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Convergences and Omissions in the  
Reporting of Corporate and White Collar  
Crime

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**CONVERGENCES AND OMISSIONS**  
**IN REPORTING CORPORATE**  
**AND WHITE-COLLAR CRIME**

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**2007**

## **Abstract**

This paper develops a novel argument for improving reporting measures in the areas of corporate and white collar crime. Section 1 aggregates the most wide-ranging collection of published data available on corporate and white collar prosecutions in order to show current deficiencies. Section 2 examines possible explanations for the current Justice Department reporting methods in an effort to discern why they are as they stand. Section 3 puts forth new reporting recommendations that would aid lawmakers, law enforcement, and private and public interests in the consideration of white collar criminal issues. The conclusion points to the need for congressional action, not unlike the Hate Crime Statistics Act of 1990, in the form of a mandate for more useful and effective federal data collection of corporate and white collar crime.

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## **Introduction**

The field of corporate regulation has changed dramatically in the last decade as a number of high-profile corporate scandals have been exposed.<sup>1</sup> Some of the notables include one of the nation's largest auditors, KPMG, which was found to have engaged in tax shelter fraud on a massive scale.<sup>2</sup> Worldcom notched up the largest corporate insolvency ever thanks to illegal revenue inflation and cost underreporting. One of the nation's largest dealers in mortgage-backed securities, Freddie Mac, is still under investigation for serious accounting irregularities.<sup>3</sup> The most dramatic and pervasive of the many corporate frauds was probably the 2001 implosion of Enron.<sup>4</sup> In fact, in its wake came a series of regulatory moves that are still being felt. In July 2002, George Bush announced the creation of the President's Corporate Fraud Task Force to maximize the federal government's ability to enforce the existing legal infrastructure.<sup>5</sup> Shortly thereafter, the legal infrastructure itself was amended by congressional passage of the 2002 Sarbanes Oxley Act, which included numerous provisions aimed at improving corporate governance.<sup>6</sup>

Amidst the maelstrom of scandal and government response, however, a number of questions have gone unanswered. For instance, on what informational basis exactly is the President or Congress acting? Are they undertaking rigorous analysis or merely moving in

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<sup>1</sup> See generally Gray, Kenneth R. et al, *Corporate Scandals: The Many Faces Of Greed*, Paragon (2005); Markham, Jerry W., *A Financial History of Modern U.S. Corporate Scandals: From Enron to Reform*. M.E. Sharp (2005); O'Brien, Justin. *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets*. Wiley (2005).

<sup>2</sup> For the IRS publication of the \$465 million penalty and a detailed report on the aftermath of the scandal, see <http://www.irs.gov/newsroom/article/0,,id=146999,00.html>.

<sup>3</sup> For an early discussion of the Justice Department investigation, see Weinberg, Art, *The Feds Pile On Freddie Mac*, *Forbes*, June 12<sup>th</sup>, 2003. For a later article that details developments in the investigation, see Day, Kathleen *Justice Probe of Freddie Mac Moving Slowly* *Washington Post*, November 2004.

<sup>4</sup> See Generally Mclean, Bethany and Peter Elkind *The Smartest Guys in the Room*. Penguin (2004); Eichenwald, Kurt. *Conspiracy of Fools Broadway* (2005); Swartz, Mimi and Sharon Watkins *Power Failure: The Inside Story of the Collapse of Enron*. Currency (2004).

<sup>5</sup> Executive Order 13271 of July 9, 2002. This and related materials available at <http://www.usdoj.gov/dag/cftf/>.

<sup>6</sup> See H.R. 3763, Title III.

response to a series of corporate spectacles? This paper argues that the dearth of available data on the number and size of various corporate crimes makes it almost certain that legislators, commentators, investors, and average citizens are making decisions without proper information. A good first step would be to overhaul the reporting processes of corporate prosecutions and white-collar crime so that as a society we could know with more certainty how best to talk about and legislate on the issues.

A simple example will help show the current problem. As the reporting arm of the Justice Department, the Bureau of Justice Statistics currently reports white collar crime dispositions from U.S. federal courts for fraud, forgery and counterfeiting, bribery, and embezzlement.<sup>7</sup> Published data exists from 1972 until 2004. Taking the first category first, one would have a difficult time discerning the difference between Zachary Bookman running a phony small-town law practice and Ken Lay bilking shareholders and pensioners across the country. This is because there is no breakdown between personal and corporate frauds and there is no weighting of the particular crimes. The implications are staggering, because surely some types of fraud (massive corporate misfeasance) are more costly and socially reprehensible than others (low-level venality). Nevertheless, one can imagine that various types (highly costly and less-so, and perhaps even corporate versus personal) could be inversely proportional. That is, one can expect a far larger number of simple Zac Bookman-style frauds than Ken Lay-esque types. Thus, a single fraud statistic without any further definitional breakdown or seriousness weighting is likely to be practically useless considering the skewing that will take place due to the low frequency of massive frauds and the fact that criminal enforcement or deterrence strategies may differ between the two.

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<sup>7</sup> See Annual Uniform Crime Report, Part II Index Crimes available by the FBI at <http://www.fbi.gov/ucr/ucr.htm>.

In fact, the BJS does not even publish specific data on corporate crime as distinct from white collar crime. To find such data, one must review assorted publications from the President's Corporate Fraud Task Force and various academic studies. For instance, the 2<sup>nd</sup> report of the Corporate Fraud Task Force listed over 500 corporate fraud convictions in 2004, an increase of 250 over 2003.<sup>8</sup> Nine hundred defendants and 60 CEOs and Presidents had been charged since 2002. A study by *Corporate Crime Reporter* of criminal fines revealed that 21% of the Fortune 500 paid criminal fines of at least \$150k in the 1990s.<sup>9</sup> A 1979 study, titled *Illegal Corporate Behavior* found that in just two years, 1975-6, 60% of the 582 largest public U.S. corporations had an action initiated against them and almost one-half had two or more violations.<sup>10</sup> Yet, one can quickly see what this misses. While interesting, these disparate data compiled over different years and in different time periods provides nothing close to a comprehensive picture of corporate crime in America. How could congress even know if there has been more corporate crime of late rather than just more public scrutiny of corporate crime?

A similar story can be told about white-collar crime in general. Again, the BJS is not the only source of statistics on the matter, but other organizations are hard pressed and rather poorly situated to deliver a complete story. The *U.S. Sentencing Commission*, for instance, has published data on fraud, the largest white-collar offense, but only since 1995 and it still suffers from the same level of generality.<sup>11</sup> The *Transactional Records Access Clearinghouse* at Syracuse University does excellent and creative work, but is still relegated to using DOJ data on

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<sup>8</sup> See Second Year Report to the President, Corporate Fraud Task Force, 2004, available at [www.usdoj.gov/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf).

<sup>9</sup> Mokhiber, Russel. Top 100 Corporate Criminals of the 1990s, *Corporate Crime Reporter*, available at <http://www.corporatecrimereporter.com/top100.html>.

<sup>10</sup> Marshall Clinard, et al. (1979), *Illegal Corporate Behavior*, Washington, D.C.: U.S. Department of Justice.

<sup>11</sup> Federal Sentencing Statistics by State, District, and Circuit are available from the U.S. Sentencing Commission at <http://www.ussc.gov/linktojp.htm>.

new-white collar prosecutions.<sup>12</sup> The *Journal of Law and Economics* published a study in 1999, measuring the effect of the sentencing guidelines on white-collar criminal penalties, which showed that from 1988 to November, 1991, there were 101 corporate criminal convictions, averaging 2.2 per month, compared to 2.3 for the 142 firms sentenced between that time and 1996.<sup>13</sup> Criminal fines, however, were significantly higher, increasing from \$1.9 million to \$19.1 million. The bottom line is that a comprehensive database of corporate criminal prosecutions does not exist, nor is there even a highly relevant historical record of white-collar crime kept by the federal government. A number of different organizations, public and private, publish data, but unfortunately each data set is typically narrowly focused on the needs or subject matter of that particular outfit.

To demonstrate this clearly, Part II assembles the most complete collection of data on the subject using each of the major sources. This will serve to show more specifically what is lacking from a numerical perspective and how the overall federal corporate crime architecture is unsatisfactory. Part III then seeks an institutional explanation of why satisfactory data does not exist in a single U.S. repository. Is it simply impossible to obtain? Is the Justice Department too bureaucratic to break with historical inertia? Does the data actually exist and is simply not made public? These and other political-economic considerations will be looked at (What organizational interests are at stake?) to see how and why corporate and white-collar reporting differs from violent and property crime reporting. Part IV sketches out a vision for what an effective reporting scheme would look like, including certain necessary white-collar and corporate distinctions and the possibility of seriousness or dollar-cost weighting indicators. The current reporting system for violent and property crime is critiqued for comparative purposes.

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<sup>12</sup> Agency specific data is available at <http://trac.syr.edu/>.

<sup>13</sup> Cohen, Mark. Evidence on the Effect of the U.S. Sentencing Guidelines, *Journal of Law and Economics*, 42: 393-42 (April 1999).

The paper's conclusion suggests that the best way to achieve a more robust reporting vision may be a congressional mandate of the kind that has been issued for sexual assault and discrimination. A detailed and firm legislative hand-binding would not only do Congress itself a favor, but also the rest of the community of concerned citizens and investors. Before jumping in, Part I traces the growth of corporate regulation to give context to the broader inquiry. Also included is an important discussion on the lexicographical distinctions between corporate and white-collar crime.

## **I. Corporate Regulation and White Collar Offense**

While this paper is concerned primarily with numerical reporting and the benefits that could follow improvements in those practices, it is critical to know just what is at stake. A very brief history is given first to situate the corporate form and the regulation of it, so that recent events and the paper's recommendations can be seen in context. A discussion about terminology follows, since corporate regulation and white-collar crime do not necessarily go hand in hand. Fleshing out the overlaps and differences will make later arguments more clear and perhaps more forceful.

### **A. History**

Firmly in use by the 14<sup>th</sup> century, early medieval corporations were ecclesiastical bodies, a principal function of which was church property management.<sup>14</sup> From these came lay associations, such as municipalities and mercantile and craft guilds, the precursors of the modern business corporation.<sup>15</sup> During the sixteenth and seventeenth centuries the importance of corporations grew as hospitals, universities, and other similar associations adapted to the corporate form.<sup>16</sup> Also of growing importance at this time was the joint stock company, a form of business association critical in the promotion of new industry and the mobilization of credit.<sup>17</sup>

As the corporate form of governance established itself, three essential principles evolved:<sup>18</sup>

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<sup>14</sup> Hansman, Henry et al. *Legal Entities, Asset Partitioning, and the Evolution of Organizations*. Newly Revised Draft for NBER Conference, November 2002 at 44.

<sup>15</sup> See Brickey, Kathleen. "Corporate Criminal Accountability: A Brief History and an Observation," 60 *Washington University Law Quarterly* 393 (1982).

<sup>16</sup> *Id.*

<sup>17</sup> See *Supra* Note 14.

<sup>18</sup> See *Supra* Note 15.

- i. A corporation was recognized as an entity distinct from its members;
- ii. Corporate property was considered distinct from the property of its members;
- iii. A judgment against a corporation could be executed only against the property of the corporation, not that of its members.

A fourth principle of sorts came through the extension of the mortmain laws.<sup>19</sup> This endowed lay corporations with immortality, from which followed the notion that a corporation could not be outlawed or excommunicated, assaulted or imprisoned, nor could it commit treason or felony.<sup>20</sup>

### 1. Development of Corporate Liability

In the sixteenth and seventeenth centuries, it was generally believed that corporations could not be held criminally liable.<sup>21</sup> They were considered juristic fictions, lacking corporeal members and any ability to act physically. A corporation was held liable on a presentment for nonfeasance as early as 1635,<sup>22</sup> but misfeasance cases were not decided for another two centuries.

### 2. Development of American Doctrine

The corporate charter, a grant from the king to the royal governors, was the foundation of most forms of political organization in the American colonies.<sup>23</sup> When colonies became states, the power to create corporations was reposed in the legislatures. In Massachusetts, for example, an early statute provided that "the inhabitants of every town ... are hereby declared to be a body

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See Pitt, Harvey L. and Karl A. Groskaufmanis. "Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct," 78 *Georgetown Law Journal* 1559, June 1990.

<sup>22</sup> See Brickey, at 401.

