hummed from dawn until well past dusk, churning out products that traveled across the country and the world. One of the major contributors was New York's garment industry.¹⁷ In 1791, Alexander Hamilton had estimated that two-thirds to four-fifths of American clothing was home-spun, but by the 20th century almost all clothing was store bought.¹⁸ This rapid change was a result of several factors. The increased movement of Americans to cities, combined with the specialization of farmers and the democratization of concepts like leisure time and fashion, brought a need for more and better quality clothes.¹⁹ City dwellers bought their clothes in department stores while rural residents ordered theirs from mail-order catalogues. Technological innovations had made it easy to mass-produce garments, but these machines caused a massive demand for cheap labor, which the influx of eastern European immigrants around the turn of the 20th century rapidly met.²⁰ The means and scale of production had changed, as had the relationships among worker, manager, and owner, but the laws regulating factories and protecting workers were stuck in a much earlier age.²¹

According to a survey taken in the 1890s, the average work week for immigrant garment workers was eighty-four hours a week, which translated to twelve hours a day, seven days a week.²² A dependent and impoverished class of workers cried out to muckraking journalists and social reformers for help, yet the New York State Legislature and the New York City Council voted down or buried legislation that would ameliorate their harsh working and living conditions.²³ Industrialists had created an alliance between business and urban political machines.²⁴ Immigrants from Ireland, Italy, Germany, and, to a lesser extent, Jews from Russia and Eastern Europe made up the predominant support for the machines.²⁵ The stalwart machine voters were often the most exploited workers, but it was not until the early 20th century that machine politicians and reformers formed an alliance to create worker protections.

16. DREHLE, *supra* note 1, at 15.

17. *Id.* at 41.

18. *Id.* at 39.

19. *Id.* at 44.

20. *Id.* at 39.

21. *Id.* at 15.

22. *Id.* at 41.

23. See CHRISTOPHER M. FINAN & ALFRED E. SMITH: THE HAPPY WARRIOR 88–89 (2002).

24. *See id.* at 89.

25. OLIVER E. ALLEN, THE TIGER 145–46 (1993).

Machine leaders were initially reluctant to join forces with reformers. First, “reform” candidates routinely ran against machine candidates for office and, as a result, machine leaders saw reformers as their main enemy at the ballot box.²⁶ Second, political machines gained financial support from industry leaders.²⁷ In fact, many machine leaders were the very same businessmen who benefited from lax worker protections.²⁸ Most importantly, however, in the years before social welfare and the safety net, the political machine was the safety net, and replacing it with government protections would threaten the machine’s ability to dole out benefits and reap the rewards on Election Day.²⁹

In his book *Plunkitt of Tammany Hall*, William Riordan describes a day in the life of the esteemed Tammany Hall District Leader, and sometime State Senator, Alderman and City Councilman George Washington Plunkitt.³⁰ In the course of an average day, Plunkitt fed and sheltered fire victims, helped constituents obtain civil service jobs, represented local drunks before a judge and promised funding for a local church.³¹ Plunkitt also made time to attend the weddings, funerals, religious services, christenings, confirmations, bar-mitzvahs and picnics that a District Leader must attend in order to keep touch with his constituents.³² For his constituents, George Washington Plunkitt was *the* social safety net, and it was for this reason that many voters tolerated the corruption and graft so endemic in the 19th Century urban political machine.³³

The appeal of machine leaders was so intertwined with their ability to dole out favors that using government as a tool of social change struck at their success. It also threatened to break the lucrative ties machines held to industry leaders. It would be a machine Democrat, however, who would harness the power of Tammany Hall and create protections for factory workers throughout New York State.

26. *See id.* at 226 (citing, as an example, a Tammany leader and a reform activist working together).

27. *See id.* at 201.

28. *Id.* at 210. “Silent” Charlie Murphy, the legendary boss of Tammany Hall, was considered one of the most honest members of Tammany, and it was his patronage and support which allowed Al Smith to organize the Factory Investigations Commission. However, even he was not above graft. One of Murphy’s major sources of income was the New York Contracting and Trucking Company, which leased piers from the City of New York and turned a 5,000% profit. Conflicts of interest like this were endemic and were even rationalized by Tammany supporters as “honest” graft. *Id.*

29. *See id.*

30. WILLIAM L. RIORDAN, *PLUNKITT OF TAMMANY HALL: A SERIES OF VERY PLAIN TALKS ON VERY PRACTICAL POLITICS* 90 (Meridian 1991) (1963).

31. *Id.* at 91–93.

32. *Id.* at 90–98.

33. *See id.*

B. MARKETING AND FINANCIAL SERVICES IN NEW YORK CITY TODAY

Today, New York City is no longer a manufacturing city.³⁴ Instead, the financial services industry has taken over as a pillar of the tax base and as an employment provider.³⁵ Commensurate to its explosion in New York City, the financial services industry has also experienced a tremendous growth in scope and visibility throughout American life. Money is no longer solid, and each bill paid or check written is no longer like a slice or chip off the bi-monthly loaf with the remainder stored under the mattress or in a bank.³⁶ Instead, a wide variety of investment products have turned money into liquid flowing in and out of the ever expanding portfolio of investments and liabilities carried by the average investor.³⁷ Today over 60% of Americans own stock either personally or through their retirement or pension plans.³⁸ Money now flows from one perception to another at the push of a button, and as investment opportunities continue to grow and Americans derive more and more wealth from investments instead of wages, Americans' need for information about the financial markets grows.³⁹

The growth of company pension funds, mutual funds, and investing as a pastime and hobby has meant that now, more than any other time in history, average Americans have a direct stake in the stock market.⁴⁰ As a result, financial news and planning is no longer merely the province of the wealthy. This explosion of interest in finance and the stock market has been a boon to New York City, and it has once again made New York the center of a growing engine of business. Rapid growth and change, however, have quickly outpaced regulatory changes. New York State has traditionally played a very small role in the actual enforcement of financial regulations.⁴¹ Almost every major financial institution has its main presence in New York City. However, until Eliot Spitzer, the New York State Attorney General traditionally maintained a hands-off policy on regulating Wall Street.⁴²

34. See Steven Kurutz, *He Heart (Made In) New York*, N.Y. TIMES, Jan. 9, 2005, at 12.

35. Heather Timmons, *New York Isn't The World's Undisputed Financial Capital*, N.Y. TIMES, Oct. 27 2006, at C1.

36. See Grover Norquist, *The Democratic Party Is Toast*, WASH. MONTHLY, Sept. 1, 2004, at 27.

37. See GASPARINO, *supra* note 10, at 96–97.

38. Norquist, *supra* note 36.

39. See GASPARINO, *supra* note 10, at 97.

40. See *id.* (noting that at the height of the bull market in 2000, American households held \$7.7 trillion dollars in assets in the stock market, an almost nine-fold increase from American household stock holdings in 1980).

41. See Phillip Weinberg, *Office of N.Y. Attorney General Sets Pace for Others Nationwide*, 76 N.Y. ST. B.J. 10 (2001) (discussing the powers and role of New York State's Attorney General).