<sup>23</sup> See Grossman, Richard L. and Frank T. Adams, *Taking Care of Business: Citizenship and the Corporate Charter*, 1993.

politic and corporate."<sup>24</sup> By 1900, the number of incorporated cities and towns exceeded 10,000.<sup>25</sup>

The private business corporation was absorbed into the mainstream of American life more slowly. Of the 225 private corporate charters granted before 1800, less than a third were issued to enterprises engaged in general commercial activity.<sup>26</sup> Accordingly, it was to the more prevalent public and quasi-public corporations that criminal liability first attached.

### 3. Nuisance and Crimes Not Requiring Criminal Intent

The law of nuisance provided the earliest support for corporate criminal prosecution.<sup>27</sup> Common nuisance was defined as "an offense against the public, either by *doing* a thing which tends to the annoyance of all the king's subjects, or by *neglecting* to do a thing which the common good requires."<sup>28</sup> As had been true in English law, the "neglect" prong of the definition was first to apply to American corporations.<sup>29</sup> As the presence and importance of corporations grew, courts extended corporate criminal liability from public nuisances to all offenses that did not require criminal intent.<sup>30</sup> This did not pose a serious doctrinal problem, because no individual agent of the corporation was responsible for the omission and there was no imputation of guilt from agent to principal; only the corporation was under a duty to perform the specific act.

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<sup>24</sup> Supra Note 22.

<sup>25</sup> Ibid, at 402.

<sup>26</sup> Ibid.

<sup>27</sup> See Pitt, Supra Note 21.

<sup>28</sup> See V.S. Khanna, Corporate Criminal Liability: What Purpose Does It Serve? 109 Harv. Law. Rev. 1477. (1996).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Prior to the mid-1800s, it was questionable whether corporations could be held criminally liable for misfeasances (positive acts) as well as nonfeasances (omissions).<sup>31</sup> In 1846, however, Lord Denman ruled in *The Queen v. Great North of England Railway Co.* that corporations could be criminally liable for misfeasance, and American courts soon began making similar rulings.<sup>32</sup>

In order to hold corporations liable for misfeasance, courts had to impute agent conduct to corporations. Such an imputation relied for logical consistency on the doctrine of *respondet superior* ("let the master answer"). This development eventually allowed courts to extend corporate criminal liability to all crimes not requiring intent.<sup>33</sup>

#### 4. Crimes Requiring Intent

Arguments against imposing criminal liability for crimes requiring intent followed two themes: 1) The corporation "has no hands with which to strike" and since it "has no soul," it cannot have "wicked intent;" and 2) An *ultra vires* plea, which says some acts are so beyond the purpose and powers granted by a corporate charter that an entity is incapable of committing them.<sup>34</sup>

Both were overcome in 1909, when the Supreme Court held a corporation liable for a crime of intent in *New York Central & Hudson River Railroad Co. v. U.S.*<sup>35</sup> A unanimous court noted that since Congress is empowered to regulate interstate commerce, "[i]t would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they

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<sup>31</sup> *Id.*

<sup>32</sup> 114 Eng. Queen v. Great North of England Railway (1846).

<sup>33</sup> Thomas J. Bernard. The Historical Development of Corporate Criminal Liability. *Criminology* 22 (1), 3–18. (1984).

<sup>34</sup> See generally, Harvey L. Pitt and Karl. A. Groskaufmanis. Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct. 78 *The Georgetown Law Journal* 1559 (1989-90).

<sup>35</sup> *New York Cent & H. R.R. Co. V. U.S.*, 212 U.S. 481 (1909).

have delegated the power to act."<sup>36</sup> The Court stated that the law "cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands."<sup>37</sup>

### 5. Modern Expansion of Corporate Criminal Liability

Four historical developments facilitated the continued growth of corporate criminal liability in the twentieth century.<sup>38</sup> First, federal courts in the U.S. disregarded European liability standards as well as the standards laid out in the Model Penal Code, settling instead on *respondeat superior* as the vehicle for corporate liability. Second, Congress enacted a growing body of legislation authorizing the imposition of corporate criminal liability. Third, public civil enforcement became more feasible, providing the government with a tool other than corporate criminal liability that combined both public enforcement and corporate liability. The fourth development was the issuance of federal sentencing guidelines for crimes by organizations.

As it stands today, the scope of corporate criminal liability in the U.S. is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.<sup>39</sup>

### **B. Terminology**

Corporate lawbreakers are mostly handled by quasi-judicial bodies of government regulators like the FTC, EPA, and FDA. The administrative and civil enforcement measures generally used in corporate violations include warning letters, consent agreements or decrees not

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<sup>36</sup> *Id.* at 496.

<sup>37</sup> *Id.*

<sup>38</sup> See supra Note 4.

<sup>39</sup> See Supra Note 33. As a practical matter, however, the growth of deferred prosecution agreements has changed the corporate landscape dramatically.

to repeat the violation, orders to compel compliance, seizure or recall of commodities, administrative or civil monetary penalties, and court injunctions to refrain from further violations.

With so many competing actions, some experts prefer an expansive definition of corporate crime, defining it as any act committed by corporations that is punished by the state, regardless of whether it is punished under administrative, civil, or criminal law.<sup>40</sup> This broadens the definition of crime beyond the criminal law, which is the only governmental action for ordinary offenders. For clarity, this paper ignores, for the most part, civil regulatory action in favor of focusing on criminal fines, and sentencing of corporate executives and white-collar defendants under traditional criminal law prosecutions.

### 1. Corporate Crime: A Type of White-Collar Crime

When sociologist Edwin Sutherland coined the phrase "white-collar crime" in a 1939 speech, he defined it as "criminal acts committed by persons of the middle and upper socio-economic groups in connection with their occupations."<sup>41</sup> His definition generated controversy, and is now regarded as too restrictive, the class of the offender being irrelevant.<sup>42</sup> A new definition emerged in 1970, when Edelhertz defined white-collar crime as "an illegal act committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid payment or loss of money or property, or to obtain business or personal advantage."<sup>43</sup> It is this definition, in its basic form, which has informed present policy.

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<sup>40</sup> See Clinard, Marshall B., and Peter C. Yeager. *Corporate Crime*, Free Press (1980).

<sup>41</sup> Sutherland used the term in a 1939 speech, entitled "The White-Collar Criminal," he gave to a joint meeting of the American Sociological Society and the American Economic Association. See Strader, J. Kelly. *Understanding White Collar Crime*. 2002.

<sup>42</sup> See inter alia J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 *Hastings L. Rev.* 1199, 1204–14 (1999).

<sup>43</sup> Edelhertz, H. *The Criminal Elite*. NY: Worth Publishing. (1970).

## 2. Occupational vs. Corporate Crime

Scholars have attempted to break white-collar crime into two types: occupational and corporate. Occupational crime is committed largely by individuals or small groups in connection with their jobs. It includes embezzling from an employer, theft of merchandise, income tax evasion; manipulation of sales; fraud; and violations in the sale of securities.<sup>44</sup> Corporate crime, on the other hand, is enacted by collectivities or aggregates of discrete individuals. If a corporate official violates the law in acting for the corporation it is corporate crime, but if he gains personal benefit in the commission of a crime against the corporation, as in the case of embezzlement of corporate funds, it is occupational crime.<sup>45</sup> In addition, a corporation cannot, of course, be jailed, and thus the major penalty to control individual violators is not available for corporations per se.

As recent scandals have shown, this breakdown is not entirely helpful. The lines between occupational and corporate crime therefore frequently blur, and this reality is not merely semantic. Corporate executives, such as those in Enron, can steer entire companies down fraudulent paths, as well as manipulate the same company for their own benefit. The DOJ and other institutions have struggled with how to properly a) prosecute corporations and individual perpetrators and b) record and compile accurate data on corporate and white-collar crime. The rise of deferred and non-prosecution agreements in recent years is strong evidence of the thorny issues facing prosecutors. Indictment of corporate executives is not necessarily the end of a business, but indictment of the corporation may well be.<sup>46</sup> In terms of record-keeping, there can

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<sup>44</sup> Clinard, Marshall B. & Yeager, Peter Cleary. *Corporate Crime*. Somerset, NJ: Transaction Publishers. (2005).

<sup>45</sup> This certainly can blur lines, when as was the case in numerous recent scandals, the executive gains tremendously from increased share prices.

<sup>46</sup> In 2003, then-Deputy Attorney General Larry Thompson laid out what firms should do to avoid a corporate indictment, including waiving attorney-client privilege and leaving accused employees to their own devices. The effect of this highly controversial memo arose because of the coercive weight of a corporate indictment. For a journalistic analysis, see *Corporate Injustice*, Wall Street Journal. April 6, 2006; Page A14

be little doubt that the lack of a single, clear definition of corporate crime has contributed to the relative dearth of statistical data.

## **II. The Data**

Eight studies are canvassed below, representing a multitude of inquiries. Collectively, they offer a range of data on both white-collar crime statistics and corporate criminal prosecutions. The studies are ordered chronologically, so as to impart a sense of the evolution of this field of study and the regulatory environment that has driven the data. The special aim of this approach to demonstrate that, while interesting and reflective of a number of trends, even the sum total of the data leaves basic questions (How much corporate crime does America have? What level of corporate and white collar crime growth has occurred in the U.S.?) unanswered.

### **A. Sutherland's Conclusion**

Sutherland, arguably the premier American sociological criminologist of the 20th century, carried out the first empirical effort in the field.<sup>47</sup> In 1949, he published *White Collar Crime*, a 20-year study of the illegal behavior of 70 of the 200 largest U.S. non-financial corporations in the U.S.<sup>48</sup> More aptly titled "Corporate Crime," he found that a full 90% of these corporations were offenders of laws regulating advertising, labor, trade, patents, copyrights and more. Melodramatically, he penned his opening line: "Business is crime."<sup>49</sup>

Sutherland uncovered a total of 980 violations, with an average of 14 per company. He concluded that corporate crime was not an aberration perpetrated by deviant executives. Just as novice street criminals learn their trade through association with more seasoned offenders, executives learn the attitudes that result in corporate crime in the normal course of business.

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<sup>47</sup> The Encyclopedia of Criminology notes that his 1934 textbook *Principles of Criminology* was to become "the most influential textbook in the history of Criminology."

<http://www.routledge.com/ref/criminology/sutherland.html>.

<sup>48</sup> Sutherland, Edwin. *White Collar Crime*. 1949.

<sup>49</sup> *Id.*

Sutherland's findings have been confirmed in more recent research by sociologists Amitai Etzioni and Marshall Clinard. Etzioni found that over a nine-year period (1975-1984), 62% of Fortune 500 companies were involved in corrupt practices such as price fixing, bribery and violations of environmental laws.<sup>50</sup> A more in depth study by Clinard, discussed next, found that 45% of the 582 largest U.S. corporations were involved in some wrongdoing over a two-year period in 1975-1976.<sup>51</sup>

### **B. 1979 Federal Study on Illegal Corporate Behavior**

Published by the DOJ in 1979 and in book-form in 1980, Marshall Clinard and Peter Yeager conducted an empirical investigation of the 582 largest publicly owned corporations in the U.S. for two years during 1975-76.<sup>52</sup> Of the industries represented, 477 firms were in manufacturing, 18 wholesale, 66 retail, and 21 service. The annual sales for the corporations ranged from \$300 million to more than \$45 billion, with an average volume of \$1.7 billion for the parent firms.<sup>53</sup> The data cover all enforcement actions obtainable, with actions initiated or imposed by 24 federal agencies during 1975 and 1976.<sup>54</sup> While this reveals for the first time the wide range of corporate violations and government responses, the study is focused so broadly, by including any enforcement action, that criminal and civil differentiations are difficult.

#### **1. Findings**

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<sup>50</sup> Amatai Etzioni, "Is Corporate Crime Worth the Time?" *Business and Society Review* 36 (Winter 1990), 33, and J. Donahue, 17

<sup>51</sup> Marshall B. Clinard, *Illegal Corporate Behavior* (Washington, DC: U.S. Department of Justice, Law Enforcement Assistance Administration, 1979). See also Marshall B. Clinard and Peter C. Yeager, "Corporate Crime: Issues in Research," *Criminology* 16 (August, 1978), 255-72.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

Some action was initiated against more than three-fifths of the corporations examined. Approximately one-half of those examined were cited for violations of a severe or moderately serious nature (according to a multi-variable definition by the authors). The larger corporations committed a disproportionate number of violations.