42. *Id.*

**C. THE ROLE OF THE NEW YORK STATE ATTORNEY GENERAL:
THEN AND NOW**

The position of New York State Attorney General is often considered the waiting room of New York State politics—in fact, it is said that the initials of the office stand for Almost Governor.⁴³ In the past half century, almost every single Attorney General has run for higher office, so it should come as no surprise that the position often attracts publicity seekers.⁴⁴ One of only four statewide elected offices, the office of Attorney General offers the possibility of statewide media exposure and the promise of a path to election as either Senator or Governor. In fact, New York State's third Attorney General was none other than the original publicity seeking politician: Aaron Burr.⁴⁵

The modern history of New York State's Attorney General Office is dominated by two street fighting ethnic politicians from New York City, Louis Lefkowitz and Robert Abrams. Louis Lefkowitz was first appointed in 1957 to replace Jacob Javitz, who had been elected to the Senate.⁴⁶ Lefkowitz followed the mold of the fiscally moderate and socially liberal policies of Nelson Rockefeller, and his tenure was marked by his desire to drive the debate on civil rights legislation in New York and his aggressive consumer oriented prosecutions.⁴⁷ Lefkowitz prided himself on a political independence and often, like his successor Robert Abrams, declined to defend Governor's actions in the courts.⁴⁸

Abrams was also a native of New York City and, like Lefkowitz, found a kindred ideological spirit in the Governor with whom he served. Although Lefkowitz and Abrams were from different political parties, their focus in office remained the same. They were committed to the liberal ideals of social justice, as well as with bread and butter issues like consumer fraud. From 1992–2000, New York State saw two short term, undistinguished Attorney Generals. However, Eliot Spitzer's election in November 2000 marked the broadening of the Attorney General's Office and a new role for the Attorney General himself.

43. Kathleen Lucadamo, *Rudy Shaking the Money Tree for Pirro*, N.Y. DAILY NEWS, Aug. 28, 2006.

44. Weinberg, *supra* note 41.

45. See New York State, Complete List of the Previous New York State Attorneys General 1626–Current, http://www.oag.state.ny.us/previous_aglist.html (last visited Jan. 13, 2007).

46. Weinberg, *supra* note 41.

47. *Id.*

48. Wayne Barrett, *Why Did Spitzer Defend Pataki?*, VILLAGE VOICE, July 8, 2003, at 24.

III. FIRE! THE TRIANGLE SHIRTWAIST FIRE AND THE LEGISLATIVE SOLUTION

A. FIRE BREAKS OUT: THE TRIANGLE SHIRTWAIST FIRE

Near closing time on Saturday afternoon, March 25, 1911, a fire broke out⁴⁹ at the Triangle Shirtwaist Company, located on the eighth, ninth and tenth floors of the Asch Building in New York City's Greenwich Village.⁵⁰ It started in a pile of rags and spread rapidly.⁵¹ On the ninth floor, as workers tried to rush down the fire escape to safety, they found the doors to the fire escape chained shut.⁵² Rather than burn to death from the flames or be asphyxiated by the smoke, workers leapt from the building onto the street below.⁵³ William G. Shepard, a correspondent for United Press, described the sound: "Thud-dead, thud-dead, thud-dead, thud-dead. Sixty-two thud-deads. I call them that, because the sound and the thought of death came to me each time, at the same instant. There was plenty of chance to watch them as they came down. The height was eighty feet."⁵⁴ Shepard completed his story with this message:

The floods of water from the fireman's hose that ran into the gutter were actually stained red with blood. I looked upon the heaps of dead bodies and I remembered these girls were the shirtwaist makers. I remembered their great strike of last year in which these same girls had demanded more sanitary conditions and more safety precautions in the shops. These dead bodies were the answer.⁵⁵

In its account of the fire, *The New York Times* also led with a damning indictment of a system that had come to see workers as expendable. The article stated:

The building is fireproof. It shows hardly any signs of the disaster that overtook it. The walls are as good as ever so are the floors, nothing is the worse for the fire except the furniture and 141 of the 600 men and girls that were employed in its upper three stories.⁵⁶

49. DREHLE, *supra* note 1, at 116–19.

50. *Id.* at 46–47, 117.

51. *Id.* at 119.

52. *Id.* at 123, 127, 267. Chaining the doors shut was common practice by employers to prevent workers from leaving their benches during the work day.

53. *Id.* at 155.

54. William G. Shepherd, *Eyewitness at the Triangle*, MILWAUKEE J., Mar. 27, 1911.

55. *Id.*

56. *141 Men and Girls Die in Waist Factory Fire; Trapped High Up in Washington Place Building; Street Strewn With Bodies; Piles of Dead Inside*, N.Y. TIMES, Mar. 26, 1911, at 1. Several months before the fire broke out, the Triangle Shirtwaist Factory had been the setting for one of the most acrimonious battles of the labor movement. Blanck and Harris hired prostitutes and gangsters to defeat organizers from the International Ladies Garment Workers Union and after several violent clashes, defeated a plan to unionize the shop. The use of prostitutes to assault female workers was a common industry practice. See DREHLE, *supra* note 1, at 6–12.

By the end of the day, 146 bodies had fallen to the street or had been consumed by the flames.⁵⁷

The owners of the factory, Max Blanck and Isaac Harris, like most of the fire victims, were first generation Jewish immigrants from Russia.⁵⁸ They had immigrated to America with little but the clothes on their back, and like their employees had spent the early part of their lives in the back-breaking conditions of the sweatshop.⁵⁹ Blanck and Harris worked their way up the ladder from small contract manufacturers, and by 1911, they were the largest shirtwaist manufacturers in the country.⁶⁰ Their lives seemed to be straight out of a Horatio Alger story. Born into poverty, they were now chauffeured to work and lived in neighboring townhouses on the fashionable Upper West Side of Manhattan. Blanck and Harris boasted cooks, maids, laundresses, governesses and, for Max Blanck's newborn baby, a nurse.⁶¹ They were perfect models for the ethos that preached that hard work would eventually lead to success.

They were neither the cruelest factory owners nor the kindest, and their factories were neither noteworthy nor notorious; but it was the mundane quality of their business practices that made the ensuing disaster of the Triangle fire so disturbing. The question could now be asked: If a fire this large and this deadly could happen to the "Shirtwaist Kings," where else could it happen, and how many more people would have to die before anything changed?⁶²

B. MR. SMITH GOES TO ALBANY

Into the breach stepped a politically ambitious product of Tammany Hall. Al Smith was born on Oliver Street, far from Blanck's and Harris's townhouses on the Upper West Side, but just one mile south of the Asch Building.⁶³ When Smith was fourteen his father died, and Smith was forced to work to support his family.⁶⁴ He was always proud of his work as a truck

57. DREHLE, *supra* note 1, at 3, 155.

58. *Id.* at 38.

59. *Id.* The term sweatshop is used today to connote any working conditions that may be considered substandard or poor. In the 19th and early 20th centuries, however, the term was a description of a very specific type of operation that lay at the bottom of the manufacturing ladder. Newly arrived immigrants, otherwise known as greenhorns, were snatched up by unscrupulous contractors. The contractors provided, according to one survey, over ninety percent of all the garments manufactured in the trade. They would use crowded tenement rooms, often their own living quarters, and cram in as many immigrants and sewing machines as they could. In these dim, dirty, and claustrophobic conditions, the contractors "sweated" their workers, aiming to undercut their competition. *Id.*

60. *Id.* at 37, 44. Shirtwaists would be known today as blouses and in late 19th and early 20th Century life were an essential part of a women's wardrobe. Blanck and Harris became so successful that they were dubbed "The Shirtwaist Kings." *Id.*

61. *Id.* at 36-37.

62. *Id.* at 37.