A total of 1,553 federal cases were begun against all 582 corporations during 1975 and 1976, or an average of 2.7 federal cases each.<sup>55</sup> Of the 582 corporations, 350 (60.1%) had at least one federal action brought against them, and for those firms that had at least one action brought against them, the average was 4.4 cases. Approximately 40% of both the total group of 582 corporations and the 477 manufacturing firms were not charged with any violations by the 25 federal agencies during the two-year period.

For the 477 manufacturing corporations studied, a total of 1,529 sanctions were imposed.<sup>56</sup> Most of the sanctions were not severe: twice as many warnings, for example, were issued as compared to any other type, and an average of 3.9 warnings for corporations with at least one. Widely used were consent orders and consent decrees; they accounted for 12.9% of all sanctions against manufacturing corporations. Of the total of 1,529 sanctions, 1,446 were primary enforcement actions; 44.2% were warnings, including recalls; 23.4% were monetary penalties; 17.6% were unilateral orders; 12.4% were consent orders; and 2.4% were injunctions and other types of sanctions. The average number of enforcement actions was three per corporation; 4.5 for the 321 corporations with at least one sanction.

About one-third of the corporations received at least one warning. The same proportion received unilateral as well as consent orders. Two of 10 had at least one monetary penalty assessed against them and one of 10 had one or more injunctions imposed.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

The rates of recidivism varied from about 25% to as high as 60% for ordinary crime. It is interesting to compare these rates with those in the field of corporate sanctions. In Sutherland's study, for instance, a high rate of recidivism was found. He found that the average corporation had an enforcement action taken against it 14 times and that 97.1% were recidivists in the sense of having two or more adverse decisions against them. The 41 criminally convicted corporations had an average of four such convictions each. In restraint of trade, the 60 firms found in violation averaged 5.1 decisions; he noted that one-half to three-fourths of the corporations engaged in such practices so regularly that they could be termed habitual.

In this study, of the 477 manufacturing corporations, 210, or almost one-half, had two or more legal actions completed against them during 1975 and 1976; 18.2% had five or more. For serious and moderately serious violations, 124 firms, or one-fourth, had two or more actions, and 7.8% had five or more. If one could extrapolate the number of sanctions over the average equivalent period used by Sutherland, the result would far exceed an average of 14.<sup>57</sup>

## 2. Corporate Executive Criminal Prosecution

Of the cases profiled, 1.5% was for the conviction of a corporate officer.<sup>58</sup> Of the 56 executives convicted, 91% were for federal antitrust violations, 5% for financial or tax violations, and 4% of violations were for federal food and drug laws.

In sum, 16 officers of the 582 corporations were sentenced to a total of 594 days imprisonment (not suspended sentences); 360 days (60.6%) were accounted for by two officers who received six months each in one case. Of the remaining 234 days, one officer received a 60-

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<sup>57</sup> At 20 years for Sutherland's study, a simple comparison of the two will flesh this out since ½ of the firms had two or more over a two year period, with many having far more than that.

<sup>58</sup> Supra Note 56.

day sentence, another was sentenced to 45 days, and another received 30 days. The average for all imprisoned executives was 37.1 days.

**C. Bureau of Justice Statistics**

The DOJ's Bureau of Justice Statistics collects information on offenses considered to be white-collar crimes, including fraud, forgery and counterfeiting, bribery, and embezzlement.<sup>59</sup> Below is a comprehensive listing of these four crimes by year. Note that these are dispositions from federal courts, referring to those who are initially prosecuted, whether or not convicted or sentenced.<sup>60</sup> Noticeably, there is no breakdown between individuals and corporations.

Table C.1: WHITE COLLAR FEDERAL COURT DISPOSITIONS

	<b>FRAUD</b>	<b>FORGERY AND COUNTERFEITING</b>	<b>BRIBERY</b>	<b>EMBEZZLEMENT</b>
<b>1972</b>	2,930	5,311	160	1,835
<b>1974</b>	3,831	4,992	315	1,769
<b>1976</b>	4,760	5,044	235	1,910
<b>1978</b>	5,909	3,887	197	2,044
<b>1979</b>	6,220	3,176	197	1,832
<b>1980</b>	5,607	2,312	159	1,581
<b>1981</b>	5,712	2,102	220	1,919
<b>1982</b>	5,808	2,280	206	2,168
<b>1983</b>	7,029	2,752	192	2,137
<b>1984</b>	7,186	2,426	214	1,922
<b>1985</b>	7,094	2,372	236	1,950
<b>1986</b>	7,793	2,671	225	1,950
<b>1987</b>	8,854	2,529	237	2,263

<sup>59</sup> See Supra Note 7.

<sup>60</sup> *Id.*

<b>1988</b>	9,071	2,070	211	2,109
<b>1989</b>	8,946	1,733	255	2,036
<b>1990</b>	8,808	1,774	264	1,966
<b>1991</b>	8,562	1,503	265	2,062
<b>1992</b>	8,748	1,446	318	1,986
<b>1994</b>	9,139	1,400	327	1,641
<b>1995</b>	9,198	1,194	284	1,374
<b>1996</b>	9,831	1,215	237	1,291
<b>1997</b>	10,806	1,325	200	1,220
<b>1998</b>	10,413	1,556	211	1,285
<b>1999</b>	10,417	1,535	197	1,322
<b>2000</b>	10,165	1,421	203	1,236
<b>2001</b>	10,268	1,383	244	1,084
<b>2002</b>	10,722	1,544	163	1,048
<b>2003</b>	11,066	1,275	132	1,038
<b>2004</b>	10,499	1,165	156	859

The data reveal a strong rise in fraud through the 1970s and 1980s, with a slowing rate of increase in the 1990s. 2000-2004 shows barely any rise at all, though in their 2005 report on fraud, PWC Global reported a more dramatic rise from 2003-2005.<sup>61</sup>

Rates of prosecution for forgery and counterfeiting dropped steadily over the decades to about one-third of their 1972 value. Bribery rose intermittently, but was virtually even 32 years later. Embezzlement dropped by half after holding steady in the 1970s and 80s.

#### **D. Study on Criminal Fines Before and After Sentencing Guidelines**

<sup>61</sup> Bussman, Kai et al. Global Economic Crime Survey 2005. Price Waterhouse Coopers. 2005. Available at: <http://www.pwc.com/extweb/insights.nsf/docid/D1A0A606149F2806852570C0006716C0>.

Before 1984, corporate criminal defendants were basically subject to the set of penalties applicable to natural persons.<sup>62</sup> As a result, fines were relatively low. According to the authors of this study, Alexander, Arlen, and Cohen, 60% of the fines imposed on corporations were less than \$10,000, with an average fine of about \$46,000.<sup>63</sup> In 1984 and 1987, Congress enacted statutes aimed at increasing corporate criminal sanctions by upping statutory maximum penalties.<sup>64</sup> As the authors of the study note, despite an increase in corporate fines, they still generally remained less than the loss estimated to have been caused by the offense – particularly if the loss was large.<sup>65</sup>

Concluding that corporate criminal penalties were too low, the Sentencing Commission drafted federal Guidelines to govern the sentencing of organizations convicted of federal crimes.<sup>66</sup> Congress adopted these Guidelines, effective November 1, 1991.<sup>67</sup> The Guidelines purport to constrain judges' discretion over criminal fines, non-fine criminal sanctions (such as restitution), and non-monetary sanctions (such as probation). They are also intended to increase both fine and non-fine criminal sanctions imposed on corporations.<sup>68</sup>

Using a data set consisting of all criminal offenses for which public corporations were sentenced through the federal courts during the 1988-96 period, the authors focused exclusively on public corporations. The study located 243 sentences of public firms between 1988 and 1996.<sup>69</sup>

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<sup>62</sup> See Alexander, Cindy R., and Mark A. Cohen. "New Evidence on the Origins of Corporate Crime," *Managerial and Decision Economics*, 17: 421-35 (1996).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> A thorough list of the Federal Sentencing Guidelines Manuals and Amendments is available by the U.S. Sentencing Commission at <http://www.ussc.gov/guidelin.htm>.

<sup>67</sup> See Desio, Paula. An Overview of the Organizational Guidelines, available at: <http://www.ussc.gov/orgguide.htm>.

<sup>68</sup> *Id.*

<sup>69</sup> See Supra Note 62.

## 1. Types of Crimes

Table D.1 below presents initial statistics comparing pre-Guidelines and post-Guidelines penalties. It characterizes the 243 criminal cases according to the type of crime and the conditions under which sentencing occurred. As shown, about 40% (101 out of 243) are pre-Guidelines cases. The other 60% were sentenced after the Guidelines took effect. Of the 142 Guidelines-era cases, 105 are "unconstrained" in that they involve criminal conduct ending before November 1, 1991, or involve offenses that are not covered by the fine provisions of the Guidelines (for example, environmental, food and drug, wildlife, safety, export violations). The remaining 34 post-Guidelines offenses were sentenced under the Guidelines' fine provisions.

Table D.1: TYPE AND NUMBER OF FEDERAL CRIMINAL SENTENCES OF PUBLIC CORPORATIONS, 1988-96<sup>70</sup>

GUIDELINES ERA										
CRIME CATEGORIES	PRE-GUIDELINES		UNCONSTRAINED		CONSTRAINED		ERA SUBTOTAL		COMBINED	
	NUMBER	%	NUMBER	%	NUMBER	%	NUMBER	%	NUMBER	%
Antitrust	25	24.8	22	20.9	16	47.1	38	26.8	63	25.9
Environmental	18	17.8	31	29.5	0	0	31	21.8	49	20.2
Fraud	38	37.6	19	18.1	8	23.5	28	19.7	66	27.3
Campaign Donations	0	0	2	1.9	3	8.8	5	3.5	5	2.1
Export Violations	3	3.0	6	5.7	0	0	6	4.2	9	3.7
Foreign Bribery	3	3.0	2	1.9	0	0	2	1.4	5	2.1
Food and Drug	7	6.9	10	9.5	0	0	10	7.0	17	7.0
Import Violations	0	0	1	.9	1	2.9	3 <sup>a</sup>	2.1	3	1.2
Safety	3	3.0	3	2.9	0	0	3	2.1	6	2.5
Tax	2	2.0	2	1.9	1	2.9	3	2.1	5	2.1
Wildlife	1	1.0	2	1.9	0	0	2	1.4	3	1.2
Miscellaneous	1	1.0	5	4.8	5	14.7	11 <sup>a</sup>	7.7	12	4.9
Total	101		105		34		142 <sup>a</sup>		243	

<sup>70</sup> *Id.*

Fraud constitutes the single largest source of convicted wrongdoing by publicly held firms, accounting for 27% of all convictions. This is consistent with previous analyses of criminal convictions by public and private firms. Although fraud constitutes 38% of pre-Guideline convictions, it comprises only 20% of post-Guidelines cases.

Antitrust and environmental offenses are two other significant sources of convictions in the data, comprising 26% and 20% of all cases, respectively. Antitrust sentences rose from 25% of pre-Guidelines cases to 27% during the post-Guidelines era and 47% of cases sentenced under the Guidelines. The percentage of crimes involving environmental offenses rose slightly, from 18% to 22% in the post-Guidelines era. This rise is somewhat surprising since during this period both Antitrust and the EPA announced policies to not seek criminal charges against firms that take appropriate steps to deter, report, and correct wrongdoing.

## 2. Number of crimes

Table D.2: FEDERAL CRIMINAL SENTENCES OF PUBLIC CORPORATIONS, BY YEAR OF SENTENCE<sup>71</sup>

GUIDELINES ERA					
YEAR	PRE-GUIDELINES	CONSTRAINED	UNCONSTRAINED	SUBTOTAL	TOTAL
1988	19	0	0	0	19
1989	27	0	0	0	27
1990	29	0	0	0	29
1991	26	0	2	2	28
1992	0	0	29	29	29
1993	0	3	28	32	32
1994	0	11	17	28	28
1995	0	10	21	31	31
1996	0	10	8	20 <sup>a</sup>	20
Total	101	34	105	142	243

As shown in the last column of Table D.2 above, there were similar numbers of corporate criminal convictions before and after the Guidelines went into effect. The 101 sentences

<sup>71</sup> *Id.*

imposed from 1988 through November 1, 1991, represent an average sentencing rate of 2.2 per month, compared to 2.3 per month for the 142 firms sentenced between 1991 and 1996. The absence of an increase in the rate at which corporations have been sentenced is inconsistent with the idea that prosecutors would respond to higher penalties by seeking more frequent prosecution.

### 3. Criminal Fines

Table D.3: PRE-NOVEMBER 1991 COMPARISON TO GUIDELINES-CONSTRAINED SANCTIONS, 1988-96<sup>72</sup>

<b>FINE</b>	<b>N</b>	<b>MEAN (\$)</b>	<b>MEDIAN (\$)</b>	<b>MAXIMUM (\$)</b>
Pre-November 1991	99	1,918,309	632,661	28,799,559
Guidelines	34	19,050,717	3,095,460	340,000,000
Total:				
Pre-November 1991	101	114,985,458 <sup>a</sup>	1,612,775	10,281,442,731
Guidelines	34	49,261,188	4,427,608	646,233,198

NOTE – All dollars updated to 1996.

<sup>a</sup> Includes \$10.3 billion total sanction for Exxon Valdez. If that were excluded, the mean would be \$13.3 million.

As shown in Table D.3 above, criminal fines are significantly higher in Guidelines-constrained cases than they were previously. The mean criminal fine imposed on a publicly held firm increased from \$1.9 million to \$19.1 million, representing a ten-fold jump. The median fine increased almost fivefold from \$633 thousand to \$3.1 million. Also of note, the percentage of fines over \$1 million increased from 37% to 59% and the percentage of fines that were relatively small (\$50,000 or less) decreased from 15% to 5%.

Total pecuniary sanctions include the criminal fine and a variety of non-fine penalties, such as restitution, disgorgement, remedial orders, forfeiture, assessments, and compensation to the government for enforcement expenses, plus pecuniary civil penalties and private liability.

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<sup>72</sup> *Id.*

Table D.3 shows that total pecuniary sanctions increased, with the median rising from \$1.6 to \$4.4 million. While the mean sanction decreased from \$115 million to \$49.3 million, exclusion of one outlier shows an increase from \$13.3 million to \$49.3 million, a nearly fourfold increase.

### **E. U.S. Sentencing Commission**

The Sentencing Commission has published data since 1995.<sup>73</sup> Table 5.1 below is an amalgamation from each year of the number of cases for each of seven white-collar offenses. Included also is the percentage the offense represents of all guidelines-constrained cases.

Table E.1: DISTRIBUTION OF SENTENCED GUIDELINE DEFENDANTS BY PRIMARY OFFENSE CATEGORY<sup>74</sup>

YEAR	FRAUD		EMBEZZLEMENT		FORGERY/ COUNTERFEITING		BRIBERY		TAX		MONEY LAUNDERING		ANTITRUST	
	NO.	%*	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%	NO.	%
1995	5,909	15.4	815	2.1	790	2.1	303	0.8	744	1.9	832	2.2	18	0.0
1996	6,028	14.2	787	1.9	730	1.7	256	0.6	851	2.0	827	2.0	15	0.0
1997	6,929	14.2	834	1.7	666	1.4	279	0.6	996	2.0	895	1.8	11	0.0
1998	6,330	12.5	770	1.5	776	1.5	252	0.5	859	1.7	913	1.8	11	0.0
1999	6,199	11.2	959	1.7	1,295	2.3	196	0.4	728	1.3	1,001	1.8	44	0.1
2000	6,286	10.5	940	1.6	1,314	2.2	257	0.4	769	1.3	991	1.7	40	0.1
2001	6,691	11.2	764	1.3	1,272	2.1	254	0.4	572	1.0	918	1.5	19	0.0
2002	7,108	11.1	734	1.1	1,466	2.3	168	0.3	622	1.0	940	1.5	17	0.0
2003	7,468	10.7	761	1.1	1,267	1.8	169	0.2	490	0.7	831	1.2	12	0.0
2004	7,261	10.4	630	0.9	1,182	1.7	166	0.2	515	0.7	842	1.2	11	0.0
2005	6,809	9.4	577	0.8	1,083	1.5	199	0.3	604	0.8	934	1.3	18	0.0

Fraud is the largest offense each year, and has sustained modest absolute growth, but substantial overall decline in percentage representation. Embezzlement has dropped by a third, and its representation among all sentences has dropped by over a half. Forgery and counterfeiting saw a 50% rise over the 11 year period, but a decline in percentage terms by a quarter. Bribery fell by a third, and its percentage representation by over a half. Tax fell by

<sup>73</sup> The U.S. Sentencing Commission publishes annual reports available at <http://www.ussc.gov/linktojp.htm>.

<sup>74</sup> This chart is aggregated from the annual reports of the U.S. Sentencing Commission, available at <http://www.ussc.gov/linktojp.htm>.

15%, and its representation of the whole by over a half. Money laundering rose 13% in absolute terms, but fell 40% in percentage terms. Antitrust saw fluctuations around 2000, but was level by 2005.

### **F. Corporate Criminal Fines in the 1990s**

The following table shows the 100 largest criminal fines paid by corporations that pled guilty or no-contest in the 1990s.<sup>75</sup> Fourteen categories of crime are represented: Environmental (38), antitrust (20), fraud (13), campaign finance (7), food and drug (6), financial (4), false statements (3), illegal exports (3), illegal boycott (1), worker death (1), bribery (1), obstruction of justice (1), public corruption (1), and tax evasion (1).

Table F.1: THE TOP 100 CORPORATE CRIMINALS OF THE 1990'S<sup>76</sup>

	COMPANY	CRIME	FINE	DATE	FORTUNE 500 RANKING, 2006
1.	F. Hoffman-LaRoche Ltd.	Antitrust	\$500 mil.	05/99	
2.	Daiwa Bank Ltd.	Financial	\$340 mil.	03/96	
3.	BASF Aktiengesellschaft	Antitrust	\$225 mil.	05/99	
4.	SGL Carbon	Antitrust	\$135 mil.	05/99	
5.	Exxon Corp. Shipping	Environmental	\$125 mil.	03/91	2
6.	UCAR International, Inc.	Antitrust	\$110 mil.	04/98	
7.	Archer Daniels Midland	Antitrust	\$100 mil.	10/96	52
8.	Banker's Trust (tied)	Financial	\$60 mil.	03/99	
8.	Sears Bankruptcy Svcs (tied)	Fraud	\$60 mil.	02/99	
10.	Haarman & Reimer Corp.	Antitrust	\$50 mil.	02/97	
11.	Louisiana-Pacific Corp.	Environmental	\$37 mil.	06/98	
12.	Hoechst AG	Antitrust	\$36 mil.	05/99	
13.	Damon Clinical Labs, Inc.	Fraud	\$35.2 mil.	10/96	
14.	C.R. Bard Inc.	Food and Drug	\$30.9 mil.	10/93	
15.	Genentech Inc.	Food and Drug	\$30 mil.	04/99	
16.	Nippon Gohsei	Antitrust	\$21 mil.	07/99	
17.	Pfizer Inc. (tied)	Antitrust	\$20 mil.	07/99	25
17.	Summitville Mining (tied)	Environmental	\$20 mil.	05/96	
19.	Lucas Western Inc. (tied)	False Stmts.	\$18.5 mil.	01/95	
19.	Rockwell Int'l Corp. (tied)	Environmental	\$18.5 mil.	03/92	

<sup>75</sup> See Supra Note 9.

<sup>76</sup> This table modified from a report by Corporate Crime Reporter, at: <http://www.corporatecrimereporter.com/>.

21.	Royal Caribbean Cruises	Environmental	\$18 mil.	07/99	
22.	Teledyne Industries Inc.	Fraud	\$17.5 mil.	10/92	
23.	Northrop	False Stmts.	\$17 mil.	03/90	55
24.	Litton Applied Technology	Fraud	\$16.5 mil.	07/99	
25.	Iroquois Pipeline Operating	Environmental	\$15 mil.	06/96	
26.	Eastman Chemical Co.	Antitrust	\$11 mil.	10/98	
27.	Copley Pharmaceutical, Inc.	Food and Drug	\$10.65 mil.	06/97	
28.	Lonza AG	Antitrust	\$10.5 mil.	03/99	
29.	Kimberly Home Health Care	Fraud	\$10.08 mil.	07/99	
30.	Ajinomoto Co. Inc. (tied)	Antitrust	\$10 mil.	10/96	
30.	(BCCI) (tied)	Financial	\$10 mil.	01/90	
30.	Kyowa Hakko Kogyo (tied)	Antitrust	\$10 mil.	10/96	
30.	Warner-Lambert Co.(tied)	Food and Drug	\$10 mil.	12/95	
34.	General Electric	Fraud	\$9.5 mil.	07/92	5
35.	Royal Caribbean (tied)	Environmental	\$9 mil.	06/98	
35.	Showa Denko Carbon (tied)	Antitrust	\$9 mil.	05/99	
37.	IBM East Europe/Asia Ltd.	Illegal Exports	\$8.5 mil.	08/98	
38.	Empire Sanitary Landfill Inc.	Campaign Fin.	\$8 mil.	10/97	
39.	Colonial Pipeline Co. (tied)	Environmental	\$7 mil.	03/99	
39.	Eklof Marine Corp.(tied)	Environmental	\$7 mil.	09/97	
41.	Chevron (tied)	Environmental	\$6.5 mil.	06/92	6
41.	Rockwell Int'l Corp.(tied)	Environmental	\$6.5 mil.	04/96	
43.	Tokai Carbon Ltd. Co.	Antitrust	\$6 mil.	05/99	
44.	Allied Clinical Labs, (tied)	Fraud	\$5 mil.	11/96	
44.	Northern Brands Int'l (tied)	Fraud	\$5 mil.	01/99	
44.	Ortho Pharmaceutical (tied)	Obst. of Justice	\$5 mil.	01/95	
44.	Unisys (tied)	Bribery	\$5 mil.	09/91	312
44.	Georgia Pacific Corp. (tied)	Tax Evasion	\$5 mil.	10/91	94
49.	Kanzaki Specialty Papers	Antitrust	\$4.5 mil.	07/94	
50.	ConAgra Inc.	Fraud	\$4.4 mil.	03/97	84
51.	Ryland Mortgage Co.	Financial	\$4.2 mil.	08/98	
52.	Blue Cross Blue Shield (tied)	Fraud	\$4 mil.	07/98	
52.	Borden Inc. (tied)	Antitrust	\$4 mil.	03/90	
52.	Dexter Corp. (tied)	Environmental	\$4 mil.	09/92	
52.	Southland Corp. (tied)	Antitrust	\$4 mil.	03/90	
52.	Teledyne Industries (tied)	Illegal Exports	\$4 mil.	02/95	
52.	Tyson Foods Inc. (tied)	Pub.Corruption	\$4 mil.	01/98	72
58.	ALCOA (tied)	Environmental	\$3.75 mil.	07/91	
58.	Costain Coal Inc. (tied)	Worker Death	\$3.75 mil.	03/93	
58.	U.S. Sugar Corp. (tied)	Environmental	\$3.75 mil.	12/91	
61.	Saybolt, Inc.	Environmental	\$3.4 mil.	08/98	
62.	Bristol-Myers Squibb (tied)	Environmental	\$3 mil.	05/92	92
62.	Chemical Waste Mgmt (tied)	Environmental	\$3 mil.	10/92	
62.	Ketchikan Pulp Co.(tied)	Environmental	\$3 mil.	04/95	
62.	United Technologies (tied)	Environmental	\$3 mil.	05/91	51