63. SLAYTON, *supra* note 2, at 3.

64. *Id.* at 36.

chaser, and in later years, at the Fulton Fish Market and throughout his career, he would contrast his background with the Ivy League educated colleagues with whom he served.⁶⁵ In a telling anecdote from his service in the State Assembly, Smith was on the floor of the Assembly when the results of a recent crew race were announced.⁶⁶ One by one, his colleagues took turns taking the floor to extol their alma mater, each reciting the race in which his university had won, saying, "I'm a Harvard man" or "I'm a Yale man."⁶⁷ When Smith took the floor, in an act that caused much confusion among his colleagues, he proudly proclaimed himself an "F.F.M. man,"⁶⁸ which he later explained stood for the initials of the Fulton Fish Market.⁶⁹

Despite his modest background, or perhaps because of it, Smith was recognized as a rising star by Tammany Hall leaders, and he was elected to the State Assembly in 1903 when he was barely thirty years old.⁷⁰ After his election Smith read bills and books on parliamentary procedure during the evenings, nights and weekends and soon became a master of the legislative process.⁷¹ When the Democrats re-took the Assembly in 1910, Smith became Majority Leader of the State Assembly.⁷² In the wake of the Triangle Fire, newly minted Majority Leader Smith was also named the Co-Chair of the Factory Investigating Commission, along with State Senate Majority Leader, and future U.S. Senator, Robert Wagner.⁷³ Through this Commission, Smith turned the tables on corporate accountability and found a new role for the urban political machine.⁷⁴

C. THE FACTORY INVESTIGATING COMMISSION, IF YOU BUILD IT REFORM WILL COME

The Factory Investigating Commission was both a bully pulpit for Smith and a tool to reform manufacturing corporations. While it might have been given a different name at the time, Smith's pursuits were the corollary to Spitzer's crusade. Investigators on Smith's Commission uncovered what today might be described as "corporate malfeasance" on a truly shocking scale.

65. FINAN, *supra* note 23, at 61.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 47.

71. DREHLE, *supra* note 1, at 203-04. Smith had been forced to leave school after eighth grade, which put him at a significant disadvantage compared to his better-educated colleagues.

72. *Id.* at 213.

73. *Id.*

74. *See id.*

The idea to create a commission was originally Smith's.⁷⁵ Rich people, he explained to the trade unionists, were "always very busy, and you can't get their attention for very long."⁷⁶ Smith suggested a legislative commission with the power to craft legislation.⁷⁷ In that instant, Smith wedded the power to reach New Yorkers through the sensational campaigns, to which muckrakers were accustomed, with the legislative power to affect change and actually change conditions rather than just decry them.

It was rough going for the Factory Investigating Commission at first. The New York State legislature appropriated only a \$10,000 budget (a little less than \$200,000 in today's dollars)⁷⁸ to the Commission for staff and expenses. The enabling act further restricted investigations to the nine largest cities in the state, and the Commission received jurisdiction over fire safety. However, when the Commission decided to look under the rocks of modern industrialism, and the Commission's stories began appearing in papers across the state, its mandate grew. Soon, newspapers began to cover the Commission's investigations, and the stories that followed tugged at the hearts of all New Yorkers. Husbands and wives worked opposing shifts at a rope factory in Auburn and had time to kiss each other goodbye only as their shifts began and ended.⁷⁹ In canneries, children as young as three worked eighteen hour shifts.⁸⁰ One child expressed the hopelessness, despair, and cruelty of his fate when he responded to a question asking how long he had been working by saying, "Ever since I was."⁸¹

As revelations of working conditions kept coming, public pressure buoyed Smith's legislative efforts. Through the Commission's work, New York State passed legislation that laid the groundwork for modern labor laws. Before the Commission, the law required buildings to be fireproof, but the buildings' occupants received no protection.⁸² Smith passed legislation that mandated fire drills and sprinklers.⁸³

The Commission expanded its purview and took on legislation regulating all aspects of factory working conditions.⁸⁴ Under the new

75. *Id.* at 212–13.

76. *Id.*

77. DREHLE, *supra* note 1, at 213.

78. *Id.* at 213–14. To calculate inflation, see The Inflation Calculator, <http://www.westegg.com/inflation> (last visited Apr. 3, 2007). For this calculation, \$10,000 was entered for "amount of money," 1911 was entered for "initial year" and 2006 was entered for "final year."

79. SLAYTON, *supra* note 2, at 97. When using the term "rich people," Smith was referring to a group commonly known as the "go-gos." The go-gos, short hand for good government types, were often the leaders of reform movements. But they were usually dilettantes in their interest in politics and quickly flitted from one fashionable reform cause to another.

80. *Id.* at 94–95.

81. *Id.* at 97.

82. *Id.*

83. *Id.* at 97–98.

84. DREHLE, *supra* note 1, at 214.

legislation, “[w]omen could not be forced to work for four weeks after a pregnancy; clean facilities for washing, eating, and toilet functions were also mandatory”⁸⁵ This change not only brought dividends for workers, but was also a victory for public health.⁸⁶ Children under fourteen could no longer work in cannery sheds or tenements, a small step towards the eventual banning of child labor.⁸⁷ Factories had to provide seats with backs for women.⁸⁸ Work for women was limited in canneries, and their hours of night work were also curtailed.⁸⁹ Slowly chipping away at the hours women were forced to work created a time for recreation and rest, which for Smith were essential elements in maintaining the values of family.⁹⁰ Losing his father at fourteen, watching his mother struggle, and working to support his family made this a personal cause for Smith. When critics asked him if his limits on night work for women went too far, he responded, “You can’t tell me. I’ve seen these women. I’ve seen their faces. I’ve seen them.”⁹¹

The Factory Investigating Commission produced thirty-two bills, most of which were signed into law.⁹² Following its lead, New York City passed thirty ordinances.⁹³ New York State’s Labor Commissioner had the power to close down any establishment and label any product “unclean” if there was evidence of a contagious disease.⁹⁴ By 1912, New York State had conducted 132,601 fire inspections.⁹⁵ By 1920, it had 123 factory inspectors.⁹⁶

The Factory Investigating Commission combined the best aspects of legislative power and investigative tools. A staff brimming with eager reformers brought to light abuses that cried out for change.⁹⁷ Their actions alone were not noteworthy. In fact, reformers had been bringing these abuses to light for years. But now, their efforts combined with legislators who were determined to change the law.

85. SLAYTON, *supra* note 2, at 97.

86. *Id.* at 97 (noting that physical inspections of bakery employees showed that thirty-five percent were afflicted with respiratory diseases, which they would transmit to customers by spitting on or drying their hands with dough).

87. *See id.* at 98.

88. *Id.* at 98.

89. *Id.*

90. SLAYTON, *supra* note 2, at 97.

91. *Id.*

92. *Id.* at 98.

93. *Id.*

94. *Id.*

95. *Id.* at 99.

96. *Id.* at 98.

97. Among those eager reformers were two very accomplished women, Belle Moskowitz and Frances Perkins. Belle Moskowitz became Smith’s shadow and closest political advisor; Frances Perkins served for over twelve years as the first female Secretary of Labor. *See* Joyce Purnick, *Guess Who’s Not Coming to Dinner*, N.Y. TIMES, Sept. 20, 2004, at B1; Frank Tomaino, *This Week in Mohawk Valley History*, OBSERVER-DISPATCH, Jan. 29, 2006, at 2F.

The Commission was able to hold the public's interest through sustained dramatic revelations of factory conditions that shocked and appalled New York State. Unlike previous campaigns, which through books, speeches, pictures, and exhibitions reached only an audience already in sympathy with progressive campaigners, the Commission captured a state-wide audience and held it with continuing revelations and exposés. The constant media drumbeat served as the fuel for reform. Without a continued media spotlight, those whose interests had successfully beaten reformers countless times before would have undoubtedly buried, stalled or blocked the legislation.⁹⁸

V. SCANDAL! THE MERRILL LYNCH ANALYST RATINGS SCANDAL AND THE PROSECUTORIAL RESPONSE

A. ENTER SPITZER

In June 2001, another politically ambitious Democrat sought to seize the mantle of reform. Eliot Spitzer's past was almost the polar opposite of Al Smith's. The scion of a wealthy family, Spitzer was educated in exclusive private schools: he graduated from Princeton and earned a law degree from Harvard.⁹⁹ Spitzer didn't work within the Democratic Party while waiting his turn to run for office, but instead, leveraged his family money and connections to eke out a close victory against a weak Republican incumbent.¹⁰⁰

Like their backgrounds, their approaches to corporate malfeasance were also different. While Smith sought to reform corporate practice through legislation, Spitzer chose publicity and prosecution.