62.	Warner-Lambert Inc. (tied)	Environmental	\$3 mil.	09/97	
67.	Arizona Chemical Co. (tied)	Environmental	\$2.5 mil.	10/96	
67.	Consolidated Rail (tied)	Environmental	\$2.5 mil.	07/95	
69.	International Paper	Environmental	\$2.2 mil.	08/91	71
70.	Consolidated Edison (tied)	Environmental	\$2 mil.	11/94	198
70.	Crop Growers Corp. (tied)	Campaign Fin.	\$2 mil.	01/97	
70.	E-Systems Inc. (tied)	Fraud	\$2 mil.	09/90	
70.	HAL Beheer BV (tied)	Environmental	\$2 mil.	10/98	
70.	John Morrell and Co. (tied)	Environmental	\$2 mil.	02/96	
70.	United Technologies (tied)	Fraud	\$2 mil.	09/92	51
76.	Mitsubishi Int'l Corp.	Antitrust	\$1.8 mil.	07/94	
77.	Blue Shield of CA (tied)	Fraud	\$1.5 mil.	05/96	
77.	Browning-Ferris Inc. (tied)	Environmental	\$1.5 mil.	06/98	
77.	Odwalla Inc. (tied)	Food and Drug	\$1.5 mil.	07/98	
77.	Teledyne Inc. (tied)	False Stmts.	\$1.5 mil.	09/93	
77.	Unocal Corp. (tied)	Environmental	\$1.5 mil.	03/94	285
82.	Doyon Drilling Inc. (tied)	Environmental	\$1 mil.	05/98	
82.	Eastman Kodak (tied)	Environmental	\$1 mil.	04/90	149
82.	Case Corp. (tied)	Illegal Exports	\$1 mil.	06/96	
85.	Marathon Oil	Environmental	\$900,000	06/91	35
86.	Hyundai Motor Co.	Campaign Fin.	\$600,000	12/95	
87.	Baxter Int'l Inc. (tied)	Illegal Boycott	\$500,000	03/93	220
87.	Bethship-Sabine Yard (tied)	Environmental	\$500,000	07/95	
87.	Palm Beach Cruises (tied)	Environmental	\$500,000	07/99	
87.	Princess Cruises (tied)	Environmental	\$500,000	07/99	
91.	Cerestar Bioproducts (tied)	Antitrust	\$400,000	06/98	
91.	Sun-Land Products (tied)	Campaign Fin.	\$400,000	08/98	
93.	American Cyanamid (tied)	Environmental	\$250,000	12/90	
93.	Korean Air Lines (tied)	Campaign Fin.	\$250,000	12/95	
93.	Regency Cruises Inc. (tied)	Environmental	\$250,000	07/99	
96.	Adolph Coors Co. (tied)	Environmental	\$200,000	11/90	430
96.	Andrew & Williamson (tied)	Food and Drug	\$200,000	11/97	
96.	Daewoo Int. Corp. (tied)	Campaign Fin.	\$200,000	04/96	
96.	Exxon Corp. (tied)	Environmental	\$200,000	03/91	2
100.	Samsung America Inc.	Campaign Fin.	\$150,000	02/06	

In sum, 21% of today's Fortune 500, which includes only American companies, paid a criminal fine of at least \$150,000 in the 1990s.<sup>77</sup>

### **G. Corporate Fraud Task Force**

<sup>77</sup> See Supra Note 75.

In July 2002, the President established the Corporate Fraud Task Force, comprised of a DOJ group focused on corporate fraud efforts, as well as an interagency working group focused on generating cooperation across law enforcement agencies. The Task Force's second annual report, published in 2004, noted over 500 corporate fraud convictions or guilty pleas, an increase of 250 over the previous year. Since inception, the Task Force had charged over 900 defendants and 60 corporate CEOs and presidents with some type of crime involving corporate fraud.

**H. Transactional Records Access Clearinghouse Data**

The latest available data from DOJ show that during February 2006, the government filed 473 new white-collar prosecutions. According to case-by-case information analyzed by the Transactional Records Access Clearinghouse (TRAC) under the Freedom of Information Act from the Executive Office for U.S. Attorneys, this number is down 10.6% from a month before.<sup>78</sup>

Table H.1: CRIMINAL WHITE COLLAR CRIME PROSECUTIONS FEBRUARY 2006-2001<sup>79</sup>

Number Latest Month	473
% Change from previous month	-10.6
% Change from 1 year ago	-2.5
% Change from 5 years ago (Including Magistrate Court)	-43.3
% Change from 5 years ago (Excluding Magistrate Court)	-45.4

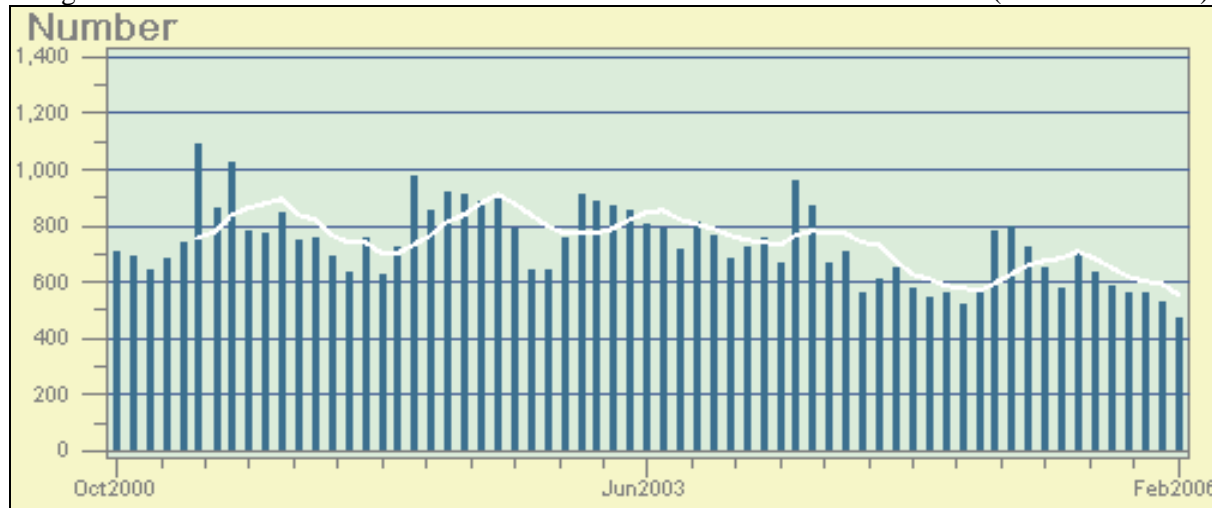
When monthly 2006 prosecutions are compared with those of the same period in the previous year, the filings were down 2.5%. Prosecutions over the past year are still much lower than they were five years ago. Overall, the data show that prosecutions are down 43.3% from

<sup>78</sup> Trac Reports. White Collar Crime Prosecutions for February 2006. Transactional Access Clearinghouse available at [http://trac.syr.edu/tracreports/bulletins/white\\_collar\\_crime/monthlyfeb06/](http://trac.syr.edu/tracreports/bulletins/white_collar_crime/monthlyfeb06/).

<sup>79</sup> *Id.*

levels reported in 2001. The broad pattern of decrease in white collar crime prosecutions over the past five years is shown more clearly in Figure H.1.

Figure H.1: WHITE-COLLAR PROSECUTIONS OVER THE LAST 5 YEARS (MOVING AVG.)<sup>80</sup>



The vertical bars represent the number of white collar crime prosecutions recorded on a month-to-month basis. The superimposed line on the bars plots the six-month moving average so that natural fluctuations are smoothed out. The one and five-year rates of change in Table H.1 and in sections that follow are based upon this six-month moving average.

### 1. Lead Charge in White-Collar Crime Prosecutions

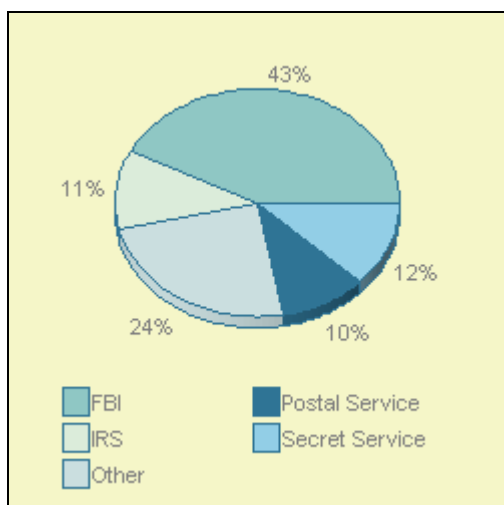
The lead investigative agency for white collar prosecutions in February 2006 was the FBI accounting for 43%.<sup>81</sup> Other agencies with substantial numbers of white-collar crime referrals were: Secret Service (12%), IRS (11%), and Postal Service (10%).

Figure H.2: PROSECUTIONS BY INVESTIGATIVE AGENCY

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<sup>80</sup> *Id.*

<sup>81</sup> See *Supra* Note 77.



## 2. U.S. Magistrate Courts

In February 2006, 15% of white-collar cases took place in U.S. magistrate courts which handle less serious misdemeanor cases, including "petty offenses."<sup>82</sup> In February, the most frequently cited magistrate court lead charge (31.5% of filings) involved bank fraud.<sup>83</sup> Other frequently prosecuted charges include: "Fraud and related activity" (12.3%), "Conspiracy" (6.8%), "Fraud and related activity - access devices" (6.8%), and Mail Fraud (6.8%).

## 3. U.S. District Courts

Table H.2 below shows the top lead charges recorded in the prosecution of white-collar crime matters filed in U.S. District court during February 2006.

Table H.2: TOP 10 CHARGES FILED IN U.S. DISTRICT COURT<sup>84</sup>

LEAD CHARGE	COUNT	RANK	1 YR. AGO	5 YRS. AGO
18 USC 1341 - Mail Fraud - Frauds and swindles	56	1	2	2

<sup>82</sup> See Title 18, Rule 58 Petty Offenses and Other Misdemeanors noting "these rules apply in petty offense and other misdemeanor cases and on appeal to a district judge in a case tried by a magistrate judge."

<sup>83</sup> See Supra Note 81.

<sup>84</sup> *Id.*

18 USC 1344 - Bank fraud	41	2	1	1
18 USC 1343 - Fraud by wire, radio, or television	34	3	4	5
18 USC 1029 - Fraud and related activity - access devices	29	4	5	6
18 USC 1028 - Fraud and related activity - id documents	21	5	6	13
18 USC 0371 - Conspiracy to commit offense or to defraud US	20	6	3	3
18 USC 0287 - False, fictitious or fraudulent claims	19	7	16	17
18 USC 1001 - Fraud/false statements generally	16	8	8	7
18 USC 0513 - Securities of the States and private entities	12	9	17	11
18 USC 0641 - Public money, property or records	12	9	7	12

"Mail Fraud - Frauds and swindles" was the most frequent recorded lead charge.<sup>85</sup> This was ranked 2<sup>nd</sup> both a year ago and five years ago. Ranked 2<sup>nd</sup> in frequency was "Bank fraud." This statute was ranked 1<sup>st</sup> a year ago, as well as five years ago. Ranked 3<sup>rd</sup> was "Fraud by wire, radio, or television," which was 4<sup>th</sup> a year ago, and 5<sup>th</sup> 5 years ago.

Among these lead charges, the one showing the greatest increase in prosecutions (up 250%) compared to one year ago was "False, fictitious or fraudulent claims."<sup>86</sup> This was the same statute that had the largest increase (96.9%) when compared with five years ago. The one showing the sharpest decline in prosecutions compared to one year ago (down 32.6%) was Conspiracy. Compared to five years ago, the most significant decline in prosecutions (67.8%) was for filings where the lead charge was "Bank fraud."

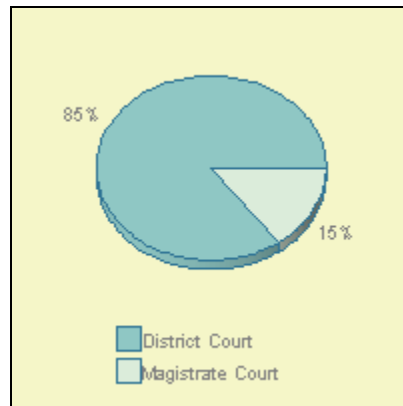
The figure below depicts the division of cases between District and Magistrate Court.

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<sup>85</sup> *Id.*

<sup>86</sup> See Title 18, Section 287.

Figure H.3: DISTRICT COURT VS. MAGISTRATE COURT<sup>87</sup>



#### 4. White-Collar Crime Prosecutions by Judicial District

In February 2006, the government brought approximately 163.5 white collar crime prosecutions for every ten million people in the U.S.<sup>88</sup> Understandably, there is great variation in the number of prosecutions that are filed in each of the nation's ninety-four federal judicial districts.<sup>89</sup> The ten districts with the largest February numbers (per capita) are shown in Table H.3.<sup>90</sup>

Table H.3 TOP 10 DISTRICTS (PER TEN MILLION PEOPLE) IN PER CAPITA PROSECUTIONS<sup>90</sup>

JUDICIAL DISTRICT	PER CAPITA	RANK	1 YR AGO	5 YRS AGO
La, M	1,317	1	-	1
Tenn, W	942	2	2	6
Miss, S	793	3	-	8
Penn, W	619	4	16	44
Ken, W	522	5	-	20
Ark, E	465	6	-	10

<sup>87</sup> See Supra Note 85.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

La, W	463	7	9	36
Mo, E	462	8	1	9
Penn, M	398	9	24	17
Ohio, S	389	10	21	52

Middle District of Louisiana (Baton Rouge), with 1,317 prosecutions (as compared with an average of 163.5 prosecutions) was the most active during February 2006. Five years ago, it was also number one. Western District of Tennessee (Memphis) ranked 2nd, as it did a year ago. Five years ago, the district's position was 6. Southern District of Mississippi (Jackson) is now 3rd, whereas five years ago, the district's position was 8.

The district which showed the greatest growth in white collar prosecutions compared to one year ago (57.8%) was Middle District of Pennsylvania (Scranton). Compared to five years ago, the most growth (9.4%) occurred in Western District of Pennsylvania (Pittsburgh).

In the last year, the judicial district court recording the largest drop in white-collar crime prosecutions (10.7%) was Eastern District of Missouri (St. Louis). But over the past five years, Eastern District of Arkansas (Little Rock) showed the largest drop at 33.3%.

### **III. Why Poor Reporting?**

There are many plausible reasons for the current state of affairs. This paper, however, will examine three of the most likely sub-questions of the inquiry. Is better data simply impossible to obtain? Is the Justice Department too bureaucratic to break with historical inertia? Does the data actually exist and is simply not made public?

#### **A. Obtaining the Data**

The first question that may generally come to mind is whether proper corporate or white collar criminal data could actually be collected. To answer this, one need only look at the history of criminal data collection to see that in fact white collar data has for most of the life of U.S. crime reporting been collected alongside other more traditional forms of crime. This suggests quite clearly that whatever reporting refinements or additions would be helpful to the community of interested legislators, investors, and citizens could be achieved without radical systemic changes.

##### 1. History of Uniform Crime Reporting

In 1927, the International Association of Chiefs of Police (IACP) formed the Committee on Uniform Crime Records with the goal of filling the latent need for national police statistics.<sup>91</sup> The result was the Uniform Crime Reporting (UCR) Program of 1929, which included a manual distributed to law enforcement agencies establishing definitions for offenses known whether or not there was an arrest.<sup>92</sup> The following seven crimes were prioritized because of their “seriousness, frequency of occurrence, pervasiveness in all geographic areas, and likelihood of

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<sup>91</sup> A good history is provided by the FBI in its UCR Handbook available at <http://www.fbi.gov/filelink.html?file=/ucr/handbook/ucrhandbook04.pdf>.

<sup>92</sup> Id.

being reported:” felonious homicide, rape, robbery, aggravated assault, burglary—breaking or entering, larceny-theft, and auto theft.<sup>93</sup> “Other” crimes, including white collar categories like fraud and embezzlement, were lumped into a second tier.<sup>94</sup> During the following months, law enforcement agencies in 400 cities from 43 states and the territories of Puerto Rico, Alaska, and Hawaii submitted statistics, from which the IACP published the first monthly Uniform Crime Reports for the United States and Its Possessions.<sup>95</sup> The pamphlet consisted of one table, “Number of Offenses Known to the Police: January 1930.”<sup>96</sup>

Later that year, at the urging of the IACP, the Congress passed 28 USC §534.<sup>97</sup> This Act granted the Attorney General the ability to “acquire, collect, classify, and preserve criminal identification, crime, and other records” and the ability to appoint officials to oversee this duty.<sup>98</sup> Pursuant to this, the FBI has served since 1930 as the data clearinghouse for the UCR; organizing, collecting, and disseminating the information voluntarily submitted by local, state, federal and tribal law enforcement agencies.<sup>99</sup>

The scope of the UCR Program has expanded over the years in response to suggestions from law enforcement advisory groups and to comply with federal mandates.<sup>100</sup> For example, agencies began contributing data on the age, sex, and race of arrestees in 1952.<sup>101</sup> Additionally, national data concerning the age, sex, and race of murder victims and the weapon used were available for the first time when the Program published the Supplementary Homicide Report in

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<sup>93</sup> An example of the reporting guidelines is available at: <http://www.fbi.gov/ucr/guidelines/guidelines.html>.

<sup>94</sup> *Id.*

<sup>95</sup> See Supra Note 91.

<sup>96</sup> *Id.*

<sup>97</sup> See Title 28, Section 534, of the United States Code.

<sup>98</sup> *Id.*

<sup>99</sup> The FBI is the principle investigative arm of the DOJ, and was given this name in 1935. On July 26, 1908, then-Attorney General Charles J. Bonaparte appointed an unnamed force of Special Agents to be the original investigative force for DOJ. It was renamed various times in the 1930s, settling on FBI only in 1935.

<sup>100</sup> See Supra Note 91.

<sup>101</sup> *Id.*

1962.<sup>102</sup> In 1978, Congress mandated the collection of arson data and, in 1982, directed the FBI to permanently count arson along with the basic property offenses.<sup>103</sup> Following passage of the Hate Crime Statistics Act of 1990, the FBI began collecting from agencies the additional variable of bias motivation in incidents in which the offense resulted in whole or in part because of the offender's prejudice against a race, religion, sexual orientation, or ethnicity/national origin.<sup>104</sup> Congress amended this Act in 1994 to include bias against physical or mental disability.<sup>105</sup>

## 2. Relegation of White Collar Crime

For our purposes, the 1980s were an important time in the evolution of crime statistics reporting, because a series of National UCR Conferences was held during those years to determine necessary system revisions.<sup>106</sup> With members from the IACP, Department of Justice, including the FBI, and the newly formed Bureau of Justice Statistics (BJS), a “Blueprint for the Future of the Uniform Crime Reporting Program” was released in 1985.<sup>107</sup> The report proposed splitting reported data into two clear categories, the eight ‘serious’ crimes and twenty-one less commonly reported crimes. The eight serious crimes became known as Part I index crimes, and these were themselves split into two categories: violent and property crimes.<sup>108</sup> Aggravated assault, forcible rape, murder, and robbery are classified as violent, while arson, burglary, larceny-theft, and motor vehicle theft are classified as property crimes. The additional twenty-one crimes are considered Part II index crimes, with the following categories indexed: simple

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<sup>102</sup> See Barnett, Cynthia. The Measurement of White-Collar Crime Using Uniform Crime Reporting. Department of Justice. 2002.

<sup>103</sup> See the Data Quality Guidelines published by the FBI available at: <http://www.fbi.gov/ucr/guidelines/02DataQualityGuidelinesDownloadable.doc>.

<sup>104</sup> H.R. 1048.

<sup>105</sup> Information about this change can be accessed in the annual reports pursuant to the law, available at: <http://www.fbi.gov/ucr/hc2005/abouthc.htm>.

<sup>106</sup> See Supra Note 102.

<sup>107</sup> An account of this is provided in the 2005 publication of Crime in the United States available at: [http://www.fbi.gov/ucr/05cius/about/about\\_ucr.html](http://www.fbi.gov/ucr/05cius/about/about_ucr.html).

<sup>108</sup> *Id.*

assault, curfew offenses and loitering, embezzlement, forgery and counterfeiting, disorderly conduct, driving under the influence, drug offenses, fraud, gambling, liquor offenses, offenses against the family, prostitution, public drunkenness, runaways, sex offenses, stolen property, vandalism, vagrancy, and weapons offenses.

A careful look will note the basic white-collar offenses assembled here among the “other” offenses. To say that collection of better, more specific data (details of what this would look like and potential limitations to be discussed in Part IV) is not possible makes no sense in light of the fact that the entire infrastructure is essentially in place. There are of course problems with the existing system, such as different reporting metrics among the states, some non-compliance, and general data biases (these will be discussed also in Part IV), but the basic point is that little beyond issuing new guidelines to local and state law enforcement agencies would be required.

## **B. Self-Starting**

As it stands, the collection of UCR data is a collaborative effort on the part of city, county, state, tribal, and federal law enforcement agencies who voluntarily provide reports on crimes known to the police and on persons arrested. For the most part (some states do not have a UCR program and thus submit their data directly to the FBI),<sup>109</sup> participating agencies submit monthly crime reports, using uniform index offense definitions, to a centralized repository within their state.<sup>110</sup> This mainly includes crimes reported to the police by the general public, but may also include crimes that police officers discover. The state UCR Program then forwards the data to the FBI's national UCR program. This national data collection effort culminates in three

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<sup>109</sup> See Supra Note 91.

<sup>110</sup> *Id.*

annual publications: *Crime in the United States*, *Hate Crime Statistics*, and *Law Enforcement Officers Killed and Assaulted*.<sup>111</sup> *Crime in the United States* is the primary report, including offense and arrest data, the number of law enforcement employees, and particular trend analyses.<sup>112</sup>

The execution of this multi-party effort might suggest a well-functioning system, but nevertheless, a plausible argument for why white-collar and particularly corporate criminal data has not occupied a critical role in statistical reporting terms might be based on bureaucratic inertia. A central prong of public choice theory has in fact focused on the private actions of bureaucratic actors, because agency leaders often have divergent interests from their public constituency.<sup>113</sup> Beholden to Congress for their budgets or executives for their jobs, entire agencies can become “captured” as Stigler has pointed out.<sup>114</sup> Has this happened in this case? Probably not, but there is more to this perspective than mere capture theory. In general, public choice theory seeks to marry economic insights to political science, viewing political actors (in this case we might broaden the scope to include the agency itself) as inherently self-interested.<sup>115</sup>

To understand the current state of white-collar reporting, public choice theory cautions that the right perspective is not that of the public interest at large, but rather the incentive structure of the specific reporting arm. Just as one might examine the expected benefits when analyzing an individual’s actions, it may be useful to look at the entity-interests of the DOJ. What exactly would the agency stand to gain from an overhaul of their reporting standards? What does the Bureau of Justice Statistics specifically stand to gain from even modest reform?

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<sup>111</sup> These reports are made available by the FBI at: <http://www.fbi.gov/ucr/ucr.htm#cius>.

<sup>112</sup> *Id.*

<sup>113</sup> See Niskanen, W. A. (1987) “Bureaucracy.” In Charles K. Rowley (Ed. ). *Democracy and Public Choice*. Oxford: Basil Blackwell.

<sup>114</sup> See Becker, G. and G. Stigler. 1974. “Law Enforcement, Malfeasance, and the Compensation of Enforcers,” *Journal of Legal Studies* 3, 1-18.

<sup>115</sup> See generally, Buchanan, James M. and Gordon Tullock. (1962), *The Calculus of Consent*. Ann Arbor: University of Michigan Press; Arrow, Kenneth J. (1951, 2nd ed., 1963), *Social Choice and Individual Values*.

Apparently little. After all, many of the important changes in the UCR's history have come at the behest of congressional urging or outright legislative mandates.<sup>116</sup> In addition, the bureaucratic inertia explanation comports with more general organizational theory on agency interests.<sup>117</sup> A self-initiated move could help the agency and the federal government as a whole fight white collar crime, but on the flipside it could also highlight more pervasive deficiencies or even organizational incompetence. In other words, action includes risk. When the payoff (from the agency's perspective, not the public's) is small, even modest reform may be outweighed by conservatism.<sup>118</sup> One possibility, for example, is that more detailed focus on white collar and corporate crime could upset certain vested interests or cause intra-agency factional strife. From a less dramatic perspective, if white collar crime was found to impose a large enough burden on the public and the economy, it could signal the need for more in depth reform or rebalancing, opening a Pandora's box of sorts.

As it stands, terrorism has been placed at the top of the agency's list, with significant resource expansion to also meet the growing problems of healthcare and credit card fraud.<sup>119</sup> In spite of these priorities, it is very difficult to say whether corporate crime itself garners the necessary amount of federal attention. A basic problem of course is that without proper statistics, it is extremely difficult to tell what a proper resource allocation might look like. The central question still stands: would the DOJ acting on its own have more to lose than it could gain from undertaking this paper's proposal? While it is also difficult to say, a countervailing fact is that the DOJ has undertaken organizational changes in the past.