98. NANCY JOAN WEISS & CHARLES FRANCIS MURPHY, 1858-1925: RESPECTABILITY AND RESPONSIBILITY IN TAMMANY POLITICS 87 (1968). Prior to Tammany Boss Charlie Murphy's conversion, he was a key ally of the bosses. In fact *the* key ally. When a reform bill came up in the State Legislature, one Tammany legislator explained reality to a reformer: "I had a talk with Murphy. The bill is not going to pass." The bill did not pass. DREHLE, *supra* note 1, at 212.

99. Thompson, *supra* note 7.

100. See generally MASTERS, *supra* note 5, at 42-45. Swept into power during the Republican landslide of 1994 against a weak general election opponent, Dennis Vacco, the Republican defeated by Spitzer, was often derided as inept. The Vacco-Spitzer battle was waged in the shadow of the titanic battle between incumbent Senator Alphonse D'Amato and Representative Charles Schumer, but was no less vitriolic. Spitzer prevailed by 25,286 votes out of over two million cast. Vacco appealed the election to the New York State Court of Appeals, but conceded six weeks after the election. See Joshua Chaffin, *Spitzer Glitz and a humbling of Harvey Pitt: Attorney General's Role in Pitt's Downfall*, FIN. TIMES, Nov. 7, 2002, at 10; Joseph P. Fried, *Following Up*, N.Y. TIMES, Aug. 18, 2002, at 33.

**B. THE MARTIN ACT, FROM OUT OF THE BLUE CLEAR SKY COMES
SPITZER'S ANSWER**

Spitzer's authority to compel the disclosure of Merrill Lynch's e-mails was based on New York State's Martin Act, which passed in 1921 and, interestingly enough, was signed into law by then-Governor Smith.¹⁰¹ The Act gave a prosecutor in New York State virtually unchecked power to pursue fiscal malfeasance.¹⁰² The Martin Act has its origins in the "Blue Sky" laws of the early 20th Century. The original authors of the Act called it the "blue sky" law for their contention that the targets of these anti-fraud statutes would "[s]ell you the sky if they could."¹⁰³ However, one might make the point that a purchaser foolish enough to make such a bargain might indeed fall within the bounds of caveat emptor.

The prosecutorial bark of the Martin Act allows the investigator a wide ambit in calling for the production of documents and affords limited protections to witnesses.¹⁰⁴ The criminal bite of the statute, however, is limited to misdemeanor prosecutions.¹⁰⁵ The statute's main intent seems not to be to aid a prosecutorial strategy, but rather to allow prosecutors a vast array of discovery weapons with which they can build fraud cases against con-artists and other tricksters. Spitzer's strategy was to combine the power of the Martin Act with public exposure and leverage the damage that would be done with the volatile nature of the stock market.

Spitzer's investigations were wide ranging and encompassed almost every sector of Wall Street, from late trading to the insurance industry.¹⁰⁶ The Martin Act and the press conference were his sword and hammer. This prosecutorial technique has been hailed as a new way for states to intervene in what has been traditionally a federal area.¹⁰⁷ As Spitzer moves to higher office though, the question becomes: Have Spitzer's tactics improved industry practices concerning stock market analysts, and are they more effective than the methods used by Al Smith and his Factory Investigating Commission?

101. Thompson, *supra* note 7.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *See id.* (writing about the "unspoken agreement" that allows the Martin Act to be used against small time criminals but not "against the big boys").

C. HENRY BLODGET & MERRILL LYNCH, THE SCANDAL UNFOLDS AND A SCHEME UNRAVELS

If the industrial revolution was about turning human labor and raw materials into a finished product, the information revolution was about using human intellect to distill and organize raw information into cognizable and understandable data. Thus, as the doors of the stock market were flung open, a ravenous need for information developed. Traditionally, this need had been met by stock market analysts who were considered experts in certain fields or sectors of the economy. Their work was highly valued, but in the 1990's they found themselves besieged on all sides by unethical temptations and pressures.¹⁰⁸

The case study of Merrill Lynch technology analyst Henry Blodget provides an example of the temptations of the typical tech stock market analyst. Blodget's actions, like those of factory owners Blanck and Harris, were typical to those in his profession. A former fact-checker and journalist, Blodget stumbled into stock analysis and shot to fame by predicting that Amazon.com would reach \$400 a share, a prediction that the stock quickly reached and surpassed.¹⁰⁹ Blodget was then hired by Merrill Lynch in a highly publicized move to be a star financial analyst and, in Merrill Lynch's words, a "rainmaker."¹¹⁰ Blodget was already one of the most well known voices of the bull market, and at Merrill Lynch he continued to urge the purchase of technology stocks.¹¹¹ Merrill Lynch used Blodget as a way to build its investment banking business,¹¹² billing him as part of a package deal. The pitch roughly became: use us and our analysts—especially Henry Blodget—will tout your stock.¹¹³

Initially, Blodget was extremely accurate in his stock picks, but the run up of the stock market during the bullish 1990's could not last forever. In internal e-mails and to his peers, even Henry Blodget discussed what he saw to be the end of the Internet bubble and the worthlessness of some of his stock picks.¹¹⁴ When Eliot Spitzer gained access to Merrill Lynch's e-mails, these e-mails from Blodget were the smoking gun.¹¹⁵ What emerged was a duplicitous pattern where Blodget would publicly announce that a

108. Ralph Sieland, *Caveat Emptor! After All the Regulatory Hoopla, Security Analysts Remain Conflicted on Wall Street*, 2003 U. ILL. L. REV. 531, 536 (discussing the challenges faced by analysts trying to steer clear of conflicts of interest).

109. Ryan Underwood, *Relics of the New Economy: Where Are They Now?*, FAST COMPANY, Mar. 2004, at 61.

110. Mara Der Hovanesian, Louis Lavelle & Tom Lowry, *How Analysts' Pay Packets Got So Fat*, BUS. WK., May 13, 2002.

111. GASPARINO, *supra* note 10, at 41.

112. *Id.*

113. *See id.*

114. *Id.* at 246.

115. *Id.*

stock “presents an attractive investment,” while he would privately e-mail a co-worker that he couldn’t believe “what a POS [piece of sh-t]” the stock was.¹¹⁶ In a particularly egregious example, Blodget publicly called Infospace.com “one of the best ways to play the wireless Internet.”¹¹⁷ Yet, privately, he referred to it as “a piece of junk.”¹¹⁸ On June 11, 2000, when Blodget made his predictions, Infospace.com’s stock closed at \$596.88, on a volume of 579,310 shares.¹¹⁹ On March 18, 2007, Infospace.com closed at \$25.14 a share, on about the same volume as June 11, 2000, a drop of over 96.5% in value.¹²⁰

It is important to note that Infospace.com was a major Merrill Lynch investment banking customer, and Blodget’s compensation, like that of many other analysts, was tied to investment banking profits.¹²¹ The nature of the stock market thrust analysts like Blodget into highly public roles where their predictions affected billions of dollars in stock value, yet their activities as analysts generated few if any direct profits for investment banks.¹²²

It is easy to concentrate on the eye popping amounts of stock value that were lost during the tech stock bust, but it is important to remember that these lost billions represented retirement and college funds, lost homes and broken families. The sudden drop in the stock market led many people to begin to cast around for blame. Stock analysts who had been feeding the boom with rosy predictions, which they broadcast on CNBC, magazine, newspapers, and websites, were the most obvious targets.¹²³

One of those investors was Debasis Kanjilal.¹²⁴ Kanjilal had invested over \$500,000 in two technology stocks, one of which was Infospace.com, on the advice of Henry Blodget’s reports.¹²⁵ Kanjilal’s lawyer alleged that conflict tainted Blodget’s analysis—Inospace was seeking to acquire Go2Net, a Merrill investment banking client.¹²⁶ Although Spitzer had not

116. Alan T. Saracevic, *Pulling Curtain Back on Hype-Master Blodget*, S.F. CHRON., Apr. 14, 2002.

117. Ron Insana, *The People v. Wall Street: New York’s Attorney General Probes Analysts’ Conflicts of Interest*, MONEY MAGAZINE, June 2002, at 71.