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<sup>116</sup> See *Supra* Note 91. The founding of the UCR program cuts against this point, but beyond that critical moment it appears that Congress has taken the reins in terms of organizational action.

<sup>117</sup> See generally, Weber, M. *The Theory of Social and Economic Organization* (tr. Henderson and Parsons), New York, 1947; Congleton, R. *A Model of Asymmetric Bureaucratic Inertia and Bias*. *Public Choice*, January 1982;

<sup>118</sup> Olson, Mancur, Jr. (1965) *The Logic of Collective Action*. Cambridge: Harvard University Press; Black, Duncan (1958), *The Theory of Committees and Elections*. Cambridge: Cambridge University Press.

<sup>119</sup> A list of FBI priorities is available at <http://www.fbi.gov/priorities/priorities.htm>.

For instance, in response to a general law enforcement need for more flexible, in-depth data, the UCR program formulated the National Incident-Based Reporting System (NIBRS), which provides detailed information about particular crime incidents to various law enforcement agencies, researchers, and the general public.<sup>120</sup> The pilot program was launched in 1987 in the South Carolina Division and has grown since then.<sup>121</sup> The data, however, is still not pervasive enough to make broad generalizations about U.S. crime levels. Thus, like the founding of the UCR program itself, the NIBRS example cuts both ways. The program got off the ground in seemingly self-starting fashion, but its execution and evolution has not been carried through with the same level of expediency. One wonders therefore whether this point tracks bureaucratic growth more generally in terms of rapid or powerful initial catalysts for the creation of an agency or program, followed by sluggishness, indecisiveness, or even infighting in carrying out the mission over time.

### **C. Existing Data**

Upon reflection, one might think that the needed data simply must exist. Were this the case, then this paper is merely a call for publication of the data. However, there is little reason to assume the necessary data exists and is held under cover. First of all, doing so would defeat much of the purpose of data collection considering part of the value proposition of the practice is to help the federal government at large correctly appropriate money and resources.<sup>122</sup> It would be illogical to keep white collar crime data confidential. Second, the history of the UCR, as described in Section A of this Part, shows that white collar crime data has in fact been collected

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<sup>120</sup> The Bureau of Justice Statistics provides useful information on the NIBRS at: <http://www.ojp.usdoj.gov/bjs/nibrs.htm>.

<sup>121</sup> *Id.*

<sup>122</sup> See Barnett, *Supra* Note 102.

for decades, and published, right alongside other categories of crime. The point of this paper is to decry the fact that, although some data exists, it is at this point not maximally useful. The growth in importance of white collar and corporate crime over the past few decades, and particularly the past decade, has rendered the current reporting system notably insufficient. This is the case because as a polity we evidently intend to focus efforts more closely on the prevention and punishment of this type of behavior, yet the existing measurement standards may be limiting our ability to do so. An implicit point is also that the existing reporting system may be hiding the true extent of the problem, for better or worse.

From a historical perspective, the state of the current system is quite understandable. As the UCR was getting off the ground, white collar crime simply was not of the same macro-level concern as street safety.<sup>123</sup> Then as the conference was taking place in the early 1980s, the participants unfortunately still did not have the sense that corporate and white collar crime were going to be of critical macro-economic importance.<sup>124</sup> This is somewhat ironic, considering that the U.S. economy was undergoing massive transformations in corporate structure and efficiency literally as the topic was being discussed at the highest law enforcement levels.<sup>125</sup> While economic growth in the U.S. has seen numerous boom periods, the growth of capital markets in the 1980s, along with increasingly sophisticated leveraged buyouts and mergers and acquisitions, was setting the stage for vast new corporate criminal domains.<sup>126</sup>

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<sup>123</sup> Note that the term itself and formal study of the topic did not come into play until many years after the founding of the UCR.

<sup>124</sup> This point is merely deductive, in the sense that if they did they probably would have used the opportunity to steer changes in that direction.

<sup>125</sup> For history and discussion of the changing face of the U.S. corporate economy during this time, see

<sup>126</sup> Michael Milken's innovations, success, and ultimate fall along with the firm Drexel Burnham are perhaps the most salient features of this time. After recession during Reagan's first term, the economy recovered strongly. See generally Bruck, Connie. *The Predators' Ball: The Inside Story of Drexel Burnham and the Rise of the Junk Bond Raiders*. 1989; Stewart, James B. *Den of Thieves*. 1993.

One wonders, however, why categorizations have not been reconsidered in this generation. This Part of the paper has explored three reasons (that the data is too hard to collect; that organizational interests may not be aligned; and that perhaps such data is better kept confidential if it were to exist at all), each of which is unsatisfactory, for why this is so. While excusable 80 years ago and perhaps even twenty-five years ago, the fact that there has not been a formal reassessment of criminal reporting categorizations is almost reckless in light of the fact that the federal government is appropriating heavily and legislating actively on the issue. Perhaps a fourth, and at least as likely explanation, is that the topic simply has not received the necessary attention. Rather than having been considered and dismissed or already handled or thought to be proper, revisions in white collar reporting has been left by the wayside as terrorism, politics, and daily administrative matters have shadowed out the importance of the issue. If this is the case, as this section seems to suggest, then the next Part is intended to provide a preliminary roadmap to get the thinking started.

## **IV. Better Data**

This section highlights some of the factors that a more useful and comprehensive reporting system would take into account. In doing so, it might be helpful to first examine some of the basic challenges inherent in the existing system. Following that, the Part I index crimes will be examined to show how they might advise a white collar and corporate reporting mechanism, but also that they carry deficiencies as well. The third section contains specific recommendations.

### **A. Biases and General Problems in Reporting**

The first major criticism of UCR data is that it does not accurately reflect crime rates because it primarily lists crimes reported to law enforcement agencies.<sup>127</sup> As such, the entire world of unreported and undetected criminal conduct is not present. While true, and while this certainly undercounts the number of crimes in America, this is not particularly damning. The data do not necessarily purport to be a true picture of all crime, only a true picture of crime reported in America. The key factor then is not necessarily the differential between crime and crimes reported, but the rate of change of this figure. If the difference between crime and crimes reported is constant, then this general criticism is not all that pervasive. If on the other hand, there is significant fluctuation or if the difference is growing or shrinking steadily, then it would call into question the value of the data.

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<sup>127</sup> See generally Cohen, Mark. *The Costs of Crime and Justice*. 2005.

Another criticism concerns how the numbers are actually counted. As it stands, if a series of crimes are connected, only the most serious one is listed.<sup>128</sup> For instance, if someone was murdered during a robbery, only murder would be listed. This obviously could underweight a variety of secondary crimes. Two countervailing points deserve mention, though. First, this bias would only generally occur with the presence of serious crimes. Since serious crimes like murder make up a vastly smaller percentage of overall crimes than say robbery does, the effect across the data is probably not large. Second, if someone is in fact murdered while being robbed, intuition suggests that they were murdered and not robbed. That is, something qualitative about the more serious crime may tend to diminish society's need or interest in knowing the other crimes carried out contemporaneously.

With regard to counting, there is a particular bias in terms of rape.<sup>129</sup> The UCR defines forcible rape as "the carnal knowledge of a female forcibly and against her will."<sup>130</sup> It thus does not list rapes against men, nor does it list same-sex rape. It also leaves out broader definitions of rape. Taken together, these three reasons suggest that with regard to this particular category such omissions could be sizable.<sup>131</sup>

A more systemic problem concerns the differences among state criminal codes. From the beginning it was recognized that the federal structure of state autonomy precluded a mere aggregation of state statistics to arrive at a national total. This is the case because different states have different crime definitions. Further, because of the variances in punishment for the same offenses in different state codes, no distinction between felony and misdemeanor crimes was

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<sup>128</sup> See Miller, T.R. et al. *Victim Costs and Consequences: A New Look*. National Institute of Justice Research Report. 1996.

<sup>129</sup> For a thorough discussion on this bias, see Kilpatrick, Dean G. and Kenneth J. Ruggiero. *Making Sense of Rape in America: Where Do the Numbers Come From and What Do They Mean?* National Crime Victims Research and Treatment Center. 2004, at 4.

<sup>130</sup> *Id.*

<sup>131</sup> *Supra* note 125.

considered possible. To skirt some of these problems and provide nationwide uniformity, the UCR formulated standardized offense definitions by which law enforcement agencies were to submit data without regard for local statutes. This, however, means that some states and more particularly, some localities often fail to comply properly and their data is not able to be included. According to the FBI, approximately 94% of the US population resides in law enforcement jurisdictions that participate in the UCR program.<sup>132</sup> This is quite an achievement for sure, but considering the variability among specific jurisdictions this is far from perfect.

## **B. Part I Index Crimes**

As noted earlier, the Part I Index offenses include homicide, rape, robbery, aggravated assault, burglary, larceny, and auto theft. These are divided into a Violent Crime Index which includes homicide, rape, robbery, and aggravated assault and a Property Crime Index, which contains burglary, larceny, auto theft, and since 1982, Arson. Considering the variety of biases and problems noted above, and the fact that there are other forms of violent and property crime, the indices surely do not measure accurately crime even in these delimited areas. Then again, they purport only to be a yardstick or proxy for crime measurement in these areas. On that count, the breakdowns are somewhat helpful since they comport reasonably well with intuitive judgments about how one might classify crime. This perspective may actually suggest an analogously separate conceptual structure for the reporting of white-collar and corporate crime. This is discussed as the first tier recommendation in the next section.

Granting the conceptual usefulness of the current reporting of Part I Index crimes, the most striking feature about them is not that the Violent and Property Crime Indexes leave out

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<sup>132</sup> See Supra Note 91.

certain crimes that one might like to see included, but that the indexes are merely the sum of the crimes in the listed categories. For example, the Violent Crime Index is published merely by adding up the number of reported murders, rapes, robberies, and aggravated assaults. This most likely does not mesh with a *prima facie*, common-sense judgment about the relative seriousness of the crimes. For example, surely the average murder is more serious than the average robbery. Imagine two states equal in every possible way, including equal Violent Crime Indexes. Now imagine that one state has five times as much murder as the other, but that this fact is disguised by a corresponding rise in absolute terms in aggravated assault (considering that there are many more aggravated assaults than murders, this would be a much smaller percentage increase) in the second state. This is a fact one would like to know, perhaps even a fact on which one would make a decision about which state to reside in. Nevertheless, it is not apparent from the Index.

Not surprisingly, there has been a relatively long history of attempts to weight the seriousness of crimes.<sup>133</sup> This could be useful in a variety of contexts, including for more accurate crime trends, appropriation of money used to fight crime, and for regular consumers of crime information such as scholars and average citizens. The main problem with traditional attempts to weight the seriousness of crime, however, is that they have often sought to use a survey-based methodology.<sup>134</sup> This would involve literally asking victims through random surveys various questions about how one crime compares on a numerical scale with another crime or how a certain victimization might compare with a hypothetical crime.<sup>135</sup> The potential problems of bias and inaccuracy are easy to see. Other attempts have sought to use jury awards

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<sup>133</sup> See Introduction, Cohen, Mark A. *The Costs of Crime and Justice*. 2005.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

or hedonic pricing approaches to find the cost of crime and through that to place relative values on the different categories.<sup>136</sup>

As cost estimates have improved, however, a potentially new approach is to dollar-cost weight the indexes using collective data (based on tangible and intangible factors) on the average cost of different crimes.<sup>137</sup> This could be highly beneficial because it relies on more concrete estimations of cost than previously were available and it would provide a readily usable relative measuring system not dependent on individual survey estimations. Considering that the Violent and Property Crime Indexes are referenced in numerous ways in scholarship, media, and even legislation, a more accurately balanced Index could have serious ramifications. It also suggests that corporate and white collar crime reporting could borrowing from this ground-breaking research in due time.

### **C. White Collar Data**

As an example of the vagueness and indeterminacy which currently shrouds public discussion, one needs look no further than the FBI's own publications. For instance, a 2002 report on the state of white-collar crime reporting concludes anemically that "tremendous growth of and involvement in the securities and commodities markets at the institutional, corporate, and private investor levels have led to great numbers of individuals involved in intentional corporate fraud and misconduct."<sup>138</sup> Great numbers? To say that there have been "great numbers" of corporate and individual fraud of late sounds unscientific at best. At worst, it sounds like a 'hunch,' which is exactly the kind of policy motivations that good data can help eliminate. The

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<sup>136</sup> See Lynch, James P. and Mona Danner. Offense Seriousness Scaling: An Alternative to Scenario Methods. *Journal of Quantitative Criminology*. 2005.

<sup>137</sup> A number of studies have been done on the cost of crime. See Cohen, *Supra* Note 129. The author is involved in a novel study using recent cost estimates to reformulate the Indexes and to see how dollar-weighting affects state rankings.

<sup>138</sup> See Barnett, Cynthia. *The Measurement of White-Collar Crime Using Uniform Crime Reporting*. 2002.

FBI does note that it is currently investigating over 189 major corporate frauds.<sup>139</sup> While important and perhaps even laudable, it would be terribly useful to have comprehensive data. This would include smaller (but still corporate) frauds and would allow for, again, better information on which to make policy decisions. Considering the foregoing, the following two levels of recommendations, each with two specific recommendations, are called for. The list is organized as such for simplicity sake, but more than likely a wholesale effort at developing better white collar crime reporting procedures would take the entire set of recommendations into account at the same time.

### 1. Tier 1 Recommendations

A White Collar Index should be carved out of the Part II Index crimes section of the Uniform Crime Report. This would aggregate in a single readily accessible place, and as a single number as well, the already existing categories of Fraud, Forgery and Counterfeiting, Bribery, and Embezzlement. Instead of merely noting what investigations are underway or talking about the largest and most salient convictions, this collection would start as a framing point for any discussion on white collar crime. One could imagine that this number or this data set would quickly gain in importance and salience as it was disseminated to the public at large. It would be easy to report on Wall Street as an additional macroeconomic indicator, and it would signal a renewed commitment on behalf of the federal government against illicit, market-corrupting behavior.

While simple, this recommendation is of the first order of importance, because currently these white collar categories are merely four randomly listed classifications among the 21 Part II

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<sup>139</sup> See the Center for Corporate Policy, 2006 Budget Analysis, available at: <http://www.corporatepolicy.org/topics/budget.htm>.

index crimes.<sup>140</sup> They are thus not readily accessible to the public, because of the work required to single the categories out and then aggregate the figures by hand. The next section on Tier 2 recommendations will talk about seriousness weighting (and its potential for problems in the white collar domain), but this does not qualify as a first order need because there is not even a white collar index to speak of yet.

A second recommendation, and one which is far more aggressive in terms of organizational imperative, is to split these categories along Corporate and Personal lines. As the general public talks heavily about the pervasive influence of corporate crime, and since the government purports to be taking this threat seriously, it would make sense to have a separate indicator of corporate prosecutions.<sup>141</sup> There are at least two reasons for this, both revolving around the fact that corporations are different beasts than individual crimes. First, they use the imprimatur of the corporate form (a legal fiction of state sponsorship in a sense), which imparts a clear, organizational aspect to the crime. In a definitional sense, then, this distinction makes good sense. Secondly, corporate white collar crimes may tend to be larger or more costly than individual crimes and breaking this out may be useful for better understanding society's white collar crime problem and assessing strategic approaches to it.

This recommendation would require a reformulation of federal reporting guidelines. While no small task, this has been done before and could be done again.<sup>142</sup> Law enforcement agencies at all levels would simply be asked to record whether it is a corporate interest at stake or an individual acting in his or her own capacity. Of course, there is much other information that could be garnered, which would be extremely telling about the state of corporate crime. Some of

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<sup>140</sup> See Supra Note 93.

<sup>141</sup> See e.g., the President's speeches on Corporate Responsibility available at: <http://www.whitehouse.gov/infocus/corporateresponsibility/>.

<sup>142</sup> See Supra Note 93.

this, like magnitude and other data will be discussed next, but the overall framework would help provide a measure of comprehensiveness that is currently lacking from reports and figures on the subject. It would also likely engender much new research on the subject, which could further return benefits over time.<sup>143</sup>

## 2. Tier 2 Recommendations

There may be considerable room to expand the offense categories associated with white collar crime and thus to broaden the reporting classifications overall.<sup>144</sup> This recommendation raises again the question of what white collar crime is. Is it just economic crime? If so, this could include all sorts of other criminal activities including certain cyber crimes and many more mundane property crimes. Should the definition have an element of “white collar” or class-based elitism involved? This may be too restrictive, because many offenses are not committed by executives or even the well-off. Must white collar crime have an organizational element to it as was suggested by the last recommendation? Perhaps in certain cases, but defining white collar crime exclusively like this could make it overly restrictive because many important crimes are committed by individual actors without the corporate aegis.<sup>145</sup>

The FBI has opted to approach white-collar crime in terms of the offense, defining it as “those illegal acts which are characterized by deceit, concealment, or violation of trust and which are not dependent upon the application or threat of physical force or violence. Individuals and organizations commit these acts to obtain money, property, or services; to avoid the payment or loss of money or services; or to secure personal or business advantage.”<sup>146</sup> While controversial

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<sup>143</sup> For a discussion of new areas of research and their expected returns, see Cohen Supra Note 129, Conclusion.

<sup>144</sup> See Supra Note 133.

<sup>145</sup> See generally Supra Note 61.

<sup>146</sup> U.S. Department of Justice, Federal Bureau of Investigation (1992). UCR Handbook: NIBRS Edition. Washington, D.C.: Government Printing Office, at 3.

in light of the foregoing discussion, this definition is not unduly problematic in and of itself. It does make the definitional choice, however, and thus leaves the door open for many different types of crime to be included. For instance, there is UCR data on bad checks. Fraud itself is sometimes broken into five subcategories: false pretenses/swindle/confidence games, credit card/ATM fraud, impersonation, welfare fraud, and wire fraud.<sup>147</sup> In addition, there is a host of other possibilities for inclusion, including jury tampering, strategic bankruptcies, tax law violations, and various misappropriations.

Many questions can therefore be raised about what categories should be included and how to approach the issue at all. For instance, should Fraud actually be listed by its component parts? Is the FBI offense definition approach even the right one? If not, what would be better?<sup>148</sup> On this point, this paper's recommendation is concerned less with the exact components of a White-Collar Crime Index and more with developing a workable solution through informed dialogue on the subject. The groundwork has already been laid, since in the past decade there has been a resurgence of academic interest on the topic. The key point is that this academic attention should be translated into real government level policy consensus. Just as the Violent and Property Crime Indexes purport only to be proxies for crime in those areas (and thus do not include all possible categories) a White Collar Index could be successfully employed using only a selective approach. However, the particular categories should be scrutinized in a multi-agency committee process.

A second Tier 2 recommendation concerns seriousness rankings. Once a White Collar Crime Index has been formally established with differentiation between corporate and individual crimes (and perhaps also after something approaching industry consensus has been reached

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<sup>147</sup> Supra Note 95.

<sup>148</sup> See Supra Note 133.

regarding what classifications to include in the index itself), then attention should properly turn to seriousness rankings. As previously noted with regard to the Violent and Property Crime indexes, knowing the relative measurements and even the average costs of crimes and crime categories could aid multiple decision makers because the magnitude of the crimes, as opposed to just the tally of the act itself, contains critical information. It could answer the question of whether the government is legislating in response to a series of large scandals or whether there is a more deeply ingrained problem in the fabric of our economy and social apparatus. It could advise federal law enforcement practices, because different approaches with differing levels of sophistication may be required for large versus small white collar crimes. It could also potentially direct future congressional legislation, not to mention countless decisions in state and local governments about the use of resources, prosecution decisions, and organizational approaches.<sup>149</sup>

It should be noted, however, that in terms of categories like bribery, fraud, etc, it is not as intuitively obvious that the dollar cost differential would be as striking as it is with violent crime.<sup>150</sup> The real differential probably lies in the corporate-individual distinction. Considering Sarbanes Oxley and the President's Corporate Fraud Task Force are directed precisely at that subsection of the white collar crime problem, one can imagine that a Corporate White Collar Crime Index, a la recommendation two in Tier 1 above, would be of primary use.

Like the tier 1 recommendation regarding corporate reporting, this final recommendation would require an overhaul of the federal reporting guidelines. This might not be as difficult as it sounds, considering such data is collected on many types of property crimes and that the

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<sup>149</sup> States do not have a single crime-fighting budget, but rather many dispersed actors and organizations each with their own budgets and each making many micro-decisions about resource consumption.

<sup>150</sup> This is to be fleshed out in the author's forthcoming paper re-ranking the violent and property crime indexes.

National Incident Based Reporting Service also is capable of collecting detailed data.<sup>151</sup>

Nevertheless, as noted originally, it might make sense to consider this proposal in sum with the previous recommendations, because significant time and energy savings could result if this was done in conjunction with other reforms.

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<sup>151</sup> Supra Note 116.

## **Conclusion**

White collar and particularly corporate crime has not only changed the criminal landscape, but actually deeply affected the American economy.<sup>152</sup> Though this fact is recognized by the FBI, Congress, and the President in the form of legislation, internal policies, and appropriations, it has not spurred the necessary structural reporting adjustments. More accurate and effective data in the area of white collar crime could aid 1) lawmakers in how they approach legislative reform, 2) law enforcement in how crime is prosecuted within the existing legal infrastructure and within existing resource constraints, 3) the media in how it reports crime and scandal, and 4) citizen investors in how they evaluate the relative prospects of American companies and the stability of the domestic economy.<sup>153</sup>

This paper has argued that the basic conceptual approach of the Department of Justice to reporting in this area of crime is insufficient. First, it fails to aggregate white collar crime into a separately reportable White Collar Crime Index. Second, it fails to differentiate between personal and corporate crime. Third, no consensus has been reached regarding either the definition of white-collar crime itself or, rather, what white collar crimes should be included in white collar reporting. Finally, once the foregoing recommendations have been considered and implemented, the paper suggests that the index could be dollar-cost indexed. This could provide useful data for determining the pervasiveness of white collar crime compared with other types of crime and for comparing individual categories of white collar crime to one another to determine the overall characteristics of white collar crime in America. It could also pull out a separate White Collar Corporate Crime Index, which may be the most packageable data set on the

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<sup>152</sup> See Supra Note 137.

<sup>153</sup> The FBI notes that: “The erosion of public confidence in the management of public companies will, if left unchecked, have a negative impact on the stock markets and capital raising, which will in turn have a negative impact throughout the U.S. economy.”

subject, considering that the many stakeholders seem particularly concerned with corporate crime as a subset of white-collar crime.

Considering the discussion in Part III regarding reasons why none of these recommendations have taken place, the best audience for this paper is Congress. From an institutional level, Congress is well equipped to hold hearings on these recommendations and to make precise determinations about their contours. In addition, a congressional act mandating reporting in compliance with determined judgments on these questions is probably the most effective and efficient way to see these improvements implemented.

Something similar happened in April 1990, when Congress enacted the Hate Crime Statistics Act of 1990. The Act forced the Attorney General to establish guidelines and collect, as part of the UCR Program, data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including the crimes of murder and nonnegligent manslaughter; forcible rape; robbery; aggravated assault; burglary; larceny-theft; motor vehicle theft; arson; simple assault; intimidation; and destruction, damage or vandalism of property.”<sup>154</sup> As a result, the FBI in conjunction with the DOJ developed procedures for and implemented the collection of hate crime data through the UCR program. In September 1994, the Violent Crime Control and Law Enforcement Act amended the Hate Crime Statistics Act to add disabilities, both physical and mental, as factors that could be considered a basis for hate crime. While there are many kinds of bias, those mandated by the enabling Act (and thus those reported) currently include race, religion, disability, sexual orientation, and ethnicity/national origin.

This Act serves as an excellent case in point for reforming white-collar procedure. As an administrative department, the DOJ and its subordinate agency the FBI, may actually be dependent on congressional action in order to surmount vested interests and bureaucratic inertia.

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<sup>154</sup> See Supra Note 104.

A legislative Act requiring comprehensive and accurate figures on white collar and corporate crime data would be well aligned with Congress's mission to fight corporate scandal, and it could further empower investors, academia, the media, and ordinary citizens interested in the state of crime and corporate ethics. If Congress cares as much as it seems to, it should rectify the situation so sheepishly admitted to by the Department of Justice itself in 2002: "The true extent and expense of white-collar crime are [currently] unknown. Summary-based UCR statistics can provide only a limited amount of information on a limited number of offenses."<sup>155</sup>

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<sup>155</sup> See Barnett, *Supra* Note 134.