118. Joseph Nocera, *Led Into Temptation, Who Wasn’t*, N.Y. TIMES, Sept. 2, 2005 at C1.

119. About Infospace@Investor Relations, Historical Price Lookup, <http://investor.infospace.com/stockLookup.cfm> (last visited Mar. 18, 2007).

120. This figure was calculated by dividing the March 18, 2007 close by the June 11, 2001 close. *Id.* Infospace is only one of the stocks touted by Blodget, however, almost all the other stocks cited in the Spitzer press release are either for companies who have been bought or have gone bankrupt.

121. See Sieland, *supra* note 108.

122. *Id.* The situation was so skewed that investment banks listed their analyst sectors an unmitigated liabilities on their balance sheets.

123. Marcia Vickers, Mike France, Emily Thornton, David Henry, Heather Timmons & Mike McNamee, *How Corrupt is Wall Street?*, BUS. WK., May 13, 2002, at 1.

124. GASPARINO, *supra* note 10, at 206.

125. *Id.* at 206–07.

126. *Id.* at 208.

filed any criminal charges against Merrill Lynch, he did have enough evidence to fulfill the Martin Act's requirement that Merrill Lynch's behavior was part of a "scheme or artifice."¹²⁷ As a result, Spitzer was able to launch an investigation.¹²⁸ In April 2001, the office subpoenaed all documentation from Merrill that concerned initial public offerings (IPOs), stock recommendations, and compensation for research analysts like Blodget.¹²⁹ After wading through e-mails, Spitzer's investigators struck gold in Blodget's comments.

D. SPITZER TO THE RESCUE! REFORMS AND RESPONSE TO THE SCANDAL

Spitzer immediately published the revelations in a stunning press release that distilled the over 100,000 pages of Merrill Lynch documents and e-mails into one clear message: Merrill Lynch analysts knew the stocks they were pushing were poor investment choices.¹³⁰ Forty-three days after Spitzer's press release, Merrill Lynch settled.¹³¹ Merrill Lynch made no admission of guilt and paid only a \$100 million fine, which, to put their penalty in perspective, is less than the volume of Infospace.com for two and one half hours after Henry Blodget's recommendation.¹³² From Spitzer, Blodget received a pass and was not charged with any offense.¹³³ Only the NASD charged Blodget with securities fraud and forced him to pay a \$4 million fine. At no point was Blodget required to admit any wrongdoing, but he was banned from any future stock market involvement.¹³⁴ Nevertheless, in a rejoinder to F. Scott Fitzgerald's contention that "there are no second acts to American lives,"¹³⁵ he currently writes a column for Slate.com and an investor-based blog.¹³⁶ In addition to Blodget, his

127. N.Y. GEN. BUS. LAW § 352 (McKinney 2005).

128. See Roberta S. Karmel, *Do Financial Supermarkets Need Superregulators?*, 28 BROOK. J. INT'L L. 495, 520-21 (2003).

129. GASPARINO, *supra* note 10, at 217-18, 239.

130. Thompson, *supra* note 7.

131. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, Spitzer, Merrill Lynch Reach Unprecedented Agreement To Reform Investment Practices (May 21, 2002) [hereinafter Reform Investment Agreement].

132. Total calculated by multiplying the closing price by the total volume of the day and dividing by the number of hours the stock exchange operates. About Infospace@Investor Relations, Historical Price Lookup, <http://investor.infospaceinc.com/stockLookup.cfm> (last visited Mar. 24, 2007).

133. GASPARINO, *supra* note 10, at 260.

134. *Id.* at 308-09.

135. The Oxford Dictionary of Modern Quotations, <http://www.koapp.narod.ru/english/diction/book7.htm> (last visited Mar. 26, 2007).

136. Blodget's new role is that of an investor "watchdog" and his columns are filled with the conservative investment advice he once eschewed. In a recent column predicting that the now Justice Samuel Alito's stock portfolio qualifies him well to be a Supreme Court Justice Blodget writes, "The evidence that high costs, frequent trading, and tax-blind strategies reduce expected returns is in plain view, and there is a ton of it. This evidence, however, is often obscured or ignored by a vast cacophonous brokerage industrial complex (brokers, fund companies, amateur

supervisor, Jack Grubman, and other co-workers paid fines and made agreements similar to Blodget's.¹³⁷

Spitzer did require, as a major portion of the settlement, that Merrill Lynch make reforms within its analyst department. Merrill Lynch made six substantive changes to its policies, which included prohibiting input from the investment department to analysts; severing the link between compensation for analysts and the investment banking department; creating a new investment committee to review analysts recommendations; creating a monitor for compliance; requiring that if research is discontinued for a company that Merrill Lynch's analysts previously covered, a report be issued on why this occurred; and finally, requiring disclosure in research reports if Merrill Lynch has received any compensation from a covered company in the past twelve months.¹³⁸

"By adopting the reforms embodied in the settlement, Merrill Lynch is setting a new standard for the rest of the industry to follow."¹³⁹ Eliot Spitzer's comments in the wake of the settlement show his hope that the concessions he had wrung from Merrill Lynch would become standard.¹⁴⁰ From his statement, it seems that Spitzer viewed this settlement as a catalyst to force the industry to become self policing.¹⁴¹ By creating an industry standard of the separation between analyst and investment banking functions, Spitzer would make it a viable option for other firms.¹⁴²

An interesting analogy can be made to the noted labor leader Samuel Gompers and his position on Al Smith's factory reforms. Gompers was at the forefront of the movement to reform manufacturers but opposed government intervention because he believed that only a vibrant trade-union movement would make the manufacturing industry self-policing.¹⁴³ He felt that government intervention would not be effective and would handicap labor's ability to monitor management.¹⁴⁴ Gompers, like Spitzer, sought industry compliance without the force of legislation.

Buffetts, and personal-finance media) which, unlike the average investor *benefits* from trading fees, viewers, listeners, etc. The brokerage-industrial complex is so good at telling us what we want to hear...that its strategies have been accepted as conventional wisdom." Henry Blodget, *Sam Alito, Financial Whiz*, SLATE.COM, Nov. 3, 2005, available at <http://www.slate.com/id/2129302/>.

137. Editorial, *Finding Fraud on Wall Street*, N.Y. TIMES, Apr. 29, 2003, at A28.

138. Reform Investment Agreement, *supra* note 131.

139. *Id.*

140. *See id.*

141. *See id.*

142. *See id.*

143. Katerine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV., 931, 1010 n.516 (1999).

144. Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LABOR REV., Dec. 1, 2000, at 32. Gompers protested statutes that would empower outsiders to decide any disputes which he felt should be kept between management and labor. At the 1913 American Federation of Labor Convention, Gompers was quoted as saying, "If it were proposed in this country to vest authority in any tribunal to fix by law

Congress's initial response to Spitzer's investigation of Merrill Lynch was a letter from Representative Richard Baker, Republican from Louisiana and Chairman of the Financial Services Subcommittee on Financial Markets, to the SEC and the forty-nine other state attorney generals asking them not to follow Spitzer's example and promising curbs on the powers from Congress if they did so.¹⁴⁵ Spitzer was not cowed by Baker's letter and continued to investigate the financial services industry.¹⁴⁶ Finally, the SEC did reach an agreement with Wall Street's major investment banks through the December 2002 "Global Settlement,"¹⁴⁷ which incorporated the benchmarks set in the settlement with Merrill Lynch. Eventually, many of these regulations would be grafted onto the Sarbanes-Oxley Act and adopted into law.¹⁴⁸

E. AN ANALYSIS OF SPITZER'S EFFECTIVENESS

Investorside, a non-profit advocacy group created in the wake of the stock analyst scandals has been a tremendous beneficiary of Spitzer's actions, and the group invited him to speak at a recent conference.¹⁴⁹ Despite this relationship, by the group's own calculations, 95% of the top eighty-two firms on Wall Street have inherent conflicts of interests, the conflict being the basic existence of an investment banking department.¹⁵⁰ The numbers cast doubt on any claims that the system has changed.

Spitzer's investigations against stock analysts came to a final fruition when regulators forced the several structural reforms Spitzer had urged on Merrill Lynch on the brokerage industry as a whole.¹⁵¹ In his speech to Investorside, Spitzer made the point that it may not be possible to measure the effectiveness of reforms "because market conditions change and there are too many variables."¹⁵² That may well be true, and in this regard, the

wages for men, labor would protest by every means in its power." *Id.* (quoting AFL Convention Proceedings 59 (1913)).

145. Jodi Schneider, *Keeping an Eye on the Funds, Low-key Congressman Watches out for "The Investor Class,"* U. S. NEWS & WORLD REP., Jan. 19, 2004, at 51.

146. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, Spitzer Responds to Rep. Richard Baker's Letter to the SEC (Apr. 30, 2005).

147. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, SEC, N.Y. Attorney General, NASD, NASAA, NYSE and State Regulators Announce Historic Agreement to Reform Investment Practices (Dec. 20, 2002).

148. See Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended at various sections of 11, 15, 18, 25, 28, and 29 U.S.C.).

149. Press Release, Investorside Research Association, Independents' Day 2005 Independent Research Conference (Apr. 13, 2005).

150. Scott Cleland, *Keep Feeding the Market's Best Watchdogs,* WALL ST. J., Jan. 9, 2004, at A11.

151. Janet Stewart Kidd, *With Analyst 'Sell' Signals Rare, Investors Need to be Alert,* BALTIMORE SUN, Sept. 10, 2006.

152. Eliot Spitzer, Att'y Gen. of the State of N.Y., Keynote Address at the Investorside Research Association's Independents' Day 2005 Conference (Apr. 13, 2005), available at <http://www.investorside.org/conflogo/Transcript.pdf> [hereinafter Spitzer Keynote Address].

evidence is very cloudy. Spitzer went on to claim success based on the fact that, “an analysis preformed by *U.S.A. Today*, given a hypothetical portfolio from brokerage analysts’ recommendations, showed that the internal recommendations would have under-performed industry benchmarks in ‘02, and in ‘03 and ‘04, they beat the S&P by 2.2 percentage points.”¹⁵³ As Spitzer goes on to point out, this information is only a “relevant data point” and not the end of the conversation.¹⁵⁴ By that same token, a September 2006 analysis of analyst sell ratings showed a 32% drop in sell ratings from 10.4% in 2003 to 7.1% in September of 2006.¹⁵⁵ These two data points show the difficulty in determining whether or not reforms have changed the industry.¹⁵⁶

The question of effectiveness is one that, especially in the context of this Note, should be examined with an eye to future effectiveness, not simply to short term changes in behavior. Spitzer did answer this question at the Investorside conference when he was asked whether there was a danger that the industry would revert back to its previous habits¹⁵⁷ Spitzer responded,

[Y]es, very often there is a flow back, things do revert. The metaphor I’ve used is that what we’ve gone through is like watching someone else get a speeding ticket. Now your first response is, “I’m glad I’m not the one who was caught,” your second response is to slow down for an exit or two on the thruway, and your third response is to put your foot on the gas pedal and say, “There won’t be another trooper ahead.”¹⁵⁸

The important follow-up questions to ask, however, are whether watching another company get the equivalent of a speeding ticket will really alter behavior and whether there are, indeed, more troopers ahead.

VI. CRIME & PUNISHMENT, THE TRIAL OF BLANCK AND HARRIS AND THE TRIBULATIONS OF HENRY BLODGET

In both Smith’s and Spitzer’s situations, the criminal justice system was either unwilling or unable to punish those responsible. Although, in both men’s defense, the bad actors were merely symptomatic of deeper problems within their respective industries, and the bad actors’ behavior was no better or worse than their cohorts. It was only poor timing, and what Blanck, Harris, and Blodget might have claimed was bad luck that led to their becoming the public face for these societal ills.

153. *Id.*

154. *Id.*

155. Kidd, *supra* note 151.

156. Spitzer Keynote Address, *supra* note 152.

157. *Id.*

158. *Id.*

Both situations also ended similarly. The trial of factory owners Blanck and Harris proved to be a great anti-climax, even though the men were set upon by grieving workers and relatives as they entered the courtroom and confronted by many witnesses who testified to the factory's failure to comply with the fire code.¹⁵⁹ Despite the overwhelming evidence, a Tammany judge and an exceptionally skilled defense lawyer, Max Steuer, combined to help acquit both owners of murder.¹⁶⁰ Blodget and his co-workers paid fines and agreed never again to tout stock, but none of the analysts responsible at Merrill Lynch were sent to jail or even tried in a court of law. Spitzer has spoken about his prosecutorial philosophy in many interviews but has never articulated a clear rationale for not charging Blodget.¹⁶¹ The surprising fact about Spitzer's decision is that a spokesman for the Attorney General's Office commented on Spitzer's decision not to bring charges against analyst Jack Grubman by saying that because the Attorney General's Office could not find that "Grubman's public and private views were divergent."¹⁶² Blodget's e-mails obviously fit the criteria for divergence on public and private views, yet the only action filed against him was by the NASD.¹⁶³

For Spitzer, it seems that a white collar prosecution of all stock analysts was not feasible because of the cost and sheer magnitude of such prosecutions. Smith saw with Blanck's and Harris's acquittals that societal forces would simply not allow the imprisonment or execution of such prominent businessmen. In the face of a criminal justice failure, both Spitzer and Smith had to search for alternate solutions to remedy the endemic flaws in respectively, the financial services industry and the manufacturing industry.

VII. CONCLUSION: LEGISLATION V. PROSECUTION

As Attorney General, Eliot Spitzer was not shy in calling on the Congress and the New York State legislature to pass legislation on a variety of topics. In fact, scarcely weeks before he issued a press release on Merrill Lynch, Spitzer called on Congress to pass a prescription drug benefit and tied it to his decision to file a \$100 million lawsuit against Aventis and Andrx for keeping cheaper generic drugs off the market.¹⁶⁴ The year before, Spitzer introduced what he called "Comprehensive Gun Legislation" and advocated that it be passed by the legislature.¹⁶⁵ The office of the Attorney

159. DREHLE, *supra* note 1, at 258.

160. *People v. Harris*, 74 Misc. 353 (N.Y. Ct. Gen. Sess. 1911).

161. GASPARINO, *supra* note 10, at 260.

162. *Id.* at 311.

163. *Id.* at 308-09.

164. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, Spitzer Announces Syracuse Areas Top Three Health Care Concerns and Outlines Agenda to Address Them (Mar. 8, 2002).

165. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, Spitzer Introduces Comprehensive Gun Legislation (Feb. 28, 2001).

General, unlike Al Smith's position as Majority Leader of the State Assembly, is not intrinsically legislative; thus, it lends itself to non-legislative solutions. Therefore, the case can be made that the investigations were a result of Spitzer's desire to combat corporate misbehavior any way he could. However, what at first glance seemed to be the result of policy expediency has turned into a tactical and legislative choice. As Spitzer's fame, acclaim, and clout have grown he has shown little desire to translate this popular support into codified laws. At some point, Spitzer's behavior has to be seen less as a result of his position and more as a policy to pursue change through prosecution and investigation instead of through litigation.

Taking a victory lap after the successful conclusion of his investigation, Spitzer testified before the Senate Commerce, Science and Technology's Subcommittee on Consumer Affairs, Foreign Commerce and Tourism.¹⁶⁶ Spitzer's testimony primarily focused on his argument that federal law should not prevent state prosecutions like his Merrill Lynch investigation. As to legislative remedies, Spitzer limited his comments to a few statements: "Rebuild the wall between research analysts and investment bankers for more favorable research reports . . . ensure that analyst compensation is not based on investment banking revenue . . . provide greater disclosure to the public . . . (and) every firm should have an independent committee that reviews all research recommendations."¹⁶⁷

Within Spitzer's testimony and statements on the settlement, there was never an attempt to spell out how these reforms would be accomplished, and Spitzer only referred to these reforms by saying that any reform in this area should include these effects. He never stated whether he thought other reforms were needed.¹⁶⁸ Spitzer never used his position to advocate for legislation the way he advocated for gun control, and he never used his investigations to set the stage for legislation the way he did with the prescription drug benefit or, as in his legislative program, for an area like strengthened DWI laws.¹⁶⁹

Spitzer has never claimed that the settlement he made with Merrill Lynch was the endgame to analyst regulation. In fact, despite not making it part of his settlement with Merrill Lynch, Spitzer did believe that the best solution was a total separation between investment bankers and analysts.¹⁷⁰

166. *Hearing on Corporate Governance: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science and Tech.*, 108th Cong. (2002) (statement of N.Y. State Att'y Gen. Eliot Spitzer), available at <http://www.oag.state.ny.us/press/2002/jun/testimony7.pdf>.

167. *Id.*

168. *See id.*

169. Press Release, Office of N.Y. State Att'y Gen. Eliot Spitzer, State Urged to Adopt Stronger DWI Laws (Aug. 25, 2000) (calling on the New York State legislature to pass a comprehensive package of DWI proposals).

170. *See Hearing on Corporate Governance: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science and Tech.*,

From this notion, it is possible to assume that perhaps this was Spitzer's eventual goal and something he hoped that voluntary compliance would accomplish. If that was indeed Spitzer's goal, for the moment it has not been accomplished.

To understand the magnitude of the opportunity lost by Spitzer's decision not to seek codification of his feelings toward investment banks and their analysts, it is important to consider what the public could have gained had Spitzer decided to form a commission similar to Al Smith's Factory Investigating Commission. Through the Martin Act, Spitzer would have had the necessary investigative power to force investment banks to divulge their private e-mail and correspondence.¹⁷¹ While we can only speculate what might have been discovered, it stands to reason that a commission would have uncovered abuses at least as galling as Henry Blodget's. Like the abuses at the rope factory in Auburn, or the tales of children in canneries, these stories would have served to ratchet up the pressure of public officials to find ways to end these abuses.¹⁷² Instead of having to settle for piece-meal compliance with a watered down standard, a commission could have built momentum for a thorough overhaul of the industry by the New York State legislature. There is, of course, no guarantee that this legislative plan would have become law. However, it does seem that even in failure, an investigative commission would have at least raised awareness about the problems in the financial services industry and softened up the ground for future legislative attempts at reform.

Had Al Smith merely relied on voluntary compliance, the results of the Triangle fire might well have been different. Assuming, as was the case with Merrill Lynch, that the Triangle Shirtwaist Company was publicly traded, and, as a result of the fire and the criminal prosecutions of Blanck and Harris, its stock had dropped precipitously, Triangle would have sought to settle with the State of New York and accepted certain voluntary constraints on its relations with workers. Smith might have proposed a watered down version of the legislation he passed, perhaps sprinkler systems, fire drills and adequate fire escapes. These reforms would have had a positive effect, but they would not have solved the deeper problems of worker abuse within the manufacturing industry. Fortunately, Smith took the more effective route, and, by striking at the heart of these abuses, he was able to hasten the end of worker exploitation. In contrast, by not seeking to systematically overhaul the research industry, Spitzer tolerated the continually cozy relationship between stock analysts, the companies they cover, and investment banks.

108th Cong. (2002) (statement of N.Y. State Att'y Gen. Eliot Spitzer), *available at* <http://www.oag.state.ny.us/press/2002/jun/testimony7.pdf>; Reform Investment Agreement, *supra* note 131.

171. Thompson, *supra* note 7.

172. SLAYTON, *supra* note 2, at 97.

Al Smith's decision to use the Triangle fire as a catalyst for a program of systematic reform can be judged as an unqualified success because it embraced the concept that reforms should be codified. Spitzer made three major decisions that contrast Smith's approach. First, he settled with Merrill Lynch rather than continuing the prosecution. This approach can be justified in light of the reforms he wrung from the company, but considering the freefall of the stock, Spitzer could have wrung more concessions from the industry by waiting.¹⁷³ His next decision was to choose voluntary compliance, rather than statutory enforcement through legislation in the New York State legislature.¹⁷⁴ While there are pros and cons to both choices, it is important to note that Spitzer saw his settlement with Merrill Lynch as a first step towards greater reforms, although it will take more time to determine the true effectiveness of his choice.¹⁷⁵ The independent analyst industry is still rather small, and it takes time and distance before one can judge the true import of reforms.

Foreclosing a chance for legislative reform at the state level, Spitzer did provide the broad strokes of reform in his testimony before Congress. An interesting coda to his testimony is that legislation was indeed offered in the House of Representatives by Spitzer's former critic, Representative Baker.¹⁷⁶ While not previously known as an investor advocate and not necessarily known as a fan of Eliot Spitzer, Representative Baker's bill contained many of the same elements of Spitzer's settlement with Merrill Lynch.¹⁷⁷ For a Republican controlled Congress, which did not appear receptive to any investor reforms, it was quite a surprise, yet Spitzer was not fully supportive. The most Representative Baker could coax from Spitzer at a hearing in front of the House of Representatives Financial Services Committee's Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises was that the bill was "a good start."¹⁷⁸ Even the fact that leading Democrats like Massachusetts Congressman and Financial Services Ranking Member Barney Frank and California

173. Thompson, *supra* note 7.

174. *Id.*

175. *Id.* This assertion is contingent on interpreting his statements in the press release settlement in that light. However, taking into account his pro-investor posture and his boosting of independent research, it does seem plausible, though some may argue that he seeks reform through the industry rather than forcing change through legislation.

176. See Mutual Funds Integrity and Fee Transparency Act of 2003, H.R. 2420, 108th Cong. (1st Sess. 2003) ("Baker Bill").

177. *Id.* In a 2006 interview, Baker did say that he was "generally supportive" of Spitzer's actions though he cited some particular disagreements with Spitzer's positions. Shelley A. Lee, *Full Plate, Firm Hand*, FSI VOICE, Aug. 16, 2006, at 12.

178. *Mutual Funds: Who's Looking Out For Investors?: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. 15-41 (2003) (statement of Hon. Eliot Spitzer, Att'y Gen., State of N.Y.).

Congresswoman Maxine Waters co-sponsored the legislation¹⁷⁹ could not persuade Spitzer to wholeheartedly support it.¹⁸⁰ Without the high profile support from potential backers like Spitzer, the bill eventually died in the Senate without a vote.¹⁸¹ While partisan politics or the desire to thwart an old enemy may have played a role, it does seem that when it comes to corporate malfeasance, Spitzer has placed his beliefs firmly in the corner of prosecution ending in voluntary settlement, even though it is made under duress reforms instead of legislation.

For an argument against the efficacy of relying on prosecution, look no further than Spitzer's predecessor and his successor. Spitzer's predecessor and electoral victim, Dennis Vacco, built his career in Buffalo on child pornography prosecutions.¹⁸² These prosecutions made him visible and popular, and they were a perfect launching pad to statewide office, but they bore no relation to Spitzer's current role in regulating business. New Attorney General Andrew Cuomo often pledged to model his administration after Spitzer's, but his first actions in office show a wide difference in priorities. Shortly after taking office, Cuomo announced that his staff would examine the over 6,000 member items passed by Albany, looking for waste, fraud and mismanagement.¹⁸³ While pursuing official corruption and child pornography are laudable goals, they bring to light the difficulty of pursuing compliance mainly through prosecution. It is unlikely that an Attorney General in the mold of Dennis Vacco would be nearly as aggressive as Eliot Spitzer had been, and just days into the post-Spitzer era, the prosecutorial priorities of the New York State Attorney General's Office are no longer the same.

Here is concrete evidence that an uncodified standard for future enforcement revolves almost entirely around the views of a single elected official. If Spitzer's successors had been in the same mold as the "Lantern Jawed Crime Fighter," as the New York Post called Spitzer, there may well be continued Wall Street investigations.¹⁸⁴ But if his successors are mere

179. Summary of H.R.2420, <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:HR02420:@@L&summ2=m&> [hereinafter Summary of H.R. 2420].

180. See MASTERS, *supra* note 5, at 130–32.

181. Summary of H.R.2420, *supra* note 179.

182. Tim Knauss & James T. Mulder, *E-Mail Led to Dreamscape Seizure the Attorney General's Office Sent a Note That Led to Confiscation of the Internet Provider's Server*, POST STANDARD, Oct. 29, 1998. Vacco became known for targeting internet ISP providers through which child pornography sites flowed.

Terry Pristin, *The 1998 Campaign: Attorney General*, N.Y. TIMES, Oct. 23, 1998, at B4.

183. Nicholas Confessore, *Cuomo to Review Spending on State Lawmakers' Pet Projects*, N.Y. TIMES, Jan. 5, 2007, at B1 [hereinafter *Cuomo to Review*].

184. Brad Hamilton & Stefan C. Friedman, *Here's the "Spitz" Take, Gov Fave Eliot Weighs In*, N.Y. POST, Feb. 27, 2005, at 21.

mortals, there is nothing preventing future Attorney Generals from returning to Vacco's, Abram's, or Lefkowitz's traditional functions.¹⁸⁵

Eliot Spitzer's campaign to clean up Wall Street started with a bang, but just five years later Attorney General Andrew Cuomo's pronouncement of a new focus on public corruption ended that campaign with a whimper.¹⁸⁶ No protests issued forth from the newly elected Governor, no howls of discontent from any highly placed sources. The only news from the Governor's mansion was a list of priorities for the coming legislative session, none of which related to corporate governance.¹⁸⁷ In his previously mentioned speech to Investorside, Spitzer placed a great deal of importance on making sure that there is always "another trooper" up ahead, even going so far as to say, "[W]e in the prosecutorial community have to keep our eye out more aggressively . . . and the burden is on us to do that."¹⁸⁸ Spitzer may now feel that federal regulators have been awoken, but considering his feelings on their previous failures,¹⁸⁹ beyond the headlines and effusive praise his investigations have garnered, the most important question to ask about Eliot Spitzer is: Why? Why pursue such a strategy and why turn your back on issue formerly of such concern and importance?

To illustrate the utilitarian nature of Spitzer's actions are two of his statements regarding the S.E.C. and its actions during his investigations. On November 4, 2003, Eliot Spitzer closed his testimony before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the House of Representatives Committee on Financial Services with the unsolicited comment: "The S.E.C. enforcement staff does a terrific job. They are aggressive, tough [and] smart prosecutors. I remain committed to working together with them and others as we continue our investigations and think about solutions."¹⁹⁰ This seemingly laudatory comment flew directly in the face of a comment Spitzer made less than four months later at a meeting with the *U.S.A. Today* editorial board: "[T]he S.E.C. had become like every other lumbering bureaucracy: so big, so segmented . . . How could they have missed the market timing, the late trading? They got lazy. They simply failed to be as aggressive as they should have been."¹⁹¹ The only explanation for the two contradictory

185. *Id.* It would almost make sense for successors to try not to emulate Spitzer's success but rather to carve out a unique legacy for themselves.

186. See *Cuomo to Review*, *supra* note 183.

187. Tom Precious, *Spitzer Maps Route to Revival; Calls for Reforms, Property Tax Cuts*, BUFFALO NEWS, Jan. 4, 2007, at A1.

188. Spitzer Keynote Address, *supra* note 152.

189. Editorial, *Spitzer: Right Wing's 'Power to States' Just a Façade*, U.S.A. TODAY, Feb. 24, 2004 [hereinafter *Spitzer: Right Wing*].

190. *Mutual Funds: Who's Looking Out For Investors?: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises of the H. Comm. on Financial Services*, 108th Cong. 15-41 (2003) (statement of Hon. Eliot Spitzer, Att'y Gen., State of N.Y.).

191. *Spitzer: Right Wing*, *supra* note 189.

positions is that, like Las Vegas, what happens in the House of Representatives Subcommittee meetings, often stays there. The same can not be said of an editorial meeting at the nation's largest newspaper.

Later in the interview, Spitzer's comments in response to a question on what was the best means of enforcement show his differing positions: "Fines don't do it. Fines get passed through and disappear into the ether. Prison sentences and shame, that's the answer."¹⁹² These bellicose quotes fly right in the face of Eliot Spitzer's actions. The subhead of the Attorney General's Office press release was the size of Merrill Lynch's fine and in an interview with *Money Magazine*, Spitzer's reply to a question concerning Henry Blodget's future was, "I think we have to understand whether the structures we have in place work and function—and we have to try to do so without vilifying individuals, which is not a productive thing to do. . . ."¹⁹³ Again, the specialized nature of subscribers of *Money Magazine* conflicts with the general nature of those of *U.S.A. Today*, and thus the answers given are different.

Currently, with executive, and now legislative, tools at his disposal, Eliot Spitzer's quest to tame Albany may yet be assured whether through fines, agreements, prison sentences, or even outright electoral victory. He may indeed enjoy a brief sojourn in Albany and then on to Washington, D.C., but the question again is: Why? What lasting effects will his tenure have had, what markers will he have left behind him, and whose lives will his policies have changed aside from the greater glory of Eliot Spitzer?

Al Smith was defeated in his first re-election campaign for Governor and lost by a landslide when he ran for President, but his ideas endured. By codifying his beliefs, he gave them an opportunity to speak for themselves outside of his shortcomings as a candidate. Legislation, even if it is compromised or watered down, sets a baseline of acceptable conduct. Abuses may continue to occur but they will only fuel the drive for reform. Seeking change through legislative reforms may not garner the same headlines or public praise as giving a publicly traded company a good public pillorying, but what it will do is protect the factory workers and the investors who come long after the commission has packed up and gone home and the press conference has ended.

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192. *Id.*

193. See Reform Investment Agreement, *supra* note 131; Ron Insana, *supra* note 117, at 71.

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